AGRICULTURE DECISIONS

Volume 56

January - June 1997
Part One (General)
Pages 1 - 833

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

AGRICULTURE DECISIONS

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

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PACKERS AND STOCKYARDS ACT

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: JOHN McINTYRE d/b/a McINTYRE LIVESTOCK.
P&S Docket No. D-96-0031.
Decision and Order filed March 12, 1997.

Failure to file an answer - Failure to pay when due the full purchase price of livestock - Failure to pay the full purchase price of livestock - Issuing checks in payment for livestock without having sufficient funds on deposit - Suspension of registration - Cease and desist order.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). governing proceedings under the Packers Stockyards Act were served upon respondent. Respondent filed a request for an extension of time, and an order was issued giving respondent until October 7, 1996, in which to file an answer.

Respondent has failed to file an answer within the time specified as prescribed in the Rules of Practice and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

Findings of Fact

1. John McIntyre, hereinafter referred to as respondent, is an individual doing business as McIntyre Livestock, whose business mailing address is [redacted], TN [redacted].
2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account or the accounts of others, and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account or the account of others, and as a market agency to buy livestock in commerce on a commission basis.

3. Respondent, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

4. Respondent has failed to pay $5,014.05 for livestock purchased in the transactions set forth in paragraph II of the complaint.

5. Respondent, failed to make timely and full payment for livestock purchased in the transactions set forth in paragraph II if the complaint despite having been placed on notice by certified mail received June 10, 1993, that his payment practices were not in conformity with the requirements of section 409 of the Act (7 U.S.C. § 228b).

6. Respondent, in transactions set forth in paragraph II of the complaint, issued the five checks listed in paragraph III of the complaint in purported payment for livestock which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the accounts upon which such checks were drawn to pay such checks when presented.

Conclusion

By reason of facts found in Findings of Fact 3 through 6 above, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent John McIntyre, his agents and employees, directly, using the name McIntyre Livestock, 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. Failing to pay, when due, the full purchase price of livestock;
2. Failing to pay the full purchase price of livestock; and
3. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented.

Respondent John McIntyre is suspended as a registrant under the Act for a period of five years. Provided, however, that upon application to Packers and Stockyards Programs, GIPSA, a supplemental order may be issued terminating the suspension of respondent at any time after the expiration of the initial 90 days of this suspension term

upon demonstration by respondent that all livestock sellers identified in the complaint in this proceeding have been paid in full. Provided further that this order may be modified upon application to the Packers and Stockyards Programs, GIPSA, to permit the salaried employment of respondent by another registrant or packer after the intial 90 days of this suspension term upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. §§ 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 21, 1997.-Editor]

In re: PRYOR LIVESTOCK MARKET, INC., JIM W. DEBERRY and DOUGLAS A. LANDERS.
P&S Docket No. D-96-0045.
Decision and Order Without Hearing by Reason of Admissions with Respect to Jim W. Deberry filed January 7, 1997.

Admission to material allegations - Failure to maintain and use properly Custodial Account for Shippers' Proceeds - Failing to deposit in the Custodial Account for Shippers' Proceeds amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock within the times prescribed - Using funds received from the sale of consigned livestock for improper purposes - Issuing checks in payment without maintaining sufficient funds on deposit - Failing to remit when due the net proceeds due from the sale price of consigned livestock - Suspension of registration - Cease and desist order.

Andre Allen Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by James Hunt, Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the "Act", by a complaint filed on August 16, 1996, by the Acting Deputy Administrator, Packers and Stockyards Programs, GIPSA, United States Department of Agriculture. The complaint alleged that Respondent Deberry in his direction, management, and control of Pryor Livestock Market, Inc., hereinafter "Pryor Livestock", wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*), by: (1) failing to maintain and

use properly Pryor Livestock's Custodial Account for Shippers' Proceeds; (2) issuing checks which were returned unpaid by the bank upon which they were drawn because sufficient funds were not available in the account upon which such checks were drawn; and (3) failing to remit and failing to remit, when due, the net proceeds due from the sale price of livestock on a commission basis. Complainant requested a finding that respondent Deberry was the alter ego of Pryor Livestock and that respondent Deberry wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42) and section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.43 of the regulations (9 C.F.R. § 201.43). The complaint requested an order that Respondent Deberry cease and desist from the violations found to exist; that Respondent Deberry be suspended as a registrant under the Act; and the assessment of civil penalties.

A copy of the complaint was served on Pryor Livestock, on August 23, 1996. Service on respondent Deberry was accomplished on September 17, 1996, by regular mail to his last known mailing address of record. Respondent Deberry was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that filing of an answer that does not deny the material allegations of the complaint shall constitute an admission of all the material allegations contained in the complaint.

Respondent Deberry submitted a response on September 30, 1996, on his own behalf. Respondent Deberry did not indicate that he was responding on behalf of or in the capacity as President of Pryor Livestock. In his reply letter, respondent Deberry indicated that there was money that was owed to customers and that money in excess of the claims in the custodial account was involved in litigation to which he was not a party. He stated that the customers would be paid upon the resolution of that litigation. Respondent Deberry did not offer any legitimate defense to the allegations in the complaint that during his direction, management, and control of Pryor Livestock, he failed to maintain and use properly Pryor Livestock's Custodial Account for Shippers' Proceeds, or that he failed to remit and failed to remit, when due, the net proceeds due from the sale price of livestock on a commission basis. The explanation that he offered in response to the complaint amounts to an admission to the factual assertions underlying these allegations.

Respondent Deberry did not admit, deny, or otherwise respond to the allegation that in his direction, management, and control of Pryor Livestock, he issued checks which were returned unpaid by the bank upon which they were drawn because of a lack of sufficient funds available in the account upon which such checks were drawn. He did not deny or otherwise respond to the remaining allegations of the complaint. He did not deny his ownership of fifty (50) percent of the stock of Pryor Livestock, Inc. or his status as alter ego, jointly with respondent Douglas A. Landers of Pryor Livestock, Inc. Section 1.136(c) of the Rules of Practice requires that the failure to

deny or otherwise respond to every material allegation in a complaint shall be deemed an admission of every allegation to which no denial or response is presented.

Respondent Deberry's reply letter constitutes an admission of all the material allegations of fact contained in the complaint. The admission of all of the material allegations of fact contained in a complaint shall constitute a waiver of hearing (7 C.F.R. § 1.139), pursuant to which complainant moved for the issuance of a Decision. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Jim W. Deberry, hereinafter referred to as Respondent Deberry, is an individual whose mailing address is (b) (6)

2. Respondent Deberry is and at all times material herein was:

   a. President of Pryor Livestock;

   b. Owner of 50% of the stock of Pryor Livestock; and

   c. Responsible for the direction, management and control of Pryor Livestock in concert with Douglas A. Landers.

3. Respondent Deberry in his direction, management and control of Pryor Livestock, failed to maintain and use properly Pryor Livestock's Custodial Account for Shippers' Proceeds (hereinafter "custodial account"), thereby endangering the faithful and prompt accounting therefor and the payment of portions thereof due the owners and consignors of livestock, in that:

   a. As of August 1, 1995, outstanding checks were drawn on the custodial account of Pryor Livestock in the amount of $92,705.51, which were offset by a balance in the custodial account of $0.00 and proceeds receivable of $5,354.51, resulting in a shortage of $87,351.00 in funds available to pay shippers their net proceeds.

   b. Such deficiencies were due in part, to the failure of Respondent Deberry to deposit in the custodial account of Pryor Livestock, within the time prescribed in the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock to the respondent and others. Such deficiencies were also due to respondent's failure to fully reimburse the custodial account by the close of the seventh day after each sale.

4. As set forth in paragraph III(a) of the complaint, Respondent Deberry in his direction, control, and management and control of Pryor Livestock, sold livestock on a commission basis and in purported payment of the net proceeds thereof, issued checks to consignors or shippers of such livestock which were returned unpaid by the

bank upon which they were drawn because sufficient funds were not available in the account upon which such checks were drawn to pay such checks when presented.

5. Respondent Deberry through his direction, management and control of Pryor Livestock on or about the dates and in the transactions set forth in (a) and (b) in paragraph III of the complaint, failed to remit, when due, the net proceeds due from the sale price of livestock on a commission basis.

6. As of June 18, 1996, $92,183.11 in proceeds remained due to consignors for the sale of their livestock.

Conclusions

By reason of the facts in Finding of Fact 2, respondent Jim W. Deberry is the alter ego of Pryor Livestock Market, Inc.

By reason of the facts in Finding of Fact 3, Respondent Deberry wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and section 201.42 of the regulations (9 C.F.R. § 201.42).

By reason of the facts in Findings of Fact 4, 5, and 6, Respondent Deberry wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.43 of the regulations (9 C.F.R. § 201.43).

Order

Respondent Deberry, his agents and employees, directly or through any corporate device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in the Custodial Account for Shippers' Proceeds, within the times prescribed in Section 201.42 of the regulations (9 C.F.R. § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Failing to otherwise maintain the Custodial Account for Shippers' Proceeds in strict conformity with the provisions of Section 201.42 of the regulations (9 C.F.R. § 201.42);

3. Using funds received from the sale of consigned livestock for his own purposes or for any purpose other than payment to consignors of the amount due from the sale of livestock and the payment of lawful marketing charges;

4. Issuing checks in payment for the net proceeds due consignors from the sale of livestock on a commission basis without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

5. Failing to remit, when due, the net proceeds due from the sale price of consigned livestock sold on a commission basis; and

6. Failing to remit the net proceeds due from the sale price of consigned livestock sold on a commission basis.

Respondent Deberry is suspended as a registrant under the Act for a period of five years (5) and thereafter until he demonstrates that the shortage in Pryor Livestock's Custodial Account for Shippers' Proceeds has been eliminated. Provided that, upon application to Packers and Stockyards Programs, GIPSA, a supplemental order may be issued terminating the suspension of respondent Deberry at any time after the expiration of the initial 150 days of this suspension term upon demonstration that all livestock consignors identified in the complaint have been paid in full. Provided further, that this order may be modified upon application to the Packers and Stockyards Programs, GIPSA, to permit the salaried employment of respondent Deberry by another registrant or packer after the expiration of the initial 150 days of this suspension term upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final February 20, 1997.-Editor]

In re: RAYMOND PERKINS d/b/a SENECA PACKING CO.
P&S Docket No. D-96-0025.
Decision and Order filed April 21, 1997.

Failure to file an answer - Engaging in the business of a packer without maintaining an adequate bond or its equivalent - Failure to pay when due the full purchase price of livestock -Failure to pay the purchase price of livestock - Willfulness - Sanctions - Civil penalty.

Eric Paul, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint and notice of hearing filed by the Acting Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and

Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act.

Copies of the complaint and notice of hearing and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by certified mail.

Respondent failed to file an answer within the time prescribed in the Rules of Practice. However on April 9, 1997, respondent filed a letter in response to complainant's Motion for Adoption of Proposed Decision. Respondent did not explain his failure to file an answer within the prescribed time period, and did not attempt to deny the principal allegations of the complaint. Under the Rules of Practice respondent's failure to file a timely answer constitutes an admission of the complaint's allegations that respondent purchased livestock for slaughter without a required bond after receiving notification on July 13, 1994, that he was required to obtain an adequate bond or its equivalent, and that there remains unpaid a total of $95,833.30 for livestock purchases made between February 28, 1995, and April 4, 1995. (7 C.F.R. § 1.136(c)). Respondent instead asserted: (1) that he did not wilfully violate the Act; (2) that he was trying without success to obtain a bond while operating; (3) that P&S in Indianapolis (complainant) knew he was slaughtering cattle without a bond; (4) that Merlin Garver (the unpaid livestock seller) knew he was not bonded; (5) that he restarted operations on March 31, 1996, with an approved bond; and (6) that he ceased his resumed operations on July 31, 1996, and is now without funds and unemployed.

Findings of Fact

1. Respondent Raymond Perkins, doing business as Seneca Packing Co., is an individual whose business address is [redacted] Ohio [redacted]

2. Respondent is, and at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Respondent was notified by certified mail, received July 13, 1994, that he was required to obtain a $100,000.00 surety bond or bond equivalent to secure the performance of his livestock buyer operations under the Act before commencing the purchase of livestock in commerce for purposes of slaughter. Notwithstanding such notice, respondent commenced and continued to engage in the business of a packer without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

4. Respondent's average annual purchases of livestock for purposes of slaughter have exceeded $500,000.00.

5. Respondent, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased from Merlin L. Garver, Inc., a dealer located in West Salem, Ohio, livestock on a dressed weight basis that had moved in commerce through posted stockyards in Ohio, Pennsylvania and West Virginia. Respondent failed to pay, when due, the full purchase price of the livestock.

6. There remains unpaid a total of $95,833.30 for these livestock purchases.

Conclusions

Respondent has admitted allegations of purchasing livestock for slaughter as a packer without required bond coverage, failing to pay, and failing to pay when due, for substantial purchases of livestock by his failure to file a timely anwer. A failure to file a timely answer constitutes an admission of the material allegations in the complaint. *See* 7 C.F.R. § 1.136(c); *In re Jeremy Byrd, d/b/a T Byrd Cattle Company*, 55 Agric. Dec. 443, 450 (1996). Respondent shall not now be permitted to contest the complaint after failing to file a timely answer without showing good cause for this failure. Respondents are required to deny or explain any allegations of the complaint and set forth any defense in a timely answer to enable the Department to handle its large caseload in an expeditious and economical manner; to provide some closure to the process; and to ensure that all parties are treated fairly under recognized rules that are uniformly applied.

Respondent has not asserted that the facts alleged in the complaint are untrue. Rather, respondent has asserted that there are other facts that should be considered in mitigation. Although respondent has failed to show why he did not assert the existence of such mitigating circumstances in a timely filed answer, we will briefly address respondent's points and show why their establishment would be unavailing.

It is well-settled that operating without a bond is a serious violation, and efforts to secure a bond do not mitigate the violation. *See In re Danny Cobb and Crockett Livestock Sales Company, Inc.*, 48 Agric. Dec. 234, 269 (1989), *aff'd*, 889 F.2d 724 (6th Cir. 1990). Respondent's failure to pay for his livestock purchases constitutes a serious violation of Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b), and the fact that these were unexpected financial difficulties would not normally warrant the withholding or lessening of sanctions. *See In re Richard N. Garver*, 45 Agric. Dec. 1090, 1094-1095 (1986), *aff'd* 846 F.2d 1029 (6th Cir.), *cert. denied* 488 U.S. 820 (1988); *In re Rotches Pork Packers, Inc., et al*, 46 Agric. Dec. 573, 584 (1987).

Respondent has violated express bonding and payment provisions of the Act and the regulations, and his conduct was willful. A violation is willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), if a person carelessly disregards regulatory requirements. *See Butz v. Glover Livestock Comm'n Co.*, 411

U.S. 182, 186-188 (1973); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied.* 112 S. Ct. 178 (1991); *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

The $10,500.00 civil penalty sought by complainant is an appropriate deterrent for the violations that are the subject of this proceeding. Complainant routinely requests a civil penalty equal to about ten percent of the unpaid livestock purchase amount from a packer, unless there is reason to believe that the assesment of such a penalty would adversely affect the interests of unpaid livestock sellers. The total civil penalty sought derives from this calculation and an additional amount, related to the amount of bond deficiency in the case, that is also sought as a standard deterrent. When a packer is no longer operating, the Secretary may assess an appropriate civil penalty without considering the effect of the penalty on the person's ability to continue in business as would otherwise be required under Section 203(b) of the Act (7 U.S.C. § 193(b)) when a proposed civil penalty is contested by a respondent who has filed a timely answer.

Respondent has asserted in his response to the pending motion that he is "financially broke and unemployed" (Respondent's letter). Respondent was advised by complainant's counsel that a substantial civil penalty was being sought when he was sent a proposed consent decision following service of the complaint. Respondent elected to ignore the proceeding until complainant filed its motion for a default decision and his present claim of financial distress in reduction of the civil penalty proposed by complainant comes too late.

By reason of the facts found in Findings of Fact 3 and 4 above, respondent wilfully violated section 202(a) of the Act (7 U.S.C. § 192 (a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§ 192 (a), 228b).

Order

Respondent Raymond Perkins, his agents and employees, directly or through any corporate or other device, in connection with his operations as a packer, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. § 913(b)), respondent is assessed a civil penalty in the amount of Ten Thousand Five Hundred Dollars ($10,500.00).

This decision shall become final and effective without further proceedings 35 days after the date of service upon the respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final June 2, 1997.-Editor]

PACKERS AND STOCKYARDS ACT

CONSENT DECISIONS

(Not published herein-Editor)

Foxley Grain Company, Inc. G.S.A. Docket No. 96-0001. 8/26/96.

Rodney L. Kolander. P&S Docket No. D-94-0020. 1/31/97.

Harry Clifton Reed. P&S Docket No. D-97-0005. 2/10/97.

Kenneth W. Swiney. P&S Docket No. D-97-0004. 2/27/97.

David Riswold. P&S Docket No. D-97-0006. 3/17/97.

Gerald G. Milosevich. P&S Docket No. D-97-0013. 3/17/97.

Pasquale V. Leone. P&S Docket No. D-97-0014. 3/19/97.

Larry Wayne Reed. P&S Docket No. D-96-0010. 3/20/97.

Dodge County Stockyard, Inc., and Martin Burch. P&S Docket No. D-96-0011. 3/24/97.

Larreen Susan Becherer and Becherer Feeder Pig Company. P&S Docket No. D-97-0012. 3/26/97.

Tommy Hanback, d/b/a H&H Livestock. P&S Docket No. D-97-0011. 3/31/97.

Robert W. Campbell and Gaines Hughes d/b/a Campbell & Hughes. P&S Docket No. D-96-0014. 4/2/97.

Benita Robinson. P&S Docket No. D-97-0009. 5/6/97.

E. Bob Cody. P&S Docket No. D-96-0015. 5/22/97.

Kiran Enterprises, Inc. t/a Trenton Halal Meat Packing Company and Mohammad S. Malik. P&S Docket No. D-97-0015. 6/24/97.

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

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

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COURT DECISIONS

DAN GLICKMAN v. WILEMAN BROS. & ELLIOTT, INC., ET AL.
No. 95-1184.
Filed June 25, 1997.

(Cite as: 117 S.Ct. 2130).

Marketing orders - Generic advertising - First Amendment - Assessments constitutional.

The Supreme Court reversed the Ninth Circuit Court of Appeals, finding that the First Amendment right to free speech was not violated by compelling growers, handlers, and processors of California tree fruits to finance generic advertising. Regulations promulgated by the Secretary under the AMAA are subject to a strong presumption of validity. Generic advertising need not be the most effective method to promote the products. Generic advertising is distinguishable from other laws found to abridge free speech because the marketing orders do not impose any restraint on Respondents' freedom to communicate any message to any audience; they do not compel any person to engage in any actual or symbolic speech; and they do not compel the producers to endorse or finance any political or ideological views. Generic advertising is germane to the purposes of the marketing orders and the assessments are not used to fund ideological activities, therefore compelled financial contributions are not unconstitutional under *Abood* and subsequent cases. The Ninth Circuit's use of the *Central Hudson* test was inconsistent with the nature and purpose of the marketing order.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA, J., joined, and which THOMAS, J., joined except as to Part II. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined as to Part II.

SUPREME COURT OF THE UNITED STATES

A number of growers, handlers, and processors of California tree fruits (respondents) brought this proceeding to challenge the validity of various regulations contained in marketing orders promulgated by the Secretary of Agriculture. The orders impose assessments on respondents that cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The question presented to us is whether the requirement that respondents finance such generic advertising is a law "abridging the freedom of speech" within the meaning of the First Amendment.

I

Congress enacted the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq., in order to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. § 602(1). Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices," §§ 602(4), these orders may include mechanisms that provide a uniform price to all producers in a particular market,[1] that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6) (A) (7), that determine the grade and size of the commodity, § 608c(6) (A), and that make an orderly disposition of any surplus that might depress market prices, *ibid.* Pursuant to the policy of collective, rather than competitive marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6) (D), (H), (I). The expenses of administering such orders, including specific projects undertaken to serve the economic interests of the cooperating producers, are "paid from funds collected pursuant to the marketing order." §§ 608c(6) (I), 610(b) (2) (ii).

Marketing order must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. § 608c(9) (B). The AMAA restricts the marketing orders "to the smallest regional production areas . . . practicable." § 608c(11) (b). The orders are implemented by committees composed of producers and handlers of the regulated commodity, appointed by the Secretary, who recommend rules to the Secretary governing marketing matters such as fruit size and maturity levels. 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30 (1997). The committee also determines the annual rate of assessments to cover the expenses of administration inspection services, research, and advertising and promotion. §§ 916.31(c), 917.35(f).

Among the collective activities that Congress authorized for certain specific commodities is "any form of marketing promotion including paid advertising." 7

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[1]*See, e.g., United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 188-189, 114 S.Ct. 2205, 2209, 129 L.Ed.2d 157 (1994).

C.F.R. § 608c(6)(I).[2] The authorized promotional activities, like the marketing orders themselves, are intended to serve the producers' common interest in disposing of their output on favorable terms. The central message of the generic advertising at issue is this case in that California Summer Fruits" are wholesome, delicious, and attractive to discerning shoppers. *See* App. 530. All of the relevant advertising, insofar as it is authorized by the statute and the Secretary's regulations, is designed to serve the producers' and handlers' common interest in promoting the sale of a particular product.[3]

II

The regulations at issue in this litigation are contained in Marketing Order 916, which regulates nectarines grown in California, and Marketing Order 917, which originally regulated peaches, pears, and plums grown in California.[4]

A 1966 amendment to the former expressly authorized generic advertising of nectarines, see 31 Fed. Reg. 8177, and a series of amendments, beginning in 1971, to the latter authorized advertising of each of the regulated commodities, see 36 Fed. Reg. 14381 (1971); 41 Fed. Reg. 14375, 17528 (1976).[5] The advertising

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[2]Congress amended the AMAA in 1954 to authorize the Secretary to establish "marketing . . . development projects." *See* Agricultural Act of 1954, § 401(c), 68 Stat. 906.

[3]Those regulations include provisions minimizing the risk that the generic advertising might adversely affect the interests of any individual producer. *See* 7 U.S.C. § 608c(16) (A) (I) (providing for termination or suspension of an order that does not "effectuate the declared policy" of the AMAA); § 608c(16) (B) (providing for termination of an order if a majority of producers does not support a regulation; § 608c(15) (A) (allowing handlers subject to a marketing order to petition for modification or exemption from an order that is inconsistent with the statute). For the purpose of this case, we assume that those regulations accomplish their goals, and that the generic advertising programs therefore further the interests of those who pay for them. We do not, however, rule out the possibility that, despite the approval of generic advertising by at least two-thirds of the handlers, individual advertising might be even more effective.

[4]The original marketing order for California peaches and plums was first issued in 1939. *See* 4 Fed. Reg. 2135 (1939). The marketing order for California nectarines was issued in 1958. *See* 7 C.F.R. § 937.45 (1959).

[5]The plum portion of Order 917 was terminated in 1991 after a majority of plum producers failed to vote for its continuation, *see* 56 Fed. Reg. 23772, but because some of the respondents are seeking a refund of 1991 assessments for plum advertising, the validity of that portion of the program is not moot.

provisions relating to pears are not now being challenged, thus we limit our discussion to generic advertising of California nectarines, plums, and peaches.

Respondent Wileman Bros.& Elliott, Inc., is a large producer of these fruits that packs and markets its own output as well as that grown by other farmers. In 1987, after encountering problems with some fruit varieties under the maturity and minimum size standards in the orders, it refused to pay its assessments and filed a petition with the Secretary challenging those standards. In 1988 it filed a second petition challenging amendments to the maturity standards as well as the generic advertising regulations. The Administrative Law Judge (ALJ), in two separate decisions that are explained in a total of 769 pages, ruled in favor of Wileman on the Administrative Procedure Act (APA) issues, without resolving the respondents' First Amendment claims. App. to Brief in Opposition 393a.[6] In a comparably detailed decision, the Judicial Officer of the Department of Agriculture entirely reversed the ALJ. Wileman, along with 15 other handlers, then sought review of the Judicial Officer's decision by filing this action in the District Court pursuant to 7 U.S.C. § 608c(15) (B). A number of enforcement actions brought by the Secretary to collect withheld assessments were consolidated with the review proceeding. Acting on cross-motions for summary judgment, the District Court upheld both marketing orders and entered judgment of $3.1 million in past due assessments against the handlers.

In the Court of Appeals the handlers challenged the generic advertising provisions of the orders as violative of both the APA and the First Amendment. The Court rejected the statutory challenge, concluding that the record contained substantial evidence justifying both the original decision to engage in generic advertising [7] and continuation of the program. It explained:

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[6]The ALJ indicated that if respondents "were not to succeed in their nonconstitutional arguments" it would rule in their favor on the First Amendment claim. App. to Brief in Opposition 393a.

[7]The Court of Appeals quoted the following as a "typical excerpt":
" `The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued.

* * *

"`Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" `at the end of each spot, have

"The Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season. Prior to the full committee meeting, the Subcommittee on Advertising and Promotion meets to review in detail the program developed by its staff. The staff in turn uses monthly reports on price trends, consumer interests, and general market conditions in the formation of the proposed advertising program.

. . .

"[I]t is only because the handlers themselves, through the committees, recommend a budget with a generic advertising component that the program is renewed by the Secretary every year. In fact, in most years the recommendations have been unanimous. We cannot assume that the handlers--the parties with firsthand knowledge of the state of their industry--would make recommendations that have an adverse effect on their businesses. Of course, the interests of the voting committee members may not always coincide with those of every handler in the industry. However, this court has previously noted that the Supreme Court 'upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree.' *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1197 (9th Cir.1990) (citing *United States v. Rock Royal Coop.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 . . .(1939))." *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1375-1376 (C.A.9 1995) (footnote omitted).

The Court of Appeals concluded, however, that government enforced contributions to pay for generic advertising violated the First Amendment contributions to pay for generic advertising violated the First Amendment rights of the handlers. Relying on an earlier Ninth Circuit decision that had cited our decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), *see Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (C.A.9 1993), the court began by stating that the "First Amendment right of freedom of speech includes a right not to be compelled to render financial support for others' speech." *Wileman Bros.*, 58 F.3d, at 1377. It then reviewed the generic advertising regulations under "the test for restrictions on commercial speech set out

considerable influence in triggering retail promotions. 41 Fed. Reg. 14,375, 14,376-77 (1976).' "*Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1375 (C.A.9 1995).

in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 [100 S.Ct. 2324, 2351, 65 L.Ed.2d 341] (1980)." *Id.*, at 1378. Although it was satisfied that the government interest in enhancing returns to peach and nectarine growers was substantial, it was not persuaded that the generic advertising passes either the second or third "prongs" of *Central Hudson*. With respect to the former, even though the generic advertising "undoubtedly" has increased peach and nectarine sales, the government failed to prove that it did so more effectively than individualized advertising. The court also concluded that the program was not "narrowly tailored" because it did not give the handlers any credit for their own advertising and because California was the only state in which such programs were in place.[8]

The Court of Appeals' disposition of the First Amendment claim is in conflict with a decision of the Court of Appeals for the Third Circuit that rejected a challenge to generic advertising of beef authorized by the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2911. *United States v. Frame*, 885 F.2d 1119, 1136, 1137 (C.A.3 1989). Characterizing that statute as "legislation in furtherance of an ideologically neutral compelling state interest," *id.*, at 1137, and noting that the "Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market," *id.*, at 1136, despite the plaintiffs objections to the content of the advertising,[9] the court found no violation of his First Amendment rights.

We granted the Secretary's petition for certiorari to resolve the conflict, 517 U.S. ----, 116 S.Ct. 1875, 135 L.Ed.2d 171 (1996), and now reverse.

III

In challenging the constitutionality of the generic advertising program in the Court of Appeals, respondents relied, in part, on their claimed disagreement with the content of some of the generic advertising. 58 F.3d, at 1377, n.6. The District

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[8]Respondents also challenged other features of the collective program including the fruit maturity and minimum size requirements. Reviewing these aspects of the order pursuant to the deferential standard of review provided in the APA, the Court of Appeals found that they were not arbitrary and capricious. *See* 58 F.3d, at 1382, 1384.

[9]The plaintiff had claimed that he disagreed with the point of view expressed in advertising that the consumption of beef is "'desirable, healthy, nutritious'"; the court concluded that his claim was not "a dispute over anything more than mere strategy." *Frame*, 885 F.2d, at 1137.

Court had found no merit to this aspect of their claim,[10] and the Court of Appeals did not rely on it for its conclusion that the program was unconstitutional. Rather, the Court of Appeals invalidated the entire program on the theory that the program could not survive *Central Hudson* because the government had failed to prove that generic advertising was more effective than individual advertising in increasing consumer demand for California nectarines, plums, and peaches. That holding did not depend at all on either the content of the advertising, or on the respondents' claimed disagreement with any particular message. Although respondents have continued in this Court to argue about their disagreement with particular messages, those arguments, while perhaps calling into question the administration of portions of the program, have no bearing on the validity of the entire program.[11]

For purposes of our analysis, we neither accept nor reject the factual assumption underlying the Court of Appeals' invalidation of the program--namely that generic advertising may not be the most effective method of promoting the sale of these commodities. The legal question that we address is whether being compelled to

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[10]The District Court stated: "Scattered throughout plaintiffs' briefs are additional objections which are difficult to characterize or quantify. They assert that the advertising condones `lying' in that it promotes the `lie' that red colored fruit is superior, that it rewards mediocrity by advertising all varieties of California fruit to be of equal quality, that it promotes sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit, and that it promotes the `socialistic programs' of the Secretary. It is impossible from these `vague claims' to determine that plaintiffs' first amendment rights have been significantly infringed." *Wileman Bros. & Elliott, Inc. v. Madigan*, Civ. No. F-90-473-OWW (ED Cal. 1993), reprinted in App. to Pet. for Cert. 91a-92a.

[11]Respondents argue that assessments were used to fund advertisements conveying the message that red nectarines are superior to other nectarines, Brief for Respondents 33, and advertisements conveying the message that "all California fruit is the same," *ibid.*; Brief for Respondents Gerawan Farming, Inc., et al. 46. They contend that they object to these messages because some of respondent companies grow varieties of nectarines that are not red, and because they seek to promote the fact that the commodities are highly varied. *See* Brief for Respondents 33; Brief for Respondents Gerawan Farming, Inc., et al. 46. Respondents' argument concerning promotion of red varieties appears to confuse complaints concerning maturity standards imposed on peach and nectarine growers with complaints concerning advertising. *See, e.g.*, App. 233; *id.* at 692. The argument that the advertising promotes a view that all California fruit is the same is premised upon no particular advertisement, but rather upon testimony by respondents' executives concerning their general opposition to paying for generic advertising. *See, e.g., id.*, at 588; *id.*, at 662-663. Respondents also suggest that assessments were improperly used to fund materials promoting fruit varieties grown exclusively by their competitors. Brief for Respondents 19-20. The claim, however, arises simply from a single reference to Red Jim nectarines, listed among 25 varieties, on a 1989 chart illustrating the availability of mid-to late- season summer tree fruits. App. 531. These complaints, if they have any merit, are all essentially challenges to the administration of the program that are more properly addressed to the Secretary.

fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.

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

IV

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience.[12] Second, they do not compel any person to engage in any actual or symbolic speech.[13] Third, they do not compel the producers to endorse or to finance any political or ideological views.[14] Indeed, since all of the respondents are engaged in the business of

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[12]This fact distinguishes the limits on commercial speech at issue in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed.2d 341 (1980), *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L. Ed.2d 346 (1976), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. ----, 116 S. Ct. 1495, 134 L. Ed.2d 711 (1996).

[13]This fact distinguishes the compelled speech in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), and the compelled association in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

[14]This fact distinguishes cases like *International Ass'n of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961), *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) and *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).

marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders.

Respondents advance several arguments in support of their claim that being required to fund the generic advertising program violates the First Amendment. Respondents argue that the assessments for generic advertising impinge on their First Amendment rights because they reduce the amount of money that producers have available to conduct their own advertising. This is equally true, however, of assessments to cover employee benefits, inspection fees, or any other activity that is authorized by a marketing order. The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech.

The Court of Appeals, perhaps recognizing the expansive nature of respondents' argument, did not rely on the claim that the assessments for generic advertising indirectly limit the extent of the handlers' own advertising. Rather, the Court of Appeals apparently accepted respondents' argument that the assessments infringe First Amendment rights because they constitute compelled speech. Our compelled speech case law, however, is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectional message out of their own mouths, *cf. West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S. Ct. 1178, 1182, 87 L. Ed. 1628 (1943), require them to use their own property to convey an antagonistic ideological message, *cf. Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.* 475 U.S. 1, 18, 106 S. Ct. 903, 912-913, 89 L. Ed. 2d 1 (1986) (plurality opinion), force them to respond to a hostile message when they "would prefer to remain silent," *see ibid.*, or require them to be publicly identified or associated with another's message, *cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035, 2044, 64 L. Ed. 2d 741 (1980). Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the court did not rely,[15] none of the generic advertising conveys any message

[15]See n. 12, *supra*.

with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits." *See, e.g.*, App. 530.

Although this regulatory scheme may not compel speech as recognized by our case law, it does compel financial contributions that are used to fund advertising. As the Court of Appeals read our decision in *Abood*, just as the First Amendment prohibits compelled speech, it prohibits--at least without sufficient justification by the government--compelling an individual to "render financial support for others' speech." 58 F.3d, at 1377. However, *Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, Abood merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's "freedom of belief." 431 U.S., at 235, 97 S. Ct., at 1799. We considered, in *Abood*, whether it was constitutional for the State of Michigan to require government employees who objected to unions or union activities to contribute to an "agency shop" arrangement requiring all employees to pay union dues as a condition of employment. We held that compelled contributions to support activities related to collective bargaining were "constitutionally justified by the legislative assessment of the important contribution of the union shop" to labor relations. *Id.*, at 222, 97 S. Ct., at 1793. Relying on our compelled speech cases, however, the Court found that compelled contributions for political purposes unrelated to collective bargaining implicated First Amendment interests because they interfere with the values lying at the "heart of the First Amendment [--] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.*, at 234-235, 97 S. Ct., at 1799; *see also id.*, at 235, 97 S. Ct., at 1799.

Here, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit. Neither the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent "does not mean [that] they have a First Amendment complaint." *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S. Ct. 1883, 1896, 80 L. Ed. 2d 428 (1984).

Moreover, rather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group. Thus, in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991), while we held that the cost of certain publications that were not germane to collective-bargaining activities could not be assessed against dissenting union members, *id.*, at 527-528, 111 S. Ct., at 1963-1964, we squarely held that it was permissible to charge them for those portions of "the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs. . ., and other miscellaneous matter." *Id.*, at 529, 111 S. Ct., at 1964. That holding was an application of the rule announced in *Abood* and further refined in *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990), a case involving bar association activities.

As we pointed out in *Keller*, *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal professional and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.*, at 13-14, 110 S.Ct., at 2236. This test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities.[16]

[16]The generic advertising program at issue here is even less likely to pose a First Amendment burden than the programs upheld in *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991). *Lehnert* involved collective programs in the context of a union agency-shop agreement which arguably always poses some burden on First Amendment rights. *See id.*, at 518, 111 S. Ct., at 1958-1959 (noting that agency-shop agreements inherently burden First Amendment rights); *see also Abood*, 431 U.S., at 222, 97 S. Ct., at 1792-1793 (recognizing that all compelled contributions for collective bargaining affect First Amendment interests because an employee may have ideological, moral, or religious objections to the union's activities). By contrast, the collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 643, 635, 104 S. Ct. 3244, 3258, 82 L. Ed. 2d 462 (1984) (opinion of O'CONNOR, J.) (Finding "only minimal constitutional protection of the freedom of commercial association" and that an association whose "activities are not predominantly of the type protected by the First Amendment" is subject to

We are not persuaded that any greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market. Respondents' criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely. Similar criticisms might be directed at other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market.[17] Although one may indeed question the wisdom of such a program its debatable features are insufficient to warrant special First Amendment scrutiny. It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising.[18]

V

The Court of Appeals' decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue here. The Court of Appeals concluded that the advertising program does not "directly advance" the purposes of the marketing orders because the Secretary had failed to prove that generic advertising is any more effective in stimulating consumer demand for the commodities than the advertising that might otherwise be undertaken by producers acting independently. We find this an odd burden of proof to assign to the administrator of marketing orders that reflect a policy of displacing unrestrained competition with government supervised cooperative marketing programs. If there were no marketing orders at all to set maturity levels, size, quantity and other features, competition might well generate greater production of nectarines, peaches, and plums. It may also be true that if there were no generic advertising, competition would generate even more advertising and an

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"rationally related state regulations of its membership").

[17]As we have already noted, n. 8 *supra*, respondents failed in their challenge to the other features of the programs before the District Court and the Court of Appeals.

[18]The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply *Abood's* "germaneness" test.

even larger consumer demand than does the cooperative program. But the potential benefits of individual advertising do not bear on the question whether generic advertising directly advances the statute's collectivist goals. Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity. While the First Amendment unquestionably protects the individual producer's right to advertise its own brands, the statute is designed to further the economic interests of the producers as a group. The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. It is illogical, therefore, to criticize any cooperative program authorized by this statute on the ground that competition would provide greater benefits than joint action.

On occasion it is appropriate to emphasize the difference between policy judgments and constitutional adjudication. Judges who have endorsed the view that the Sherman Act is a charter of economic liberty,[19] naturally approach laws that command competitors to participate in joint ventures with a jaundiced eye. Doubts concerning the policy judgments that underlie many features of this legislation do not, however, justify reliance on the First Amendment as a basis for reviewing economic regulations. Appropriate respect for the power of Congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders on the following reasoning.

Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme. *See* § 602(1). At least a majority of the producers in each of the markets in which such advertising is authorized must be persuaded that it is effective, or presumably the programs would be discontinued.[20] Whether the benefits from the advertising justify its cost is a question that not only might be answered differently in different markets, but also

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[19]*See, e.g., Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360, 53 S. Ct. 471, 473-474, 77 L. Ed. 825 (1933); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517-518, 2 L. Ed. 2d 545 (1958); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 647, 97 S. Ct. 2881, 2895-2896, 53 L. Ed. 2d 1009 (1977) (STEVENS, J., dissenting).

[20]The Secretary must terminate an order if he determines that it does not further the policies of the AMAA, see 7 U.S.C. § 608c(16) (A) (I), or that a majority of producers does not support it, see § 608c(16) (B). The committee voted unanimously for generic advertising assessments in each of the years at issue here. *See* 58 F.3d, at 1376.

involves the exercise of policy judgments that are better made by producers and administrators than by judges.

As with other features of the marketing orders, individual producers may not share the views or the interests of others in the same market. But decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising. Perhaps more money may be at stake when a generic advertising program is adopted than for other features of the cooperative endeavor, but that fact does not transform this question of business judgment into a constitutional issue. In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers "do not wish to foster" generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice SOUTER, with whom The Chief Justice and Justice SCALIA join, and with whom JUSTICE THOMAS joins except as to Part II, dissenting.

The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech, for two principal reasons. First, the Court finds no discernible element of speech in the implementation of the Government's marketing orders, beyond what it sees as "germane" to the undoubtedly valid, nonspeech elements of the orders. Second, the Court in any event takes the position that a person who is neither barred from saying what he wishes, not subject to personal attribution of speech he dislikes, has no First Amendment objection to mandatory subsidization of speech unless it is ideological or political or contains a message with which the objecting person disagrees. I part company with the Court on each of these closely related points. The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation, and the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will. I therefore conclude that forced payment for commercial speech should be subject to the same level of judicial scrutiny as any restriction on communications in that category. Because I believe that the advertising scheme here fails that test, I respectfully dissent.

I

The nub of the Court's opinion is its reading of the line of cases following *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977):

> "Abood, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest is not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.' "Ante, at 13 (quoting *Abood, supra,* at 235).

While I certainly agree with the Court that a proper understanding of *Abood* is necessary for the disposition of this case (and will dwell on the scope of its holding at some length below), it seems to me that *Abood* appears more readily in its proper size if we begin our analysis with two more basic principles of First Amendment law: that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope, and that protected speech may not be made the subject of coercion to speak or coercion to subsidize speech.

A

Even before we first recognized commercial speech protection in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), we had stated a basic proposition of First Amendment protection, that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties [of the First Amendment] " *Roth v. United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). This premise was later echoed in *Virginia Bd. of Pharmacy*, where we asked whether commercial speech "is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection." 425 U.S., at 762 (citations and internal quotation marks omitted). The answer, of course, was no.

What stood against the claim of social unimportance for commercial speech was not only the consumer's interest in receiving information, *id.*, at 763-764, but the commercial speaker's own economic interest in promoting his wares. "[W]e may assume that the advertiser's interest is a purely economic one. That hardly

disqualifies him from protection under the First Amendment." *Id.*, at 762. Indeed, so long as self-interest in providing a supply is as legitimate as the self-interest underlying an informed demand, the law could hardly treat the advertiser's economic stake as "utterly without redeeming social importance" and isolate the consumer's interest as the exclusive touchstone of commercial speech protection.

Nor is the advertiser's legitimate interest one-dimensional. While the value of a truthful representation of the product offered is central, advertising's persuasive function is cognizable, too. Like most advertising meant to stimulate demand, the promotions for California fruit at issue here do more than merely provide objective information about a product's availability or price; they exploit all the symbolic and emotional techniques of any modern ad campaign with messages often far removed from simple proposals to sell fruit.[1] "Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. . . . The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 636, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (KENNEDY, J., dissenting). Since persuasion is an essential ingredient of the competition that our public law promotes with considerable effort, the rhetoric of advertising cannot be written off as devoid of value or beyond protection, any more than can its power to inform. Of course, that value may well be of a distinctly lower order than the importance of providing accurate factual information, and the inextricable linkage between advertising and underlying commercial transaction "may give [the government] a concomitant interest in the expression itself," *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (citation and internal quotation marks omitted); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. ----,---- (1996) (slip op., at 12) (opinion of STEVENS, J.). But these considerations amount to nothing more than the premise justifying a merely moderate level of scrutiny for commercial speech regulations generally: "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Rubin v. Coors Brewing*

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[1]Thus, commercial advertising generally and these programs in particular involve messages that go well beyond the ideal type of pure commercial speech hypothesized in *Virginia Bd. of Pharmacy,* which would do "'no more than propose commercial transaction,'" 425 U.S., at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 385, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)), by communicating the idea "'I will sell you the X prescription drug at the Y price," 425 U.S., at 761.

Co., 514 U.S. 476, 482, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) (citations and internal quotation marks omitted).

B

Since commercial speech is not subject to any categorical exclusion from First Amendment protection, and indeed is protectible as a speaker's chosen medium of commercial enterprise, it becomes subject to a second First Amendment principle: that compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny. In *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), for example, the State argued that "the First Amendment interest in compelled speech is different [from] the interest in compelled silence," and ought therefore to merit a more "deferential test." *Id.*, at 796. We rejected that argument out of hand: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Id.*, at 796-797; *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) ("Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say") (citations and internal quotation marks omitted); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) ("[I]nvoluntary affirmation c[an] be commanded only on even more immediate and urgent grounds than silence").

As a familiar corollary to the principle that what may not be suppressed may not be coerced, we have recognized (thus far, outside the context of commercial speech) that individuals have a First Amendment interest in freedom from compulsion to subsidize speech and other expressive activities undertaken by private and quasi-private organizations.[2] We first considered this issue in *Abood*

[2]The Secretary of Agriculture does not argue that the advertisements at issue represent so-called "government speech," with respect to which the government may have greater latitude in selecting content than otherwise permissible under the First Amendment, *see Keller v. State Bar of Cal.*, 496 U.S. 1, 10-13, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209,

v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), in addressing the First Amendment claims of dissenting employees subject to an "agency-shop" agreement between their government employer and a union. The agreement required each employee to pay the union a "service fee" equal to the dues required of union members, but limited no one's right to speak separately and obliged no employee to join the union, personally espouse unionism, or participate in the union in any other way. *Id.*, at 212. Thus, as in this case, the sole imposition upon nonmembers was the assessment to help pay for the union's activities. And yet, purely financial as the imposition was, we held that the union's use of dissenters' service fees for expressive purposes unrelated to collective bargaining violated the First Amendment rights of those employees. In so holding, *Abood* drew together several lines of First Amendment doctrine; after recognizing the parallels between expression per se and associating for expressive purposes, *id.*, at 233-234, the Court relied on compelled-speech cases such as Barnette, *supra*, in concluding that just as the government may not (without a compelling reason) prohibit a person from contributing money to propagate ideas, neither may it force an individual to contribute money to support some group's distinctly expressive activities, *id.*, at 234-235. We have repeatedly adhered to this reasoning in cases of compelled contributions to unions in agency shops, *see, e.g., Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991); *Teachers v. Hudson,* 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984) (statutory case); *Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961) (statutory case anticipating *Abood*), and have followed the same rationale in holding that state-compelled dues to an integrated bar association may not constitutionally be used to advance political and ideological causes distinct from the core objectives of professional regulation, *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).

C

The Court recognizes the centrality of the Abood line of authority for resolving today's case, but draws the wrong conclusions from it. Since *Abood* struck down the mandatory "service fee" only insofar as it funded the union's expression of support for "ideological causes not germane to its duties as collective-bargaining

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259, n. 13, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (Powell, J., concurring in judgment). *See* Brief for Petitioner 25, n. 16 (waiving argument).

representative,"431 U.S., at 235; *see also id.*, at 232, the Court reads *Abood* for the proposition that the First Amendment places no limits on government's power to force one individual to pay for another's speech, except when the speech in question both is ideological or political in character and is not germane to an otherwise lawful regulatory program. *Ante*, at 13-15.[3]

1

The Court's first mistaken conclusion lies in treating *Abood* as permitting any enforced subsidy for speech that is germane to permissible economic regulation, in the sense that it relates to the subject matter of the regulation and tends to further its objectives. But *Abood* and its subsequent line of cases is not nearly so permissive as the Court makes out. In *Abood*, we recognized that even in matters directly related to collective bargaining, compulsory funding of union activities has an impact on employees' First Amendment interests, since the employees might disagree with positions taken by the union on issues such as the inclusion of abortion in a medical benefit plan, or negotiating no-strike agreements, or even the desirability of unionism in general. 431 U.S., at 222. To be sure, we concluded that any interference with such interests was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Ibid.*; *see also Keller, supra*, at 13-14 ("[T]he State's interest in regulating the legal profession and improving the quality of legal services" justifies "the compelled association [inherent in the] integrated bar"). But this was simply a way of saying that the government's objective of guaranteeing the opportunity for a union shop, the importance and legitimacy of which were already settled, *see Abood*, 217-232 (following *Railway Employees v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956), and *Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 2d 1141 (1961)), could not be attained without the incidental infringements of the interests in unfettered speech and association that petitioners there claimed. Collective bargaining, and related activities such as grievance arbitration and contract administration, are part and

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[3]That is, the Court appears to hold that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is non-ideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy. *See, e.g., ante*, at 15 ("[The *Abood*] test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities") (emphasis added).

parcel of the very economic transactions between employees and employer that Congress can regulate, and which it could not regulate without these potential impingements on the employees' First Amendment interests. *Abood* is thus a specific instance of the general principle that government retains its full power to regulate commercial transactions directly, despite elements of speech and association inherent in such transactions. *See Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (commercial conduct may be regulated without offending First Amendment despite use of language); *Roberts v. United States Jaycees*, 468 U.S. 609, 634, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (opinion of O'CONNOR, J., concurring in part and concurring in judgement) (in contrast to right of expressive association, "there is only minimal constitutional protection of the freedom of commercial association," because "the State is free to impose any rational regulation on the commercial transaction itself"); *see also New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (constitutional right of expressive association is not implicated by every instance in which individuals choose their associates); *Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 428 (1984) (funding of union social activities, as opposed to expressive activities, has minimal connection with First Amendment rights).

Decisions postdating *Abood* have made clear, however, that its limited sanction for laws affecting First Amendment interests may not be expanded to cover every imposition that is in some way "germane" to a regulatory program in the sense of relating sympathetically to it. Rather, to survive scrutiny under *Abood*, a mandatory fee must not only be germane to some otherwise legitimate regulatory scheme; it must also be justified by vital policy interests of the government and not add significantly to the burdening of free speech inherent in achieving those interests. *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991); *accord Ellis, supra,* at 456.

Thus, in *Lehnert* eight Justices concluded that a teachers' union could not constitutionally charge objecting employees for a public relations campaign meant to raise the esteem for teachers in the public mind and so increase the public's willingness to pay for public education. *See* 500 U.S., at 528-529 (plurality opinion); *id.*, at 559 (SCALIA, J., concurring in judgment in part and dissenting in part). "expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do [collective-bargaining functions]." *Id.*, at 528-529 (plurality opinion). The advertising campaigns here suffer from the same defect as the public relations effort to stimulate demand for the teachers' product: a local union can negotiate a particular contract for the benefit of a shop's whole labor

force without globally espousing the virtues of teachers, and (in the absence of further explanation) produce markets can be directly regulated in the interest of stability and growth without espousing the virtues of fruit. They were, indeed, for a quarter century, and still are under the many agricultural marketing orders that authorize no advertising schemes. *See infra*, at 19-25. In each instance, the challenged burden on dissenters' First Amendment rights is substantially greater than anything inherent in regulation of the commercial transactions. Thus, the *Abood* line does not permit this program merely because it is germane to the marketing orders.[4]

2

The Court's second misemployment of *Abood* and its successors is its reliance on them for the proposition that when government neither forbids speech nor attributes it to an objector, it may compel subsidization for any objectionable message that is not political or ideological. But this, of course, is entirely at odds with the principle that speech significant enough to be protected at some level is outside the government's power to coerce or to support by mandatory subsidy without further justification. *Supra*, at 5-7. Since a commercial speaker (who does not mislead) may generally promote commerce as he sees fit, the government requires some

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[4]The Court purports to find support for its more permissive reading of the *Abood* "germaneness test" in a separate holding of *Lehnert* allowing mandatory charges for portions of the union's internal newsletter, the Teachers' Voice, that concerned "`teaching and education generally, professional development, unemployment, job opportunities, award programs. . ., and other miscellaneous matters.'" *Ante* at 14, (quoting *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 529, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991)). But the *Lehnert* Court noted that these communications, though plainly speech, were not "public in nature," 500 U.S., at 529; the Teachers' Voice was the union's means of communicating with its members, not the public at large, *see Lehnert v. Ferris Faculty Assn-MEA-NEA*, 643 F.Supp. 1306, 1328 (W.D. Mich. 1986), *aff'd*, 881 F. 2d 1388 (C.A.6 1989), *aff'd. in part and rev'd in part on other grounds*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991). In upholding charges for this type of internal communication, *Lehnert* simply followed our earlier decision in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984), in which we reasoned that "[t]he union must have a channel for communicating with the employees, including the objecting ones, about its activities. . . . [The union surely may] charge objecting employees for reporting to them about those activities it can charge them for doing." *Id.*, at 450-451. In other words, this type of internal communication about chargeable activities, unlike the public advertising campaign struck down in *Lehnert*, was necessary to the union's role as collective-bargaining agent and imposed no greater burden on the employees' First Amendment interest than their compelled association with the union in the first instance. In these respects, however, the instant advertising programs are much more like the impermissible public relations campaign that the permissible internal communications at issue in Lehnert.

justification (such as its necessity for otherwise valid regulation) before it may force him to subsidize commercial speech to which he objects. While it is perfectly true that cases like *Abood* and *Keller* did involve political or ideological speech, and the Court made reference to that character in explaining the gravity of the First Amendment interest at stake, nothing in those cases suggests that government has free rein to compel funding of nonpolitical speech (which might include art,[5] for example, as well as commercial advertising). While an individual's First Amendment interest in commercial speech, and thus the government's burden in justifying a regulation of it, may well be less weighty than the interest in ideological speech, *Abood* continues to stand for the proposition that being compelled to make expenditures for protected speech "works no less an infringement of . . . constitutional rights" than being prohibited from making such expenditures. *Abood,* 431 U.S., at 234. The fact that no prior case of this Court has applied this principle to commercial and nonideological speech simply reflects the fortuity that this is the first commercial-speech subsidy case to come before us.

3

An apparent third ground for the Court's conclusion that the First Amendment is not implicated here is its assumption that respondents do not disagree with the advertisements they object to subsidizing. *See ante,* at 11, 13. But this assumption is doubtful and would be beside the point even if true. As the Court itself notes, *ante,* at 8-9, and n. 11, respondents do claim to disagree with the messages of some promotions they are being forced to fund: some of the ads promote specific varieties of plums, peaches, and nectarines marketed by respondents' competitors but not by respondents; other ads characterize California tree fruits as a generic and thus fungible commodity, whereas respondents believe that their produce is superior to most grown in California. While these points of disagreement may seem trivial to the Court, they in fact relate directly to a vendor's recognized First Amendment interest in touting his wares as he sees fit, so long as he does not mislead. *Supra,* at 3-4. Whether the "central message," *ante,* at 11, of the generic advertising is that all California peaches, plums, and nectarines are equally good, or that only the varieties and characteristics featured in the advertisements are desirable, respondents do indeed disagree with that message.

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[5]*Cf. Schad v. Mount Ephraim,* 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee").

In any event, the requirement of disagreement finds no legal warrant in our compelled-speech cases. In *Riley,* for example, we held that the free-speech rights of charitable solicitors were infringed by a law compelling statements of fact with which the objectors could not, and did not profess to, disagree. *See Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S., at 797-798. *See also Hurley,* 515 U.S., at 573 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . ."); *Barnette,* 319 U.S., at 635 (if the Free Speech Clause bars the government from making the flag salute a legal duty, nonconformist beliefs are not required to exempt one from saluting). Indeed, the *Abood* cases themselves protect objecting employees from being forced to subsidize ideological union activities unrelated to collective bargaining, without any requirement that the objectors declare that they disagree with the positions espoused by the union. *See, e.g., Teachers v. Hudson,* 475 U.S., at 301-302; *Abood,* 431 U.S., at 234. Requiring a profession of disagreement is likewise at odds with our holding two Terms ago that no articulable message is necessary for expression to be protected, *Hurley,* 515 U.S., at 569; protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference. What counts here, then, is not whether respondents fail to disagree with the generalized message of the generic ads that California fruit is good, but that they do indeed deny that the general message is as valuable and worthy of their support as more particular claims about the merits of their own brands. One need not "disagree" with an abstractionist when buying a canvas from a representational painter; one merely wishes to support a different act of expression.

D

The Secretary of Agriculture has a further argument for minimizing or eliminating scrutiny of this subsidization mandate, which deserves some mention even though the Court does not adopt it. The Secretary calls for lesser scrutiny of forced payments for truthful advertising and promotion than for restrictions on commercial speech, on the ground that the effect of compelled funding is to increase the sum of information to the consuming public. This argument rests, however, on the assumption that regulation of commercial speech is justified solely or largely on preservation of public access to truthful information, an assumption we have already seen to be inaccurate. *Supra,* at 2-5. Truth is indeed a justifiable objective of commercial speech protection, but so is nonmisleading persuasion directed to the advertiser's own choice of what to promote.

Although not cited by the Secretary, the closest pass at authority for his limited rationale of commercial speech protection is *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985), our only examination of a commercial speech mandate before today. The state law there required disclosures about the method of calculating a contingent fee when legal representation on that basis was advertised. In speaking of the objecting lawyer's comparatively modest interest in challenging the state requirement, we referred to protection of commercial speech as "justified principally by the value to consumers of the information such speech provides. " *Id.*, at 651 (citation omitted); *see also Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S., at 765, 770; *Rubin v. Coors Brewing Co.*, 514 U.S., at 481 (1995). But this proposition will not bear the weight of the government's position. We said "principally," not exclusively, and proceeded to uphold the state requirement not because a regulation adding to public information is immune from scrutiny, but because the mandate at issue bore a reasonable relation to the "State's interest in preventing deception of consumers," 471 U.S., at 651, who might otherwise be ignorant of the real terms on which the advertiser intended to do business. *Zauderer* thereby reaffirmed a longstanding preference for disclosure requirements over outright bans, as more narrowly tailored cures for the potential of commercial messages to mislead by saying too little. *See id.*, at 651-652, n. 14; *see also Hurley,* 515 U.S., at 573; *Riley v. National Federation of Blind of N.C., Inc., supra* at 796, n. 9 (1988); *Central Hudson,* 447 U.S., at 565; *Virginia Bd. of Pharmacy, supra,* at 771-772. But however long the pedigree of such mandates may be, and however broad the government's authority to impose them, *Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.

II

For the reasons discussed above, none of the Court's grounds suffices for discounting respondents' interests in expression here and treating these compelled advertising schemes as regulations of purely economic conduct instead of commercial speech. I would therefore adhere to the principle laid down in our compelled-speech cases: laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities. Under the test for commercial speech, the law may be held constitutional only if (1) the interest being pursued by the government is substantial, (2) the regulation directly advances that interest and (3) is narrowly tailored to serve it. *Central Hudson, supra,* at 566

(1980).[6] The burden is on the government. *Edenfield v. Fane,* 507 U.S., at 770; *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d (1989). In this case, the Secretary has failed to establish that the challenged advertising programs satisfy any of these three prongs of the *Central Hudson* test.

A

The express purposes of the Agriculture Marketing Agreement Act, 7 U.S.C. §601 et seq. (AMAA or Act), including the advertising programs established under it, are to stabilize markets for covered agricultural products and maintain the prices received by farmers. 7 U.S.C. §§ 602(1), (4); *see also* Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) §§ 501(b)(1), (3), Pub. L. 104-127, 110 Stat. 888, 1030 (finding by Congress that the purpose of agricultural commodity promotion laws is to maintain and expand the market for covered commodities).[7] It is doubtless true that at a general level these are substantial

[6]Contrary to some arguments offered by respondents, these advertising schemes are not removed from the commercial category on the grounds that they are content-based, producing not mere "dissemination of 'purely factual and uncontroversial information,'" *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985)), but controversial and ideological messages, and even objectionable sexual imagery. Regulation of commercial speech necessarily turns on some assessment of content, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), yet that fact has never been thought sufficient to require a standard of strict scrutiny. And we have consistently held that advertising does not automatically lose its character as commercial speech simply because it may do much more than propose a transaction or disseminate purely factual information. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 473-375, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-68, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983). The concept of commercial speech would be reduced to a relic if the threshold for imposing strict scrutiny were reached simply because certain advertisements evoke vaguely nostalgic themes of indeterminate political import or because the hypersensitive may see the specter of sex in the film of a child eating a peach.

[7]A subtitle of the FAIR Act, which was enacted on April 4, 1996, authorizes promotion and advertising orders for any agricultural commodity. Its procedural mechanisms are similar to those put in place by the AMAA, although there is one noticeable difference (other than breadth of coverage) between the two laws: orders issued under FAIR, unlike those under the AMAA, must be national in scope. FAIR Act §§ 511-526, 110 Stat. 1032-1048. The new Act does not, however, affect or pre-empt any other federal or state law, such as the AMAA, authorizing promotion or research relating to an agricultural commodity. § 524, *id.*, at 1047. The FAIR Act also includes new findings in support of "commodity promotion laws," including the advertising provisions of the

government interests, and unless there were some reason to doubt that undue market instability or income fluctuation has in fact affected a given segment of the economy, governmental efforts to address such problems would require little to satisfy the first *Central Hudson* criterion that a substantial government interest be the object of the regulation. Thus, if the government were to attack these problems across an interstate market for a given agricultural commodity or group of them, the substantiality of the national interest would not be open to apparent question, and the sole issues under *Central Hudson* would seem to be whether the means chosen were sufficiently direct and well tailored. But when the government's program targets expression in only a narrow band of a broad spectrum of similar market activities in which its interests appear to be at stake, a question naturally does arise. For the arbitrariness or underinclusiveness of the scheme chosen by the government may well suggest that the asserted interests either are not pressing or are not the real objects animating the restriction on speech. *See Rubin v. Coors Brewing Co.*, 514 U.S., at 489 ("[E]xemptions and inconsistencies" in alcohol labeling ban "bring into question the purpose of the... ban ," such that it does not survive the *Central Hudson* test); *City of Ladue v. Gilleo,* 512 U.S. 43, 52-53, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (same); *Florida Star v. B.J. F.*, 491 U.S. 524, 540, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) ("[T]he facial underinclusiveness" of a regulation of speech "raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests" invoked in support of it). Under such circumstances, the government's obligation to establish the empirical reality of the problems it purports to be addressing, *see Turner Broadcasting System, Inc., v. FCC,* 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497(1994); *Edenfield v. Fane, supra,* at 770-771, requires a sensible reason for drawing the line between those instances in which the government burdens First Amendment freedom in the name of the asserted interest and those in which it does not.

Here, the AMAA's authorization of compelled advertising programs is so random and so randomly implemented, in light of the Act's stated purposes, as to unsettle any inference that the Government's asserted interest is either substantial or even real. First, the Act authorized paid advertising programs in marketing orders for 25 listed fruits, nuts, vegetables, and eggs, but not for any other agricultural

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AMAA. § 501, *id.*, at 1029.

commodity. *See* 7 U.S.C. § 608c(6) (I).[8] The list includes onions but not garlic, tomatoes but not cucumbers, Tokay grapes but not other grapes, and so on. The selection is puzzling. The only thing the limited list unambiguously shows is that a need for promotional control does not go hand-in-hand with a need for market and economic stability, since the authorization for marketing orders bears no such narrow restriction to specific types of produce. But no general criterion for selection is stated in the text, and neither Congress nor the Secretary has so much as suggested that such a criterion exists. Instead, the legislative history shows that from time to time Congress has simply amended the Act to add particular commodities to the list at the request of interested producers or handlers, without ever explaining why compelled advertising programs were necessary for the specific produce chosen and not others.[9] The legislative history for the bill authorizing paid advertising programs for plums, nectarines, and several other commodities is a good case on point. The record indicates merely that "[o]ver the

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[8]Section 608c(6) (I) currently provides that marketing orders may include terms "[e]stablishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order; Provided, that with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . .

[9]The substantive terms of marketing orders under the AMAA as originally enacted were generally limited to restrictions on the total marketable quantity of the commodity, allocations among handlers, disposition of surplus quantities, and maintenance of reserve supplies 7 U.S.C. § 608c (6) (1934 ed., Supp. III). For the first time in 1954, Congress permitted marketing orders to establish "marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption [of a] commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 68 Stat. 907; 7 U.S.C. § 608c(6) (I). Since then, Congress has repeatedly amended the Act to authorize, but only for specified commodities, "any form of marketing promotion including paid advertising. § 608c(6) (I). The first such amendment, in 1962, allowed advertising programs for cherries, Pub. L. 87-703, 76 Stat. 632; similar schemes for plums and nectarines followed in 1965, Pub. L. 89-330, 79 Stat. 1270, and for "California-grown peaches" in 1971, Pub. L. 92-120, 85 Stat. 340; and today, various authorizations cover the 25 commodities listed in § 608c(6) (I). The Act now also permits crediting some or all of a handler's independent expenditures for advertising against his assessment obligations with respect to 6 commodities (but not nectarines, plums, or peaches). § 608c(6) (I).

past several years, numerous commodity groups have come to the Congress and asked for authority to provide for [market development and advertising] activities under the terms of their agreement and it has always been granted. This bill combines several such individual requests made by various producer groups operating under marketing agreements or order." H.R. Rep. No. 89-846, 89th Cong., lst Sess., 2 (1965). A letter from the Acting Secretary of Agriculture appended to the cited House Report similarly accounts for the choice of covered products solely by reference to grower and handler interest. *Id.*, at 3-4. Or, again, the legislative history of the amendment adding "California-grown peaches" to the list refers only to the view of the Department of Agriculture that "any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so." S. Rep. No. 92-295, p. 2 (1971). Nor do the proposed rulemakings for authorizing advertising programs in marketing orders carry findings that might explain why such programs might be needed for the specified commodities but not others; the announcements rely instead on a "consensus of the industry . . . That promotional activities . . . have been beneficial in increasing demand," 36 Fed. Reg. 8736 (1971) (plums); *see also* 41 Fed. Reg. 14376-14377 (1976) (peaches).[10]

Of course, when government goes no further than regulating the underlying economic activity, this sort of piecemeal legislation in answer to expressions of interest by affected parties is plainly permissible, short of something so arbitrary as to fail the rational basis test. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-489, 75 S. Ct. 461, 99 L. Ed. 563 (1955). But when speech is at stake, the government fails to carry its burden of showing a substantial interest when it does nothing more than refer to a "consensus" within a limited interest group that wants the regulation. Instead, the erratic pattern of regulation itself places the reality of any public or governmental interest in question, and a correlation with nothing more than the priorities of particular interest groups gives no reassuring answer.[11]

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[10]A possible exception is the proposed rulemaking for nectarines, which refers to the relative unfamiliarity of the consuming public with nectarines, due in part to the fact that new varieties that could be marketed nationally had only recently been developed. *See* 31 Fed. Reg. 5635, 5636 (1966). This solitary finding does not cure the other defects of the statutory scheme, however.

[11]This does not mean that taking the views of the industry into account in itself renders a program suspect. Both the AMAA and the more general authorization of compelled agricultural advertising programs recently enacted as part of the FAIR act require orders implementing such programs to be approved by producers and/or handlers in periodic referenda. *See* 7 U.S.C. §§ 608c(8) (A), (B), (9) (B) (I), (16), (19); FAIR Act § 518, 110 Stat. 1043-1044. Since the asserted purpose of these

A second element of the arbitrary in this statutory and regulatory scheme inheres in the geographical limitations on the marketing orders that include the advertising programs challenged in this case, which apply only to peaches, plums, and nectarines grown in California, unaccompanied by counterparts for advertising the same commodities grown elsewhere. Some geographical restriction, it must be said, follows from the general provision of the AMAA limiting marketing orders to the smallest production or marketing area practicable and consistent with the policy of the Act. *See* 7 U.S.C. § 608c(11)(B). But this provision merely explains why a substantial governmental interest in advertising a type of produce would have to be manifested in as many orders under the AMAA as there are defined production or marketing areas; it does nothing to explain the oddity that a government interest worth vindicating should occur within such geographically select boundaries and nowhere else, or to negate the suggestion of the evidence already mentioned, that the government's asserted interest is nothing more than the preference of a local interest group.

The oddity is most pronounced in the instance of peaches, since the statute itself authorizes forced advertising only in marketing orders for "California-grown peaches," not in orders for peaches grown anywhere else in the country. § 608c(6)(I). Although California is the biggest peach-growing State, more than 30 others also grow peaches commercially and together typically account for about half of the national crop, and roughly two-thirds of the peaches sold fresh. *See* App. 380; U.S. Dept. of Agriculture, Agricultural Statistics, 1995-96, p. V-23 (Table 294). Yet the non-California peaches are utterly ignored in the Government's promotional orders. The challenged advertising campaign for "California Summer Fruits," running in markets throughout United States and in Canada, *see* App. 341-343, 477-479, does not proclaim simply that peaches or the other fruits are good things. Rather, as the Secretary tells us, the Advertising Program "promotes California fruit as unique." Brief for Petitioner 31. It may or may not be, but promoting a crop from one State at the expense of essentially the same thing grown in the others reveals nothing about a substantial national interest justifying the National Government in restricting speech. Without more, the most reasonable

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advertising schemes is to increase demand for the covered commodities and thereby maintain the income of producers and handlers, requiring periodic approval by those most likely to benefit if a program is working as planned may serve as an additional check on whether the purpose of the program is in fact being achieved. Contrary to what the majority implies, *see ante*, at 19, however, the mere vote of a majority is never enough to compel dissenters to pay for private or quasi-private speech whose message they do not wish to foster; otherwise, the First Amendment would place no limitation on this types of majoritarian action.

inference is not of a substantial government interest, but effective politics on the part of producers who see the chance to spread their advertising costs. Nothing more appears.[12]

The Secretary makes no attempt to explain how the Act's geographical scope restrictions relate to the asserted goals of the advertising programs. The general restriction of marketing orders to the smallest practicable area has been part of the Act since it became law, long before Congress permitted compelled advertising, the authorization for which was simply grafted onto the existing Act as a convenient vehicle for the funding schemes. *See* n. 9., supra; *see also* S. Rep. No. 92-295, p. 2 (letter from Department of Agriculture indicating that the AMAA "could provide the facility for" financing commodity advertising programs). Nor does any explanation appear for restricting peach advertising programs to California produce. Without some explanation, one would expect something quite different, that a compelled advertising program of the National Government intended to increase consumer demand for an agricultural commodity would apply to produce grown throughout the land. Indeed, in recently enacting the FAIR Act, which authorizes compulsory advertising programs for all agricultural commodities on a national basis (but also leaves the separate provisions of the AMAA intact, *see* § 524, 110 Stat. 1047), Congress specifically found that "[t]he cooperative development, financing, and implementation of a coordinated national program of research, promotion, and information regarding agricultural commodities are necessary to maintain and expand existing markets and to develop new markets for these commodities." § 512(a) (7), *id*., at 1033 (emphasis added); *see also* § 514(a) (2), *id.*, at 1035 ("Each order issued under this section shall be national in scope"). The AMAA, of course, actually prohibits orders of and regulatory history so remote from the government's asserted interests as to undermine the reality, let alone the substantiality, of the claims put forward by the Secretary in attempting to satisfy Central Hudson's first requirement.

B

Even if the Secretary could establish a sufficiently substantial interest, he would need also to show how the compelled advertising programs directly advance that interest, that is, how the schemes actually contribute to stabilizing agricultural

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[12]While plum and nectarine production is more highly concentrated in California, *see* U.S. Dept. of Agriculture, Agricultural Statistics, 1995-96, pp. V-21, V-27 to V-28 (Tables 288, 304-308), the AMAA's requirement that marketing orders cover the smallest geographical area practicable still lacks any reasonable connection to the asserted purposes of the advertising programs instituted thereunder.

markets and maintaining farm income by stimulating consumer demand. To show this required causation, the Secretary relies on cases concerning governmental bans on particular advertising content, where we have accepted the unremarkable presumption that advertising actually works to increase consumer demand, so that limiting advertising tends to soften it. *See United States v. Edge Broadcasting Co.,* 509 U.S. 418, 428, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993); *Posadas de Puerto Rico Associates v. Tourism Co., of P.R.,* 478 U.S. 328, 341-342, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986); *Central Hudson,* 447 U.S., at 569. This presumption is not, however, automatically convertible into support for the Secretary here. In the cases mentioned, the question has been whether some advertising (in the absence of the government's ban) would be more effective in stimulating demand than no advertising (due to the ban). Here, in contrast, the causal question of direct advancement does not involve comparing the effectiveness of something with nothing, for even without the coercive promotional schemes there would be some effectiveness of advertising under the Government's program with the effectiveness of whatever advertising would likely exist without it.[13]

For this purpose, the Secretary correctly notes that the effectiveness of the Government's regulation must be viewed overall, considering the market behavior of growers and handlers generally, not just in its isolated application to one or a few individuals such as respondents. *Edge Broadcasting, supra,* at 427. The Secretary therefore argues that though respondents have voiced the desire to do more individual advertising if the system of mandatory assessments were ended, other handlers who benefit from the Government's program might well become "free riders" if promotion were to become wholly voluntary, to the point of cutting the sum total of advertising done. That might happen. It is also reasonable conceivable, though, that pure self-interest would keep the level of voluntary advertising high enough that the mandatory program could only be seen as affecting the details of the ads or shifting their costs, in either event without effect

[13]Although they do not apply the *Central Hudson* test, the majority does criticize that Court of Appeals' application of it as "illogical" insofar as that court enquired whether collective advertising or purely private advertising is more effective at stabilizing markets, because the Act's basic policy is to achieve its economic goals by compelling cooperation in lieu of independent, competitive decision making. *Ante* at 16-17. But the extent to which the Act eliminates competition varies among different marketing orders, and the spottiness of collective advertising schemes under the Act demonstrates that there is no necessary connection between some compelled economic cooperation and forced collective advertising. There is nothing "illogical" in comparing the effectiveness of collective and private advertising schemes in the context of the marketing order regime.

on market stability or income to producers as a group.[14] We, of course, do not know, but these possibilities alone should be fatal to the Government here, which has the burden to establish the actual justification for ordering a subsidy for commercial speech. Mere speculation about one or another possibility does not carry the burden, *see Turner Broadcasting System,* 512 U.S., at 664; *Edenfield v. Fane,* 507 U.S., at 770-771, and the Government has to show that its mandatory scheme appreciably increases the total amount of advertising for a commodity or somehow does a better job of sparking the right level of consumer demand than a wholly voluntary system would. There is no evidence of this in the record here.

C

Finally, a regulation of commercial speech must be narrowly tailored to achieving the government's interests; there must be a "'fit' between the legislature's ends and the means chosen to accomplish those ends, –a fit . . . that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S., at 480 (citations and internal quotation marks omitted). This sense of fitness is not precise, to be sure, but it rules out a regulation if "far less restrictive and more precise means" are available. *Id.,* at 479 (internal quotation marks omitted). Respondents argue that the mandatory advertising schemes for California peaches, plums, and nectarines fail this narrow tailoring requirement, because they deny handlers any credit toward their assessments for some or all of their individual advertising expenditures. The point is well-taken. On its face, at least, a credit system would be a far less restrictive and more precise way to achieve the government's stated interests, eliminating as it would much of the burden on respondent's speech without diminishing the total amount of advertising for a particular commodity. Indeed, the remarkable thing is that the AMAA itself provides for exactly such credits for individual advertising expenditures under marketing orders for almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit, but not for other commodities. 7 U.S.C. § 608c(6) (I).

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[14]While even on the cost-shifting scenario the Government would have reduced the "problem" of free riders referred to by the Secretary, that would not be a sufficient free-standing justification for the program. "[P]rivate speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to the paid for," *Lehnert v. Ferris Faculty Assn.*, 500 U.S., at 556 (SCALIA, J., concurring in judgment in part and dissenting in part). We have never sustained a restriction on speech solely because some individuals would ride free on the private speech of others, but only when the free-rider problem arises in serving other substantial governmental interests.

The Secretary contends, however, that the purpose of individual "branded" advertising is to increase the market share of a single handler, and so is at odds with the purpose of the Government's mandatory program, which is to expand the overall size of the market through the use of "generic" advertising for a commodity generally. *See also* FAIR Act §§ 501(b) (6), (7), 110 Stat. 1030-1031 (congressional finding of same). Perhaps so, but that does not tell us what to make of the credit for, say, private raisin advertising. It would be hard to imagine more effectively "branded" advertising than promotions for Sun-Maid raisins, but the statute would allow Sun-Maid a credit. Why would that be consistent with the Government's generic objective, but a credit for respondents' nectarine ads not be? The Government gives us no answer. Without some further explanation, the statute on raisin advertising seems to reflect a conclusion that could reasonably be drawn after examining some of the "branded" advertising in the record before us. A consumer galvanized by respondents' depiction of "Mr. Plum," App. 542, might turn down a plum by any other name, but I doubt it.[15]

I acknowledge that in implementing a credit program for individual advertising in an otherwise valid compulsory program, the government would need substantial leeway in determining whether such expenditures do in fact further the goal of expanding markets generally. But where, as here, no particular evaluation has been made, and the statute dealing with other fruit apparently assumes that some private advertising does serve the common good, and everything else is left to assertion, there could be no finding that a program completely denying credits for all individual advertising expenditures is narrowly tailored to an interest in the stability or expansion of overall markets for a commodity.

[15]The Secretary also maintains that credit programs are appropriate for market conditions specific to the almond industry, where a single producer cooperative has a 92% share of the market for direct sales to consumers, *see Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429, 438, n. 9 (C.A.9 1993), because in such circumstances "certain types of individual and brand advertising may accomplish the government's goals of market stability and increased consumption without creating a significant free-rider problem." Brief for Petitioner 47. As with the Secretary's other proffered justifications for the seemingly arbitrary choices made in the AMAA provisions concerning advertising, this explanation rests on nothing more than an unsubstantiated assertion, here about the effects of brand advertising. Moreover, the legislative and regulatory history provides no indication that this was the reason for permitting credits for almonds, but not plums, nectarines, or California-grown peaches. To the extent the record says anything, it seems to say quite the contrary of what the Secretary claims. *See* S. Rep. No. 91-1204, p. 2 (1970) (incorporating letter from Almond Growers Council noting that commodities"); 37 Fed. Reg. 3983 (1972). The Secretary's explanation only leads one to wonder about filberts, for example; is their production, too, under the domination of a large cooperative? Is the grapefruit market structured in a way that renders virtually generic the brand-specific advertising for the Indian River crop?

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Although the government's obligation is not a heavy one in *Central Hudson* and the cases that follow it, we have understood it to call for some showing beyond plausibility, and there has been none here. I would accordingly affirm the judgment of the Ninth Circuit.

Justice THOMAS, with whom Justice SCALIA joins as to Part II, dissenting.

I

I join JUSTICE SOUTER's dissent, with the exception of Part II. My join is thus limited because I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. ----, ---- (1996) (THOMAS, J., concurring in part and concurring in judgment) (criticizing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Because the regulation at issue here fails even the more lenient *Central Hudson* test, however, it, a fortiori, would fail the higher standard that should be applied to all speech, whether commercial or not.

II

I write separately to note my disagreement with the majority's conclusion that coerced funding of advertising by others does not involve "speech" at all and does not even raise a First Amendment "issue." *See ante,* at 11-13. It is one thing to differ about whether a particular regulation involves an "abridgment" of the freedom of speech, but is entirely another matter–and a complete repudiation of our precedent–for the majority to deny that "speech" is even at issue in this case.

In numerous cases, this Court has recognized that paying money for the purposes of advertising involves speech.[1] The Court also has recognized that compelling

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[1]*See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.,Y.,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (advertising to promote the use of electricity is speech); *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (corporate advertising regarding referendum); *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (contributions for political advertising).

speech raises a First Amendment issue just as much as restricting speech.[2] Given these two elemental principles of our First Amendment jurisprudence, it is incongruous to suggest that forcing fruit-growers to contribute to a collective advertising campaign does not even involve speech, while at the same time effectively conceding that forbidding a fruit-grower from making those same contributions voluntarily would violate the First Amendment. *Compare ante* , at 11 (promotional regulations should be scrutinized under the same standard as other anticompetitive aspects of the marketing orders), with *ante*, at 11, and n. 12 (distinguishing this case as not involving a "restraint" on any producer's freedom to communicate with any audience). Yet, that is precisely what the majority opinion does.[3]

What we are now left with, if we are to take the majority opinion at face value, is one of two disturbing consequences: Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are,[4] or (2) compelling payment for

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[2]*See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. ---- (1997) (coerced carriage of broadcast signals over cable television facilities); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (coerced inclusion of private messages in utility bill envelopes); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (coerced creation of a speaker's forum on private property); *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209, 97 S., Ct. 1782, 52 L. Ed. 2d 261 (1977) (coerced payment of dues used to engage in speech); *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (coerced display of state license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (coerced right of reply to newspaper editorials); *West Virginia Bd. Of Ed. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (coerced pledge of allegiance).

[3]The majority's grounds for distinguishing certain of our precedents are, to say the least, unpersuasive and contradictory, as JUSTICE SOUTER's dissent amply demonstrates. Moreover, the majority's excessive emphasis on the supposed collectivization of the fruit industry, *ante*, at 10, 16-18, likewise fails to support its conclusion. Although the Constitution may not "enact Mr. Herbert Spencer's Social Statics," *Lochner v. New York*, 198 U.S. 45, 75, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting), and thus the Government has a considerable range of authority in regulating the Nation's economic structure, part of the Constitution–the First Amendment–does enact a distinctly individualistic notion of "the freedom of speech," and Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere.

[4]*See United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (draft card burning); *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (flag burning); *Tinker v. DesMoines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (armbands); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (prohibition on sleeping in park raises First Amendment issues); *Schad*

third party communication does not implicate speech and thus, the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.

DEPARTMENT OF AGRICULTURE v. CAL-ALMOND, INC., ET AL.
No. 95-1879
Filed June 27, 1997.

(Cite as: 117 S. Ct. 2501).

SUPREME COURT OF THE UNITED STATES

The petition for a writ of certiorari is granted. The judgement is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Brothers & Elliott, Inc.* 521 U.S. ______ (1997).

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v. Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (nude dancing).

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

In re: GARELICK FARMS, INC.
94 AMA Docket No. M 1-1.
Decision and Order filed January 14, 1997.

Burden of proof — Butterfat tests — T-test — Bartlett formula tolerances — Market Administrator's authority to verify tests — Rulemaking — Underpayment notice.

The Judicial Officer reversed Judge Kane's (ALJ) Initial Decision and Order granting a Petition, filed by a milk handler under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, seeking cancellation of an underpayment notice issued by the Market Administrator of Federal Milk Marketing Order No. 1. Petitioner asserts that the Market Administrator does not have authority under Federal Milk Marketing Order No. 1 to require Petitioner to substitute the Market Administrator's average butterfat test results for Petitioner's average butterfat test results and require Petitioner to pay producers on the basis of the Market Administrator's test results. The burden of proof in a proceeding under 7 U.S.C. § 608c(15)(A) rests with Petitioner, and Petitioner has not met its burden of proof. The Market Administrator has authority under the Agricultural Marketing Agreement Act and Federal Milk Marketing Order No. 1: to test milk for butterfat content; to require handlers to use the Market Administrator's average butterfat test result for each producer to calculate the amount to be paid for milk received from each producer; and to issue an underpayment notice to a handler, requiring the handler to pay producers on the basis of the Market Administrator's average butterfat test results. Both the Market Administrator's method of determining butterfat content in milk samples and the Market Administrator's use of the Bartlett formula tolerances and t-test, (to determine the significance of the difference between his test result and Petitioner's test result), are lawful and reasonable. The Bartlett formula is not a *rule* under the Administrative Procedure Act; therefore, the Market Administrator's use of the Bartlett formula tolerances need not be preceded by a rulemaking proceeding conducted in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Garrett B. Stevens and Denise Hansberry, for Respondent.
Petitioner, Pro se.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Garelick Farms, Inc. (hereinafter Petitioner), instituted this proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. § 608c(15)(A)), and the Rules of Practice Governing Proceedings on Petitions To Modify or Be Exempted From Marketing Orders (hereinafter Rules of Practice), (7 C.F.R. §§ 900.50-.71), by filing a Petition on October 6, 1993.

Petitioner is a handler regulated under Federal Milk Marketing Order No. 1, (7 C.F.R. §§ 1001.1-.86(1993)), (Milk in the New England Marketing Area). As a handler regulated under Federal Milk Marketing Order No. 1, Petitioner is required to pay each milk producer, from whom Petitioner receives milk, not less than the basic blended price per hundredweight adjusted for, *inter alia*, a butterfat differential, the computation of which is based upon the average butterfat content of milk received from the producer.

The Market Administrator for Federal Milk Marketing Order No. 1 (hereinafter Market Administrator) tested samples of milk collected from 157 producers from whom Petitioner received milk during February 1993 and found the average butterfat content in the milk samples from the 157 producers to be significantly higher than the average butterfat content reported by Petitioner for milk received from the same 157 producers during February 1993. The Market Administrator sent Petitioner an underpayment notice, dated August 13, 1993, that requires Petitioner to adopt the Market Administrator's average butterfat test results, in lieu of Petitioner's average butterfat test results, on milk samples from 35 of the 157 producers whose milk samples the Market Administrator tested and requires Petitioner to pay those 35 producers an additional $3,502.29 for milk received by Petitioner from those 35 producers during February 1993. (Petition at 2.) Petitioner asserts that the Market Administrator does not have authority under Federal Milk Marketing Order No. 1 to require Petitioner to substitute the Market Administrator's average butterfat test results for Petitioner's average butterfat test results and require Petitioner to pay producers on the basis of the Market Administrator's average butterfat test results. (Petition at 2, ¶¶ B(3), B(4).) Petitioner seeks cancellation or rescission of the Market Administrator's underpayment notice of August 13, 1993, (Petition at 2, ¶ B(5)).

The Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Respondent), filed an Answer on November 4, 1993, denying that the Market Administrator lacks authority to issue the August 13, 1993, underpayment notice to Petitioner and contending that the Market Administrator's determination of Petitioner's underpayment of 35 producers is "supported by substantial record evidence and is otherwise fully in accordance with law." (Answer at 2.)

Administrative Law Judge Paul Kane (hereinafter ALJ) presided over a hearing conducted on June 27, 1995, and June 28, 1995, in Boston, Massachusetts. Jeffrey Earl, quality control manager for Petitioner, and Richard A. Lahar, controller for Petitioner, appeared on behalf of Petitioner. Denise Hansberry, Esq., Office of the General Counsel, United States Department of Agriculture, appeared on behalf of Respondent.

On December 28, 1995, the ALJ issued an Initial Decision and Order granting Petitioner's Petition and relieving Petitioner of the obligation to pay an additional $3,502.29 for milk that Petitioner received from 35 producers during February 1993. (Initial Decision and Order at 20.)

On February 23, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] On March 21, 1996, Petitioner filed a response to Respondent's Appeal Petition (hereinafter Petitioner's Response), and on March 22, 1996, the case was referred to the Judicial Officer for decision.

It is well settled that the burden of proof in a section 8c(15)(A) proceeding rests with Petitioner.[2] Petitioner in this proceeding, instituted under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. § 608c(15)(A)), has the burden of proving that the challenged provisions of the order or the challenged obligations imposed in connection with the order are not in

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

[2]*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-
945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

accordance with law. Based upon a careful consideration of the record, I find that Petitioner has not met its burden of proof. I agree with Respondent that the Market Administrator has authority to test milk for butterfat content and to require handlers to use the Market Administrator's average butterfat test result for each producer to calculate the amount to be paid for milk received from each producer. Further, I agree with Respondent that the Market Administrator's disallowance of Petitioner's average butterfat test results on milk Petitioner received from 35 producers during February 1993 and issuance of the August 13, 1993, underpayment notice to Petitioner, requiring Petitioner to pay those 35 producers on the basis of the Market Administrator's average butterfat test result for each of those 35 producers, was reasonable and in accordance with law.

I not only disagree with the ALJ's conclusion in this case, but I also disagree with much of the ALJ's discussion. Therefore, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order.

Applicable Statutory Provisions and Regulations

7 U.S.C.:

§ 608c. Orders regulating the handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity of product thereof. . . .

. . . .

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$3.24

. . . .

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved

or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order, and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

. . . .

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as

provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

. . . .

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

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

7 U.S.C. § 608c(1), (5)(A)-(C), (E), (15)(A).

7 C.F.R.

PART 1000—GENERAL PROVISIONS OF FEDERAL MILK MARKETING ORDERS

§ 1000.1 Scope and purpose of Part 1000.

This part sets forth certain terms, definitions, and provisions which shall be common to and part of each Federal milk marketing order except as specifically defined otherwise, or modified, or otherwise provided, in an individual order.

7 C.F.R. § 1000.1 (1993).

. . . .

§ 1000.3 Market administrator.

(a) *Designation.* The agency for the administration of the order shall be a market administrator selected by the Secretary and subject to removal at the Secretary's discretion. The market administrator shall be entitled to compensation determined by the Secretary.

(b) *Powers.* The market administrator shall have the following powers with respect to each order under his administration:

(1) Administer the order in accordance with its terms and provisions;

(2) Make rules and regulations to effectuate the terms and provisions of the order;

(3) Receive, investigate, and report complaints of violations to the Secretary; and

(4) Recommend amendments to the Secretary.

(c) *Duties.* The market administrator shall perform all the duties necessary to administer the terms and provisions of each order under his administration, including, but not limited to, the following:

. . . .

(7) Prescribe reports required of each handler under the order. Verify such reports and the payments required by the order by examining records . . ., by examining such handler's milk handling facilities; and by such other investigation as the market administrator deems necessary for the purpose of ascertaining the correctness of any report or any obligation under the order. Reclassify skim milk and butterfat received by any handler if such examination and investigation discloses that the original classification was incorrect.

7 C.F.R. § 1000.3(a), (b), (c)(7) (1993).

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

Subpart—Order Regulating Handling

. . . .

REPORTS

. . . .

§ 1001.32 Reports regarding individual producers and dairy farmers.

. . . .

(c) Each handler shall submit to the market administrator, within 10 days after his request made not earlier than 20 days after the end of the month, his producer payroll for the month, which shall show for each producer:

(1) The daily and total pounds of milk delivered and its average butterfat test; and

(2) The net amount of the handler's payments to the producer, with the prices, deductions, and charges involved.

7 C.F.R § 1001.32(c) (1993).

PAYMENTS FOR MILK

. . . .

§ 1001.73 Payments to producers.

(a) On or before the 5th day after the end of the month, each handler shall pay each producer for milk received from him during the first 15 days of the month at a rate that is not less than the Class III price for the preceding month.

(b) On or before the 20th day after the end of the month, each handler shall make final payment to each producer for the total value of milk received from him during the month at not less than the basic blended price per hundredweight computed under § 1001.62, adjusted by the location adjustment applicable under §§ 1001.52 and 1001.53 and the butterfat differential applicable under § 1001.76, minus the amount of the payment made to the producer under paragraph (a) of this section. If the handler has not received full payment from the market administrator under § 1001.72(b) by the date payments are due under this paragraph, he may reduce pro rata his payments to producers by an amount not to exceed such underpayment. Such payments shall be completed after receipt of the balance due from the

market administrator by the next following date for making payments under this paragraph.

(c) If the handler's net payment to a producer is for an amount less than the total amount due the producer under this section, the burden shall rest upon the handler to prove to the market administrator that each deduction from the total amount due is properly authorized and properly chargeable to the producer.

(d) In making payment to producers under paragraph (b) of this section for milk diverted from a pool plant the handler may elect to pay such producers at the price applicable at the zone location of the plant from which the milk was diverted, if the resulting net payment to each producer is not less than that otherwise required under this section and the rate of payment and the deductions shown on the statement required to be furnished under § 1001.75 are those used in computing the payment.

7 C.F.R. § 1001.73 (1993).

. . . .

§ 1001.76 Butterfat differential.

(a) In making the payments to producers required under § 1001.73 and the payments to cooperative associations required under § 1001.74(d), each handler shall add for each one-tenth of one percent of average butterfat content above 3.5 percent, or may deduct for each one-tenth of one percent of average butterfat content below 3.5 percent, as a butterfat differential, an amount per hundredweight that shall be computed by the market administrator under paragraph (b) of this section.

(b) Round to the nearest one-tenth cent, 0.138 times the butter price less 0.0028 times the average price per hundredweight, at test, for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month. The butter price means the simple average for the month of the daily prices per pound of Grade A (92-score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following day until the next price is reported.

7 C.F.R. § 1001.76 (1993).

§ 1001.77 Adjustment of accounts.

(a) Whenever the market administrator's verification of a handler's reports or payments discloses an error in payments to or from the market administrator under § 1001.72, § 1001.85, or § 1001.86, the market administrator shall promptly issue to the handler a charge bill or a credit, as the case may be, for the amount of the error. Adjustment charge bills issued during the period beginning with the 11th day of the prior month and ending with the 10th day of the current month shall be payable by the handler to the market administrator on or before the 18th day of the current month. Adjustment credits issued during that period shall be payable by the market administrator to the handler on or before the 20th day of the current month.

(b) Whenever the market administrator's verification of a handler's payments discloses payment to a producer or a cooperative association of an amount less than is required by §§ 1001.73 and 1001.74, the handler shall make payment of the balance due the producer or the cooperative association not later than the 20th day after the end of the month in which the handler is notified of the deficiency.

7 C.F.R. § 1001.77 (1993).

ADMINISTRATIVE ASSESSMENT AND MARKETING SERVICE DEDUCTION

§ 1001.85 Assessment for order administration.

On or before the 18th day after the end of the month, each handler shall pay to the market administrator his pro rata share of the expense of administration of this order. The payment shall be at the rate of 4 cents per hundredweight, or such lesser rate as the Secretary may prescribe. The payment shall apply to:

(a) All of a handler's receipts at pool plants during the month of fluid milk products from all sources, except receipts from pool plants, receipts from regulated plants or pool bulk tank units under other Federal orders if such receipts were subject to an administrative expense assessment under the other order, and receipts of exempt milk processed at plants other than pool plants;

(b) All receipts and beginning inventory of a cooperative association in its capacity as a handler under § 1001.9(d) for the month less its disposition to pool plants and ending inventory for the month; and

(c) The quantity distributed as route disposition in the marketing area from a partially regulated distributing plant for which a value is determined under § 1001.61.

7 C.F.R. § 1001.85 (1993).

§ 1001.86 Deduction for marketing services.

(a) In making the payments required by § 1001.73 to producers, other than himself and any producer who is a member of a cooperative association that the Secretary determines is performing the services specified in this section, each handler shall deduct 5 cents per hundredweight, or such lesser rate as the Secretary shall determine to be sufficient, for marketing services. The handler shall pay the amount deducted to the market administrator on or before the 18th day after the end of the month.

(b) The market administrator shall expend amounts received under paragraph (a) of this section only in providing for market information to such producers and for verification of weights, samples, and tests of milk received from them. The market administrator may contract with a cooperative association for the furnishing of the whole or any part of these services.

7 C.F.R. § 1001.86 (1993).

Discussion

Petitioner, Garelick Farms, Inc., is a Massachusetts corporation whose address is [redacted] Massachusetts [redacted]. (Petition at 1, ¶ B(1).) Petitioner was incorporated on October 23, 1973. (Petition at 1, ¶ B(1).) Mr. Peter M. Bernon is the chairman and chief executive officer of Petitioner, (Petition at 1, ¶ B(1)); Mr. Alan J. Bernon is the president and secretary of Petitioner, (Petition at 1, ¶ B(1)); Mr. Richard A. Lahar is the controller of Petitioner, (Petition at 2; Tr.

Volume I[3] at 1); and Mr. Jeffrey Earl is the quality control manager of Petitioner, (Tr. Volume I at 1).

Petitioner is the largest milk dealer in New England, (Petition at 2, ¶ B(6); Tr. Volume I at 137), and is a *handler*[4] regulated under Federal Milk Marketing Order No. 1, (7 C.F.R. §§ 1001.1-.86 (1993)), (Milk in the New England Marketing Area). (Tr. Volume I at 200; Initial Decision and Order at 11, Findings of Fact No. 2.) As a handler regulated under Federal Milk Marketing Order No. 1, Petitioner is required to pay each *producer*,[5] from whom Petitioner receives milk, not less than the basic blended price per hundredweight adjusted for, *inter alia*, a butterfat differential, the computation of which is based upon the average butterfat content of milk received from the producer. (7 U.S.C. § 608c(5); 7 C.F.R. §§ 1001.73, .76 (1993); Tr. Volume I at 65-66, 205.)

Petitioner tested samples of the milk it received from producers during February 1993 and determined that the average butterfat content of the milk it received from 157 of those producers was 3.693 percent. (Tr. Volume I at 193, 195; RX 9 at 15). The Market Administrator tested samples of milk that the Market Administrator collected from these same 157 producers during February 1993 and determined that the average butterfat content of the milk was 3.755 percent. (Tr. Volume I at 193, 195; RX 9 at 15.) The Market Administrator determined, on the basis of his average butterfat test results on milk samples from each producer, that Petitioner had underpaid 35 of the 157 producers for milk received during February 1993, a total of $3,502.29. (RX 22.)

Petitioner ascertains the average butterfat content of milk received from each producer by performing tests on samples of the milk it receives from each producer in Petitioner's laboratory. (Petition at 2, ¶ B(3).) Other than the difference between

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[3]The hearing in this proceeding was conducted on June 27, 1995, and June 28, 1995. The portion of the transcript that relates to that segment of the hearing conducted on June 27, 1995, is in a single volume containing pages numbered 1 through 217. The portion of the transcript that relates to that segment of the hearing conducted on June 28, 1995, is in a single volume containing pages numbered 1 through 75. References in this Decision and Order to *Tr. Volume I* are to the volume of the transcript that relates to the June 27, 1995, segment of the hearing, and references in this Decision and Order to *Tr. Volume II* are to the volume of the transcript that relates to the June 28, 1995, segment of the hearing.

[4]The word *handler* is defined in 7 U.S.C. § 608c(1) and in Federal Milk Marketing Order No. 1 at 7 C.F.R. § 1001.9 (1993).

[5]The word *producer* is defined in Federal Milk Marketing Order No. 1 at 7 C.F.R. § 1001.12 (1993).

Petitioner's average butterfat test results and the Market Administrator's average butterfat test results, there is no evidence in the record that the milk samples tested by Petitioner in February 1993 were handled in a manner that resulted in Petitioner obtaining inaccurate butterfat test results in February 1993. (Tr. Volume I at 9-10.) However, Mr. Schaefer, a milk-sample tester employed by the Market Administrator, (Tr. Volume I at 8, 19), who, at the time of the hearing, had been inspecting Petitioner's testing facilities and milk samples received by Petitioner for 18 years, testified that he was on vacation in February 1993. Furthermore, Mr. Schaefer testified that on 19 occasions, during the period 1992 through 1994, he found that milk samples tested by Petitioner were handled in a manner which could cause Petitioner to obtain butterfat test results that are lower than the actual butterfat content of the milk received by Petitioner, as follows:

CROSS-EXAMINATION BY MS. HANSBERRY:

Q. Mr. Shafer [sic], you stated that you've been with the Market Administrator's office for 35 years; is that correct?

[BY MR. SCHAEFER:]

A. Yes, ma'am.

Q. Okay. And your supervisor is Gordon Hawkins?

A. Yes, ma'am.

Q. So do you report directly to him?

A. I do.

Q. Now, you stated that in February of 1993 you were on the vacation; is that correct?

A. Yes.

Q. Okay. And what exactly -- In starting, say, in '93 to the present what were your exact duties in relation to Garelick?

A. Well, twofold. We sample milk. We travel with the tank trucks and sample milk, and we also check the testing of their original testing of the samples.

Q. Okay. In just taking the year 1993 what were you doing with Garelick? Were you traveling with the milk haulers? Were you going to the laboratory or both?

A. Well, both.

Q. Both?

A. Both.

Q. Okay. Other than February of '93, did you observe any other problems either with the milk haulers or at the lab in '93?

A. Yes.

Q. Okay. Can you tell us -- What was that?

A. Well, with the milk haulers I've had warm and frozen samples in the years -- well, I've got '92, '93, '94. I've got 19 unsatisfactory, which we call Form 7s.

Q. In the years '92 to '94?

A. Yes.

Q. Okay. Now, you stated that a problem that you had found was a warm or a frozen sample?

A. Oh, it could be. Yes. I have found them, yes.

Q. How would that affect a butter fat test?

A. It would lower the test.

Q. Okay. Can it ever raise the test?

A. No.

Q. Now, if do you find -- or at the time that you did find a warm or frozen sample, how did you handle that?

A. I write up what I call a Form 7, and I bring -- I bring them in and try to discuss this unsatisfactory condition with Mr. Moynihan.

Q. Who is Mr. Moynihan?

A. Well, at the time he was vice-president of milk procurement at Garelick Farms, and he took care of that end of it.

Q. Was this in the years '92, '93, '94?

A. Yes.

. . . .

Q. Can you turn to the document that's been marked Respondent's Exhibit 14.

A. Yes.

Q. Is this -- Are these the Form 7s that you have referred to in your testimony?

A. Yes.

Q. Now, I know that you do not fill out all of these reports, but of the ones you have filled out how many, if you know, resulted in a finding of unsatisfactory between 1992 and '94?

A. Nineteen that I filled out.

Tr. Volume I at 19-23.

Mr. David Paul Herrington, a milk-sample tester employed by the Market Administrator, (Tr. Volume I at 35-36), also testified that he occasionally found milk samples sent to Petitioner that were handled in a manner which could cause

Petitioner to obtain butterfat test results that are lower than the actual butterfat content of the milk received by Petitioner. (Tr. Volume I at 46-47; RX 14.) However, during February 1993, Mr. Herrington only observed one milk sample sent to Petitioner that was not properly handled. This sample was not clearly identified and Mr. Herrington testified that the lack of clear identification of the milk sample could have resulted in Petitioner attributing butterfat test results from this sample to the wrong producer. (Tr. Volume I at 42-43; RX 13 at 1.)

Petitioner uses a Milko-Tester to test milk samples for butterfat content. (Tr. Volume I at 12, 61, 156.) Mr. Gordon C. Hawkins, the laboratory director employed by the Market Administrator, (Tr. Volume I at 64-65), testified that while the Milko-Tester is not the most precise instrument available to test milk samples for butterfat content, it is approved for determining the butterfat content of milk and can be accurate, as follows:

[BY MS. HANSBERRY:]

Q. And what kind of testing equipment is used by your lab in White River Junction?

[BY MR. HAWKINS:]

A. We have a Multi Spec. Mark 2 infrared, multiple component analyzer.

Q. Now, is this instrument considered to be the most modern and up-to-date equipment?

A. Well, it's the current technology, the method that most milk testing is done by today.

Q. Okay. Now, we know from the petitioner's case that they use a different instrument, the Milko-Tester. Are you familiar with that instrument?

A. Yes, I am.

Q. In your opinion is that a less precise instrument than the infrared?

A. Well, the Milko-Tester is an approved method, and it certainly has the capability of meeting the requirements for accuracy at any one point in time. The Milko-Tester doesn't have quite as good a precision as the infrared, and the Milko-Tester, in my experience, has more tendency to drift off from its calibration than the infrared.

When we first put in an infrared instrument, we were impressed with its, number one, its precision, and number two, its ability to, once you got it calibrated to a set of samples, got it locked in, it just tends to hold that calibration very well.

Q. Okay. What does it mean to drift off of a calibration?

A. Well, it means it doesn't hold its accuracy. It can change. It can drift either high or low.

Q. So it can be accurate for some tests and then kind of drift and become --

A. Over a period of time. It can change, in other words.

Tr. Volume I at 156-57.

Other than the difference between Petitioner's average butterfat test results and the Market Administrator's average butterfat test results, there is no evidence in the record that Petitioner operated its Milko-Tester in February 1993 in a manner that resulted in Petitioner obtaining inaccurate butterfat test results in February 1993. (Tr. Volume I at 9-10, 36-37, 41-42.) However, Mr. Schaefer testified that one of his duties is to ensure that Petitioner operates its Milko-Tester in accordance with state regulations and that he observed several instances, during the period 1992 through 1994, in which Petitioner's Milko-Tester was "out of tolerance." (Tr. Volume I at 25-28; RX 15 at 2-3, 5-12.) Similarly, Mr. Herrington testified that, in April 1993 and June 1994, he observed Petitioner operating its Milko-Tester improperly. (Tr. Volume I 48-53; RX 15 at 1,4.) The record reveals that, when Petitioner was informed of the improper operation of its Milko-Tester, Petitioner corrected the operational deficiencies before performing any additional butterfat tests on milk samples. (Tr. Volume I at 27-28.)

Petitioner uses the average butterfat test results obtained from its Milko-Tester to calculate the butterfat differential for each producer. Petitioner then uses the butterfat differential for each producer to determine the amount to be paid to each

producer. (7 C.F.R. §§ 1001.73, .76 (1993).) Each month, Petitioner is required to report its average butterfat test results for each producer to the Market Administrator. (7 C.F.R. § 1001.32(c) (1993).)

The Market Administrator administers Federal Milk Marketing Order No. 1. (7 C.F.R. § 1000.3(b), (c) (1993); Tr. Volume I at 199.) Federal Milk Marketing Order No. 1 requires each handler making payments for milk received from producers, other than the handler itself and any producer who is a member of a *cooperative association*[6] that the Secretary determines is performing the services specified in 7 C.F.R. § 1001.86 (1993), to deduct a portion of the sum owed each producer and pay it to the Market Administrator to be used by the Market Administrator for marketing services. (7 C.F.R. § 1001.86(a) (1993); Tr. Volume I at 155.) One of the marketing services performed by the Market Administrator, in accordance with Federal Milk Marketing Order No. 1, is a butterfat verification program under which the Market Administrator tests fresh milk samples for butterfat content and compares his butterfat test results to the butterfat test results reported by handlers, in order to determine the accuracy of each handler's butterfat test results. (7 C.F.R. § 1001.86(b) (1993).)

Market Administrator employees collect milk samples for butterfat verification testing from producers who are not members of a cooperative association. (Tr. Volume I at 180-81.) Mr. Hawkins testified about the frequency and method of collection of producer milk samples for testing by the Market Administrator, as follows:

[BY MS. HANSBERRY:]

Q. Do you know how often a nonmember producer who supplies a handler will have its fresh milk samples tested about?

[BY MR. HAWKINS:]

A. Our goal is to verify the test for each nonmember about once every third month or four times a year.

Q. How do you decide which nonmember's milk will be tested in a given month?

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[6]The term *cooperative association* is defined in Federal Milk Marketing Order No. 1 at 7 C.F.R. § 1001.20 (1993). (See also Tr. Volume I at 81.)

A. Well, it's done on a rotational basis. I think it was mentioned earlier, in each geographical area the nonmembers are divided up into two or three groups. There are usually three groups, and they're simply done on a rotational basis. So the technician gets around to all of the nonmembers about every third month.

Q. How do you obtain the fresh milk samples from the nonmember producers?

A. Well, there's about three different ways we can get them. The first way is for our technician to personally travel to the farm and take his own sample out of the farm's milk tank. We get roughly one-third of our samples that way.

Secondly, they sometimes make arrangements with the bulk milk hauler and driver to have the hauler or driver take extra samples for us, and our technician picks these up wherever he can that's convenient, the last farm on the route or a garage or a reload station and collect them at that point.

Thirdly, many of our samples -- With many handlers our technicians are able to make arrangements with the handler ahead of time, and on selected days to go to the handler's plant and use samples out of the handler's regular supply that is coming in everyday.

Q. Do your technicians follow the same rules and regulations as handlers when you obtain these fresh milk samples?

A. Yes, they do.

Q. What rules are you following? Is it state regulations for --

A. The state regulations, and the law in all states are identical as far as sampling requirements.

Q. So whatever state you would be in or the technicians are in, they would follow those state reg.'s?

A. That's correct.

Q. What exactly is the procedure for obtaining these samples from the producers?

A. Well, per the state regulations we have to test at least three samples during the month from each producer assuming every other day pick up of the milk. If the milk is picked up everyday, then we have to test six samples during the month. These are stratified random samples that are divided into three ten-day periods, and the sample has to be taken within each shown period of the month.

Q. Who does the testing?

A. Our laboratory at White River Junction, Vermont.

Q. And who obtains the samples? It would be the --

A. Who obtains the samples?

Q. Yes.

A. Our field technicians.

Q. And you said all the testing is done in the laboratory in White River Junction?

A. That's correct.

Q. And how long do you keep the fresh milk samples in your lab before you test them?

A. Per the state regulations all samples have to be tested within three days, 72 hours after taken.

Tr. Volume I at 180-83.

After Market Administrator employees collect fresh milk samples, the samples are tested in the Market Administrator's laboratory located in White River Junction, Vermont, by licensed technicians employed by the Market Administrator, (Tr. Volume I at 58, 155-56, 178-81), on a Multispec Mark II infrared multiple component analyzer, which is operated in compliance with State of Vermont laws,

rules, and regulations concerning weighing, sampling, and testing milk and cream, (RX 4); *Official Methods of Analysis for Operating Infrared Testing Instruments*, published by the Association of Official Analytical Chemists, (RX 2); and *Guidelines for Controlling the Accuracy of Electronic Testing Instruments for Milk Components*, published by the Northeast Dairy Practices Council, (RX 3). (Tr. Volume I at 157-60.)

Mr. Hawkins testified that the accuracy of the Market Administrator's Multispec Mark II infrared multiple component analyzer is maintained by using control samples which are prepared in the Market Administrator's laboratory. These control samples are prepared on a weekly basis and are chemically tested in triplicate using the ether extraction method, conducted in accordance with the Milk Market Administrators' Laboratory Manual, (RX 1), which is approved by the Association of Official Analytical Chemists, to measure the exact butterfat content in a sample. (Tr. Volume I at 160-62.) The samples are tested on the Market Administrator's Multispec Mark II infrared multiple component analyzer which is then calibrated to the samples so the instrument readings are identical to the chemical tests. (Tr. Volume I at 163.) Mr. Hawkins testified that the calibration of the infrared component analyzer is maintained by using these control samples "daily, hourly and even more often to monitor the accuracy of the instrument." (Tr. Volume I at 163.)

Mr. Hawkins further testified that during February 1993, 59 control samples were tested on the Market Administrator's equipment and that a comparison of the Market Administrator's test results to the chemical reference test results reveals that the Market Administrator's butterfat test results were extremely accurate, as follows:

[BY MS. HANSBERRY:]

Q. Okay. Can you turn now to Exhibit No. 12 [RX 12]. I have one question before that. When do you test these control samples?

[BY MR. HAWKINS:]

A. They're tested on the instrument. As soon as the sample is prepared and ready we do the fine tuning, which has been referred to previously, and then they're tested continuously for the next week as necessary for maintaining and checking the accuracy of the instrument.

Q. Now, can you turn to Exhibit No. 12, Respondent's Exhibit No. 12.

A. (Witness complying). Okay.

Q. Can you identify that document?

A. This is a summary of control samples which were tested in our laboratory during the month of February 1993. These were control samples that were tested along with the producer samples everyday. This is an extra quality assurance program which we use. This goes above and beyond the state regulations to give us added assurance of the accuracy of our instrument.

I'd just like to point out the accuracy checks required by the state regulations, that is, one per hour, are fine and good, but they don't tell the whole story necessarily. You see, with the state regulations to perform an accuracy check on the instrument first you stop testing, you flush the machine, that is, you use either the diluent or distilled water to clean the machine, flush it, then you check the zero setting, you adjust the zero setting if necessary to make sure it's where it's supposed to be. Then you test the control sample in triplicate to -- and you use the last two readings of the three to -- as the official test to compare with the reference test.

Needless to say, they usually come out good. It's possible if an instrument isn't operating properly, it can drift away from its calibration during the one-hour testing period and be somewhat off either high or low, and once you've flushed, cleaned and reset to zero, then it would be back in tolerance again and the control would come out okay. These additional controls that we run with the producer samples, they're mixed right in with the producer samples. There's no stopping, no zeroing, no flushing or anything. It's just producer sample, control, another producer sample. They're right in line. It tells you exactly what the instrument is doing at that moment in time.

In addition, another thing I like about these with our instrument at White River, when these are tested along with -- mixed in with the producer samples, the results are recorded automatically. It's a single test just like the producer samples are a single test. It's automatically recorded

by the equipment. It's in the data, and the data, for example, when it comes down to Boston, I can check these results on these controls and get an excellent picture of what the -- how the instrument is performing.

The first three pages -- the first two pages of this document show all the individual controls that were run with the producer samples for the month of February. It shows the average for the 59 samples for the month, and the last four pages are simply pages that show what the reference tests were for those samples during the month.

Q. For the control samples?

A. For the control samples, yes.

Q. You stated this is a quality assurance program that is implemented by your lab, but is not required by state law?

A. That's correct.

Q. Can you just look at Page 2 of that document.

A. Yes.

Q. Now, this is for the month of February of 1993?

A. Right.

Q. You ran -- Looking at the very last line on Page 2 you ran 59 controls; is that correct?

A. Yes.

Q. Can you explain what those other figures show?

A. It shows the average for those 59 controls, the instrument average was 4.232 percent. The reference test average was 4.232 percent, so for the month as a whole there was absolutely no difference between our instrument readings and the chemical reference test on these control samples.

Q. So according to this document your instrument was performing -- well, the average test run by your instrument exactly matched the control sample?

A. That's correct.

Q. Do you know whether Garelick does any -- has any type of program like this, any quality assurance programs?

A. To my knowledge they do not.

Q. And was this document prepared in '93, was it prepared in the regular course of business by your office?

A. Yes, it was.

Tr. Volume I at 163-67.

Mr. Hawkins testified that the Market Administrator's laboratory also performs instrument checks during the operation of the infrared multiple component analyzer, as required by state law. During February 1993, 43 instrument checks were performed and the average difference between the chemical reference and the Multispec Mark II infrared multiple component analyzer reading was .004 percent, which reveals that the Multispec Mark II infrared multiple component analyzer was operating in accordance with state law. (Tr. Volume I at 168-69; RX 11.) Further, Mr. Hawkins testified that state law requires repeatability checks, (10 tests of the same milk sample to determine if the testing equipment identifies approximately the same butterfat content in the sample in each of the 10 tests), and that the results of the repeatability checks performed during February 1993 demonstrate that the Market Administrator's Multispec Mark II infrared multiple component analyzer "was performing accurately." (Tr. Volume I at 171-72; RX 20.)

Further still, Mr. Hawkins testified that the Market Administrator's laboratory participates in a bi-monthly national sample testing exchange program endorsed by the Association of Official Analytical Chemists and that the results of the exchange program indicate that the testing performed at the Market Administrator's laboratory is accurate. (Tr. Volume I at 172-78; RX 24, 26.)

Once the Market Administrator concludes the butterfat testing on producer samples for the month, the Market Administrator compares the handler's average butterfat test result for producers from whom the handler received milk during that month to the Market Administrator's average butterfat test result for the same

producers. (Tr. Volume I at 183-85.) The Market Administrator uses two objective criteria, the t-test and the Bartlett formula tolerances, when comparing the Market Administrator's average butterfat test result to a handler's average butterfat test result, to determine if any difference between the Market Administrator's average and the handler's average is significant. (Tr. Volume I at 186.) Mr. Hawkins described the t-test and the Bartlett formula tolerances, as follows:

[BY MS. HANSBERRY:]

Q. What is the T Test?

[BY MR. HAWKINS:]

A. The T Test is a common statistical procedure for comparing two sets of sample data to determine if they both represent the same population. It mathematically takes into consideration the difference between the mean for the two sets of samples and also the deviation of the differences in the two sets of samples, and it determines whether the difference -- whether there is a significant difference or whether the difference that occurred is merely due to chance. We use the T Test at the 99.95 percent confidence level.

Q. What does that mean?

A. It means that a decision made by the T Test is -- would be correct 99.95 percent of the time or, in other words, five chances out of 10,000 that the T Test would give a wrong decision.

Q. So is the T Test a widely accepted method of testing the significance of the difference between two test averages?

A. It's a commonly accepted procedure, yes.

Q. Can you turn now to Exhibit No. 8 [RX 8] and identify that document.

A. This is an explanation of the T Test and a handwritten example of how the calculation was performed.

Q. Okay. Can you turn to Page 3 of the document.

A. Okay.

Q. Can you explain -- Looking at the far left side of this document, what does that column represent?

A. The far left column is the degrees of freedom in the calculation, which is one less than the number of comparisons.

Q. I meant at the far left where they have the numbers.

A. Yes. That is the degrees of freedom which equates to the number of producers in the comparison, less one.

Q. Okay. So if you have, according to this document or Page 3 of Exhibit 8, [RX 8 at 3] if you have between 100 and 200 producers --

A. Right.

Q. -- who are being sampled, whose milk is being sampled, can you say what those figures would mean? I mean, what would be a statistically significant figure under the T Test?

A. We use the, as I mentioned, the 99.95 percent confidence level, so we use the column on the far right, and for a group of producers between 100 and 200 the T value would be 3.39.

Q. Okay. So if the test results indicate that the T Test exceeds 3.390, would it be statistically significant?

A. That's correct. If the calculated T exceeds the value in the table, that means it's statistically significant.

Q. Okay. Where did you get this document, Exhibit No. 8 [RX 8]?

A. This is a copy from a statistical manual.

Q. Is it the statistical method -- is this it?

A. That is it, yes.

Q. What is the Bartlett Formula?

A. The Bartlett Formula tolerances were developed for the dairy division by a market service committee of market administrators quite a few years ago. A Mr. Bartlett was a statistician with the Agricultural Market Service of U.S.D.A. The tolerances were developed from actual producer test data that was collected in a nine-market study by a Dr. Herman, who was an agricultural economist with the U.S.D.A. The test data were used to develop the expected -- the statistically expected difference between two series of tests of the same farms, and these expected differences are then expressed at the three standard error level which is 99.7 percent probability.

Q. What does that mean?

A. Again, that means that the decision would be correct 99.7 percent of the time or there would be only three chances out of a thousand that the formula would give the wrong decision.

Q. So when something is outside the Bartlett Tolerance, there's a 99.7 percent chance that it's correct?

A. Correct. Yes.

Q. And can you turn to Exhibit No. 6 [RX 6] and identify that document.

A. Okay. Exhibit 6, [RX 6] the first three pages are the tolerances which we follow. Since in New England we always test three fresh milk samples from each producer based on state regulations, and all the handlers are also testing three fresh milk samples per month, these tolerances become a constant, so we made up this table to show for a given number of producers what the maximum difference would be. This simplifies our work in checking the tolerance.

Q. So can you say what the last -- Pages 4 through 9 of the document are?

A. Okay. Pages 4, 5, 6 and 7 are copies of correspondence between our Boston office and the dairy division in Washington that were written when these tolerances were being accepted by our office. The last two pages are a table and a graph from the original Market Service Committee Report which are some of the steps that are used in arriving at the tolerances.

Q. Okay. So the last two pages, Pages 8 and 9, are they -- is this documentation summarized in these charts on Pages 1 through 3 of the exhibit?

A. Yeah, that's correct. Following the steps in the formula using those last two pages you would arrive at the tables that are Pages 1 through 3.

Q. So if you look at Page 2 of Respondent's Exhibit 6, [RX 6]--

A. Okay.

Q. -- if you look down, I guess, in the fourth column over where it says "number of producers."

A. Yes.

Q. If you have a 157 producers whose samples are tested, what does it show? What is the Bartlett Tolerance?

A. It shows the maximum sampling would be .038 percent. That is the Bartlett Tolerance.

Tr. Volume I at 186-90.

The Market Administrator only finds a handler's butterfat tests unverifiable if the difference between the Market Administrator's average butterfat test result and the handler's average butterfat test result is statistically significant on the t-test and exceeds the Bartlett formula tolerances. (Tr. Volume I at 185-86, 191.)

The Market Administrator rarely finds a significant difference between his average butterfat test result and a handler's average butterfat test result. (Tr. Volume I at 104, Volume II at 12; RX 18.) During the period from 1990 through 1994, the Market Administrator conducted 204 butterfat test comparisons, and the Market Administrator only found three instances, (two of which involve

Petitioner), in which a handler had underpaid producers based upon the handler's butterfat test results, (Tr. Volume II at 12-14).

If the Market Administrator's butterfat verification program discloses that a handler has paid a producer less than required under 7 C.F.R. § 1001.73 (1993), the Market Administrator may notify the handler and require the handler to pay the deficiency to the producer. (Tr. Volume I at 205-06; 7 C.F.R. § 1001.77(b) (1993).) The Market Administrator, as a matter of policy, only includes in the underpayment notices references to those producers that the Market Administrator determines have been underpaid by more than $50. (Tr. Volume II at 11-12.)

In February 1993, the Market Administrator conducted a routine sampling of milk from approximately 160 producers who were not members of a cooperative association who delivered milk to Petitioner. (Tr. Volume I at 192.) The Market Administrator conducted tests on milk samples from 157 of these producers. (Tr. Volume I at 192-93.) At the end of February 1993, the Market Administrator compared the Market Administrator's average butterfat test result from milk samples from these 157 producers to Petitioner's average butterfat test result from milk samples from the same 157 producers. (Tr. Volume I at 192.) The maximum allowable difference, under the Bartlett formula tolerances, between the Market Administrator's and Petitioner's average butterfat test results for February 1993, based on the number of samples the Market Administrator and Petitioner tested (3 fresh milk samples from each producer) and the number of producers whose milk samples were tested (157), is .038 percent. (Tr. Volume I at 189-91; RX 6 at 2.) The Market Administrator's average butterfat test result is 3.755 percent, and Petitioner's average butterfat test result is 3.693 percent. (Tr. Volume I at 193; RX 9 at 1.) The difference between the Market Administrator's average butterfat test result and Petitioner's average butterfat test result is .062 percent and exceeds the Bartlett formula tolerance. (Tr. Volume I at 192-93.)

Moreover, under the t-test, if the *calculatedt* exceeds the value on the *Cumulative t Distribution Table,* (RX 8 at 3), there is a statistically significant difference between two test averages. Based on the average butterfat test results obtained by the Market Administrator and Petitioner on milk samples from 157 producers during February 1993 and *the t-test at the 99.95 percent confidence level,* the *t value* should not have exceeded 3.39. (Tr. Volume I at 188; RX 8 at 3.) Mr. Hawkins testified that, when using the t-test to determine the statistical significance of the difference between Petitioner's average butterfat test result and the Market Administrator's average butterfat test result, the *t value* is 9.451, nearly three times the value allowed under the t-test, as follows:

[BY MS. HANSBERRY:]

Q. Can you turn to Exhibit No. 10 [RX 10].

[BY MR. HAWKINS:]

A. Okay.

Q. Can you just explain what that document is.

A. This is the statistical analysis that our computer does on our test comparisons each month. This is for February 1993. It shows some of the calculations conducted in the T Test. The first line is for Garelick Farms, and it shows, as I mentioned, some of the data, some of the figures in the calculation, and over on the right it shows the T results are 9.451, and the table -- the table t value at 99.95 percent confidence level which was a 3.39. So it shows that the T results was actually nearly three times the table value indicating the test difference was highly significant.

Q. Okay.

. . . .

A. This also shows the two other handlers that we sampled and tested in February of '93. The second line, that handler had no tests of his own or had an inadequate number of tests, and, therefore, there was no comparison, and he ended up using our laboratory's tests for payment to his producers.

The third line is another handler which was sampled and tested by our laboratory in February of '93. It shows that with that handler we tested 103 producers, and that the difference was -- the average difference was .012 percent plus, so that handler's average test was higher than our laboratory's average by .012, and it shows that the T results for that handler are 2.12 which was below the table value of 3.39.

Q. So that was not statistically significant?

A. That was not significant.

Q. So in the month of February of '93 the only handler that you tested who was statistically significant under the T Test was Garelick?

A. That's correct.

Tr. Volume I at 196-98.

Based upon the comparison between the Market Administrator's February 1993 average butterfat test results and Petitioner's February 1993 average butterfat test results, the Market Administrator issued an underpayment notice to Petitioner, dated August 13, 1993, requiring Petitioner to pay a total of $3,502.29 to 35 producers that the Market Administrator determined had been underpaid by Petitioner, (RX 22). Mr. Erik Rasmussen, the Market Administrator, (Tr. Volume I at 198), testified that the failure of Petitioner to pay producers, as provided in the underpayment notice dated August 13, 1993, would result in a violation of 7 U.S.C. § 608c(5)(A) which requires handlers to pay minimum and uniform prices for each use classification of milk. (Tr. Volume I at 206.)

Federal Milk Marketing Order No. 1 does not specifically require or authorize the Market Administrator to test milk samples from producers on a Multispec Mark II infrared multiple component analyzer and use the t-test and the Bartlett formula tolerances, when comparing the Market Administrator's average butterfat test result to a handler's average butterfat test result. (7 C.F.R. §§ 1001.1-.86 (1993).) Nonetheless, Federal Milk Marketing Order No. 1 provides that "[o]n or before the 20th day after the end of the month, each handler shall make final payment to each producer for the total value of milk received from him during the month at not less than the basic blended price per hundredweight . . . adjusted by the location adjustment . . . and the butterfat differential. . . ." (7 C.F.R. § 1001.73(b) (1993).) "The market administrator shall expend amounts received [in accordance with 7 C.F.R. § 1001.86(a)] . . . only . . . for verification of weights, samples, and tests of milk . . . ." (7 C.F.R. § 1001.86(b)(1993).) "Whenever the market administrator's verification of a handler's payments discloses payment to a producer . . . of an amount less than is required by [7 C.F.R.] § 1001.73 . . ., the handler shall make payment of the balance due the producer . . . not later than the 20th day after the end of the month in which the handler is notified of the deficiency." (7 C.F.R. § 1001.77(b) (1993).) Moreover, the Judicial Officer has previously held that a market administrator may test milk samples for butterfat content and direct handlers to pay producers on the basis of the market administrator's butterfat test results. *In re Adam L. Liptak, supra*; *In re Banner Dairies*, 15 Agric. Dec. 355 (1956); *In re Pet Milk Co.*, 10 Agric. Dec. 322 (1951).

I find that the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter Agricultural Marketing Agreement Act), and Federal Milk Marketing Order No. 1 clearly authorize the Market Administrator to perform the butterfat tests that he performed on milk samples from milk which Petitioner received from

producers in February 1993. Moreover, Federal Milk Marketing Order No. 1 clearly authorizes the Market Administrator to issue the August 13, 1993, underpayment notice to Petitioner, requiring Petitioner to pay producers on the basis of the Market Administrator's average butterfat test results. Further, based upon the record, I find that the Market Administrator's issuance of the August 13, 1993, underpayment notice to Petitioner was reasonable.

Findings of Fact

1. Petitioner, Garelick Farms, Inc., is a Massachusetts corporation whose address is [redacted] Massachusetts [redacted]. Petitioner was incorporated on October 23, 1973.
2. Mr. Peter M. Bernon is the chairman and chief executive officer of Petitioner; Mr. Alan J. Bernon is the president and secretary of Petitioner; Mr. Richard A. Lahar is the controller of Petitioner; and Mr. Jeffrey Earl is the quality control manager of Petitioner.
3. At all times material to this proceeding, Petitioner was a handler regulated under Federal Milk Marketing Order No. 1, (7 C.F.R. §§ 1001.1-.86) (1993)), (Milk in the New England Marketing Area).
4. At all times material to this proceeding, Petitioner was required by Federal Milk Marketing Order No. 1, (7 C.F.R. § 1001.73 (1993)), to pay each producer, from whom Petitioner received milk, not less than the basic blended price per hundredweight adjusted for, *inter alia*, a butterfat differential, the computation of which was based upon the average butterfat content of milk received from the producer.
5. During February 1993, Petitioner ascertained the average butterfat content of milk received from each producer by performing tests in Petitioner's laboratory on samples of the milk received from each producer. Petitioner performed these tests on a Milko-Tester.
6. Petitioner used its average butterfat test results from samples of milk received from each producer to calculate the butterfat differential applicable to each producer. Petitioner used the butterfat differential applicable to each producer to determine the amount to be paid to each producer from whom Petitioner received milk during February 1993.
7. Petitioner reported its February 1993 average butterfat test results applicable to each producer to the Market Administrator.
8. At all times material to this proceeding, the Market Administrator administered Federal Milk Marketing Order No. 1.

9. At all times material to this proceeding, Federal Milk Marketing Order No. 1 required each handler making payments for milk received from producers, other than the handler itself and any producer who was a member of a cooperative association that the Secretary determined was performing services specified under 7 C.F.R. § 1001.86 (1993), to deduct a portion of the sum owed each producer and pay it to the Market Administrator to be used by the Market Administrator for marketing services.

10. At all times material to this proceeding, one of the marketing services performed by the Market Administrator was a butterfat verification program under which the Market Administrator tested fresh milk samples for butterfat content and compared the results of the butterfat tests to the results reported by handlers, in order to determine the accuracy of each handler's butterfat test results.

11. Market Administrator employees collected fresh milk samples from 160 producers from whom Petitioner received milk during February 1993 for butterfat testing and handled the samples in a manner so that the butterfat content in the samples could be accurately tested. Licensed technicians employed by the Market Administrator tested milk samples from 157 of these producers in the Market Administrator's laboratory located in White River Junction, Vermont, on a Multispec Mark II infrared multiple component analyzer, which was operated in compliance with State of Vermont laws, rules, and regulations concerning weighing, sampling, and testing milk and cream; *Official Methods of Analysis for Operating Infrared Testing Instruments*, published by the Association of Official Analytical Chemists; and *Guidelines for Controlling the Accuracy of Electronic Testing Instruments for Milk Components*, published by the Northeast Dairy Practices Council.

12. At all times material to this proceeding, the accuracy of the Market Administrator's Multispec Mark II infrared multiple component analyzer was maintained by using control samples which were prepared in the Market Administrator's laboratory. These control samples were prepared on a weekly basis and were chemically tested in triplicate using the ether extraction method, conducted in accordance with the Milk Market Administrators' Laboratory Manual, which is approved by the Association of Official Analytical Chemists to measure the exact butterfat content in a sample. Control samples were tested on the Market Administrator's Multispec Mark II infrared multiple component analyzer which was then calibrated to the control samples so the Multispec Mark II infrared multiple component analyzer instrument readings were identical to the chemical tests.

13. During February 1993, 59 control samples were tested on the Market Administrator's Multispec Mark II infrared multiple component analyzer with producer milk samples. A comparison of the Market Administrator's control

sample test results to the chemical control sample test results reveals an average of a 0 percent difference between the chemical reference test results and test results on the infrared multiple component analyzer. The comparison demonstrates that the butterfat test results on producer samples obtained from the Market Administrator's infrared multiple component analyzer during February 1993 were extremely accurate.

14. During February 1993, the Market Administrator's laboratory performed 43 instrument checks, as required by state law. The results of the 43 instrument performance checks demonstrate that the Multispec Mark II infrared multiple component analyzer was operated in accordance with state law during February 1993.

15. During February 1993, the Market Administrator performed repeatability checks, as required by state law, (10 tests on the same milk sample to determine if the testing equipment identifies approximately the same butterfat content in the sample in each of the 10 tests). The results of the repeatability checks demonstrate that the Market Administrator's Multispec Mark II infrared multiple component analyzer was performing accurately during February 1993.

16. In January and March 1993, the Market Administrator's laboratory participated in a national sample testing exchange program endorsed by the Association of Official Analytical Chemists, and the results of the exchange program indicate that the testing performed at the Market Administrator's laboratory was accurate.

17. At all times material to this proceeding, the Market Administrator used two objective criteria, the t-test and the Bartlett formula tolerances, when comparing the Market Administrator's average butterfat test result to a handler's average butterfat test result to determine if any difference between the Market Administrator's average butterfat test result and the handler's average butterfat test result was significant. The Market Administrator only found a handler's average butterfat test result unverifiable if the difference between the Market Administrator's average butterfat test result and the handler's average butterfat test result was statistically significant on the t-test and exceeded the Bartlett formula tolerances. The t-test is a widely-recognized, commonly-accepted, and accurate method of statistically measuring the significance of the difference between two test averages. The Bartlett formula tolerances accurately measure the significance of the difference between two series of tests.

18. During period from 1990 through 1994, the Market Administrator conducted 204 butterfat test comparisons, and the Market Administrator only found three instances, (two of which involve Petitioner), in which a handler had underpaid producers based upon the handler's butterfat test results.

19. If the Market Administrator's butterfat verification program discloses that a handler has paid a producer less than required under 7 C.F.R. § 1001.73 (1993), the Market Administrator may notify the handler of the underpayment and require the handler to pay the deficiency to the producer. At all times material to this proceeding, the Market Administrator, as a matter of policy, only included in underpayment notices references to those producers that the handler had underpaid by more than $50.

20. In February 1993, the Market Administrator conducted a routine sampling of milk from approximately 160 producers who were not members of a cooperative association who delivered milk to Petitioner. The Market Administrator conducted tests on milk samples from 157 of these producers. At the end of February 1993, the Market Administrator compared the Market Administrator's average butterfat test result from milk samples from these 157 producers to Petitioner's average butterfat test result from milk samples from the same 157 producers.

21. The maximum allowable difference, under the Bartlett formula tolerances, between the Market Administrator's and Petitioner's average butterfat test results for February 1993, based on the number of samples the Market Administrator and Petitioner tested (3 fresh milk samples from each producer) and the number of producers whose milk samples were tested (157), is .038 percent. The Market Administrator's average butterfat test result is 3.755 percent and Petitioner's average butterfat test result is 3.693 percent. The difference between the Market Administrator's average butterfat test result and Petitioner's average butterfat test result is .062 percent and exceeds the Bartlett formula tolerance.

22. Under the t-test, if the *calculated t* exceeds the value on the *Cumulative t Distribution Table*, there is a statistically significant difference between two test averages. Based on the average butterfat test results obtained by the Market Administrator and Petitioner on milk samples from 157 producers during February 1993 and *the t-test at the 99.95 percent confidence level*, the *t value* should not have exceeded 3.39. When using the t-test to determine the statistical significance of the difference between Petitioner's average butterfat test result and the Market Administrator's average butterfat test result, the *t value* is 9.451, nearly three times the value allowed under the t-test, indicating that the difference between the Market Administrator's test result and Petitioner's test result is statistically significant.

23. Based upon the comparison between the Market Administrator's February 1993 average butterfat test results applicable to 157 producers from whom Petitioner received milk in February 1993 and Petitioner's February 1993 average butterfat test results applicable to the same 157 producers, the Market Administrator issued an underpayment notice to Petitioner dated August 13, 1993,

requiring Petitioner to pay a total of $3,502.29 to 35 producers that the Market Administrator determined had been underpaid by Petitioner.

Conclusions of Law

1. The Market Administrator's performance of butterfat tests on samples of milk from producers who delivered milk to Petitioner in February 1993 is in accordance with law and reasonable.
2. The Market Administrator's determination that Petitioner's February 1993 average butterfat test results are not verifiable and disallowance of Petitioner's February 1993 average butterfat test results on milk Petitioner received from 35 producers are in accordance with law and reasonable.
3. The Market Administrator's issuance of the underpayment notice dated August 13, 1993, to Petitioner requiring Petitioner to pay 35 producers on the basis of the Market Administrator's average butterfat test results for each of these 35 producers is in accordance with law and reasonable.

Issues Raised By Respondent on Appeal

Respondent raises six issues in Respondent's Appeal Petition.

First, Respondent contends that the ALJ erroneously held that the Market Administrator could not use the Bartlett formula tolerances without first publishing the Bartlett formula tolerances in accordance with the notice-and-comment rulemaking requirements in 5 U.S.C. § 553, as follows:

> First, while [the ALJ] recognized and acknowledged the Market Administrator's authority under the [Agricultural Marketing Agreement Act] and [Federal Milk Marketing] Order [No.] 1 to verify weights and insure the accuracy of butterfat payments made by handlers to . . . producers [who are not members of a cooperative association], he held that the Market Administrator's issuance of an underpayment notice to Garelick was nonetheless invalid because it was based on "unpublished interpretations" of the provisions of the Order. The "unpublished interpretations" to which the ALJ referred was the Market Administrator's use of the Bartlett formula tolerances as a means of verifying the accuracy of Garelick's butterfat payments to . . . producers [who are not members of a cooperative association]. (Initial Decision and Order 19). According to the ALJ, the Market Administrator should not have used the Bartlett formula tolerances

to analyze and compare statistical data without first insuring that the analysis was "subjected to the rigors of rulemaking." (Id. at 17).

Respondent's Appeal Petition at 7-8. [Footnote omitted.]

Petitioner agrees with the ALJ's holding, as follows:

> THE ARGUMENT PRESENTED BY THE RESPONDENT'S APPEAL PETITION LEANS HEAVILY ON THE ALJ'S INTERPRETATION OF THE MARKET ADMINISTRATOR'S USE OF THE BARTLETT FORMULA TOLERANCES. THE USE OF THE BARTLETT FORMULA TOLERANCES ANALYZE AND COMPARE STATISTICAL DATA WITHOUT FIRST INSURING THE ACCURACY OF THESE FORMULATIONS.
>
> THE BARTLETT FORMULA WAS PUT TOGETHER IN 1967 AS A TOOL FOR [FEDERAL MILK MARKETING] ORDER [NO.] 1. IT IS NOT USED BY MORE THAN A COUPLE OF FEDERAL [MILK MARKETING] ORDERS, IF ANY. IN 1967 BUTTERFAT TESTING WAS DONE USING THE BABCOCK METHOD OF TESTING. THE BARTLETT FORMULA GEARED TO THIS BABCOCK METHOD OF TESTING DOESN'T TAKE INTO CONSIDERATION ANY OF THE NEW AND MORE ACCURATE TESTING PROCEDURES (SUCH AS MILKO TESTER MACHINE AND INFRARED EQUIPMENT). IF THE BARTLETT FORMULA IS TO BE USED AS THE MARKET ADMINISTRATOR'S "TOOL", WE FEEL THAT IT SHOULD BE SUBJECT TO THE "RIGORS OF RULEMAKING" AND SHOULD BE REDONE TO INCLUDE THE ADVANCES MADE IN THE ACCURACY OF BUTTERFAT TESTING, THEN GIVEN TO THE INDUSTRY, AND NOT HELD AS A CLUB OVER ITS HEAD.

Petitioner's Response at 1-2.

I agree with Respondent that the Bartlett formula is not a rule and need not be the subject of a rulemaking proceeding in accordance with 5 U.S.C § 553 prior to the use of the Bartlett formula by the Market Administrator to determine whether Petitioner's butterfat tests are verifiable.

The Bartlett formula is a method of measuring the significance of the difference between two series of tests. (Tr. Volume I at 189.) A "rule" under the Administrative Procedure Act is defined as:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

"Rule making" is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

> Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The Agricultural Marketing Agreement Act specifically provides that, in the case of milk and its products, orders issued pursuant to 7 U.S.C. § 608c may provide for the verification of weights, sampling, and testing of milk purchased from producers, (7 U.S.C. § 608c(5)(E)); Federal Milk Marketing Order No. 1 requires the Market Administrator to expend amounts received in accordance with 7 C.F.R. § 1001.86(a) (1993) on the verification of weights, samples, and tests of milk, (7 C.F.R. § 1001.86(b) (1993)); and Federal Milk Marketing Order No. 1 provides that whenever the Market Administrator's verification of a handler's payments discloses payment to a producer of an amount less than is required by 7 C.F.R. § 1001.73 (1993), the handler must adjust the payment after receiving notice of the deficiency from the Market Administrator, (7 C.F.R. § 1001.77(b) (1993)). However, the method by which the Market Administrator tests milk and compares the test results to a handler's test results is not in Federal Milk Marketing Order No.

1 and has not been published in the *Federal Register* in accordance with the rulemaking procedures in 5 U.S.C. § 553.

The use of the Bartlett formula tolerances by the Market Administrator to measure the significance of the difference between two series of tests is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy and does not describe the organization, procedure, or practice requirements of the United States Department of Agriculture. The Bartlett formula does not relate to policy-making or regulate conduct. Neither Petitioner nor any other handler is required to use the Bartlett formula tolerances. Rather, the Bartlett formula is one of the methods of measurement that the Market Administrator uses for the narrow purpose of assisting in the Market Administrator's determination of the significance of the difference between his butterfat test results and handlers' butterfat test results.

I find, under these circumstances, that the Bartlett formula is not a *rule* under the Administrative Procedure Act. Therefore, the Market Administrator's use of the Bartlett formula tolerances need not be preceded by a rulemaking proceeding conducted in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

The Market Administrator's use of the Bartlett formula tolerances is clearly in accordance with law, and unless the use of the Bartlett formula tolerances is found arbitrary and capricious, its use must be upheld.

The record clearly establishes that the Bartlett formula is a highly accurate[7] method of measurement. (Tr. Volume I at 188-91; RX 6.) Further, the Market Administrator uses the Bartlett formula in combination with the t-test, a widely-recognized, commonly-accepted, and highly accurate[8] method of statistically measuring the significance of the difference between two test averages. (Tr. Volume I at 186-88.) The Market Administrator only finds a handler's average butterfat test results unverifiable if the difference between the Market Administrator's average butterfat test result and a handler's average butterfat test result is statistically significant on the t-test and exceeds the Bartlett formula tolerances. (Tr. Volume I at 185-86, 191.) Significant differences between the Market Administrator's average butterfat test result and a handler's average butterfat test result rarely occur. (Tr. Volume I at 104, Volume II at 12; RX 18.) During the period from 1990 through 1994, the Market Administrator conducted

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[7]Tr. Volume I at 189.

[8]Tr. Volume I at 186, 188.

204 butterfat test comparisons, and the Market Administrator only found three instances, (two of which involve Petitioner), in which a handler had underpaid producers based upon the handler's butterfat test results. (Tr. Volume II at 12-14.)

I find that the Market Administrator's use of the Bartlett formula tolerances to assist in his determination of the significance of difference between the Market Administrator's and a handler's average butterfat test results is not only lawful, but also, reasonable.[9]

Second, Respondent contends that the ALJ's finding that the Market Administrator's laboratory was not operated with the care necessary to ensure the accuracy of butterfat test results is in error. (Respondent's Appeal Petition at 17.)

The ALJ did find that:

> 5. Upon receipt of an invitation from the Administrator, employees of Garelick visited the Administrator's Laboratory at White River Junction, Vermont, in April 1993. It was at this Laboratory that the Administrator's assistants conducted examinations with an infrared instrument, approved by the State of Vermont, of milk samples obtained from producers who had sold milk to Garelick during February 1993. At this inspection, Garelick's employees observed the Administrator's assistants engaged in laboratory techniques not acceptable as commonly accepted industry practices. . . .
>
> . . . .
>
> 7. The Administrator's infrared equipment failed calibration inspections in January 1993 and was thereafter subjected to an abnormal frequency of recalibrations by the manufacturer of the equipment. (RX 19, p. 2; RX 29)
>
> 8. Upon assembly of the suspect laboratory values, the Administrator attempted to compare those expressions with Garelick's payments, based on butterfat content, to producers. . . .
>
> . . . .

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[9]Even if I had found the Market Administrator's use of the Bartlett formula tolerances unlawful or unreasonable, (which I do not find), the finding would not have helped Petitioner because the t-test reveals a statistically significant difference between the Market Administrator's February 1993 average butterfat test result and Petitioner's February 1993 average butterfat test result. (Tr. Volume I at 196.)

> The Administrator has an empirical problem . . . . His laboratory at White River Junction may not have been operated with the care necessary to accurately reflect the values reported. (Findings #5, 7)[.]

Initial Decision and Order at 12-13, 17.

It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.[10] However, in some circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc., supra*, 42 Agric. Dec. at 1797-98; *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility,

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[10]*E.g.*, *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *compare In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426-28 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[11]

I carefully reviewed the record both with respect to general procedures employed by the Market Administrator to ensure the accuracy of his laboratory's test results and with respect to the level of care exercised by the Market Administrator's laboratory when conducting butterfat tests on milk samples from producers from whom Petitioner received milk during February 1993. I find that the record is sufficiently strong to compel a reversal as to the ALJ's findings with respect to the care used by the Market Administrator's laboratory when testing milk samples for butterfat content and with respect to the accuracy of the Market Administrator's test results. There is nothing in this record which supports a finding that the Market Administrator failed to use the care necessary to ensure accurate butterfat test results. Instead, I find the Market Administrator has developed procedures to ensure that the butterfat test results are as accurate as possible and that the Market Administrator employed those procedures when testing milk samples from producers from whom Petitioner received milk during February 1993. (See the discussion of the Market Administrator's butterfat testing procedures, *supra*, pp. 20-34 and Findings of Fact Nos. 10-22, *supra*, pp. 37-42.)

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[11]*See also In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. ___, slip op. at 9-10 (Aug. 19, 1996); *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 5 (July 23, 1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes, supra*, 45 Agric. Dec. at 548; *In re Gerald F. Upton, supra*, 44 Agric. Dec. at 1942; *In re Dane O. Petty, supra*, 43 Agric. Dec. at 1421; *In re Eldon Stamper, supra*, 42 Agric. Dec. at 30; *In re Aldovin Dairy, Inc., supra*, 42 Agric. Dec. at 1797-98; *In re King Meat Co., supra*, 40 Agric. Dec. at 1500-01. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc., v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); *3 Kenneth C. Davis, Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

Third, Respondent contends that the ALJ erroneously "seemed to find some fault with the fact that the Market Administrator did not attempt to recover payments from producers who were overpaid by handlers. (Initial Decision and Order, at 2)." (Respondent's Appeal Petition at 23.) (Emphasis in the original.)

I can find nothing on page 2 of the Initial Decision and Order to support Respondent's contention. On page 12 of the Initial Decision and Order, the ALJ does state that:

> 3. The record does not disclose any attempt by the Administrator to recover sums over-paid to farmers by Garelick based upon the same laboratory protocols and statistical analyses. (Tr. 152)

Initial Decision and Order at 12.

I agree with the ALJ's Finding of Fact No. 3. However, the Market Administrator is not required by the Agricultural Marketing Agreement Act or Federal Milk Marketing Order No. 1 to "recover sums over-paid to farmers by Garelick," and I do not find the ALJ's Finding of Fact No. 3 relevant to this proceeding.

Fourth, Respondent contends that the ALJ erroneously found in his Finding of Fact No. 7 that "'[t]he Administrator's infrared equipment failed calibration inspections in January 1993 and was thereafter subjected to an abnormal frequency of recalibrations. . . .' (Initial Decision and Order at 13, *citing* RX 19, p.2; RX 29)." (Respondent's Appeal Petition at 24.)

The record establishes that the Market Administrator's Multispec Mark II infrared multiple component analyzer was recalibrated on January 22, 1993, due to a homogenizer leak. (Tr. Volume I at 169-70; RX 19 at 2.) I find nothing in the record to indicate that the Market Administrator's Multispec Mark II infrared multiple component analyzer "was thereafter subjected to an abnormal frequency of recalibrations."

Fifth, Respondent contends that the ALJ erroneously found that:

> the Administrator did not attempt to collect a butterfat differential deviation for all producers. For example, the Administrator's letter of March 29, 1993, reveals that producer 1044 was allegedly shorted .07% on its butterfat differential, and that producer 1042 was similarly allegedly shorted .12% on its differential, but no attempt was made to collect for producer 1056 for an alleged shortage of .09%. (RX 22, p. 4, RX 9, p.2). (Initial Decision and Order, at 19).

> A review of the relevant documentation reveals, however, that producer 1056, whom the Market Administrator determined was underpaid by .09%, had a low volume of sales to Garelick which resulted in an underpayment of only $40.49. By contrast, producer 1044 whom the Market Administrator's tests revealed had been underpaid by .07% on its actual butterfat content, had a higher volume of sales to Garelick which resulted in an underpayment of $59.96. (See RX 22, p.2). Since the Market Administrator has implemented a policy whereby audit adjustments are only issued on behalf of producers who are underpaid by more than $50.00, producer 1044's underpayment warranted an adjustment while producer 1056's did not. (See Tr. 11-12, vol 2).

Respondent's Appeal Petition at 24-25.

Although I find that the record supports Respondent's explanation for the Market Administrator's failure to include the amount underpaid by Petitioner to producer 1056 in the Market Administrator's August 13, 1993, underpayment notice, I do not find that the ALJ erred when he found that the Market Administrator did not include a reference to producer 1056 in the underpayment notice. I do not find the Market Administrator's failure to include the amount underpaid by Petitioner to producer 1056 in the Market Administrator's August 13, 1993, underpayment notice relevant to this proceeding.

Sixth, Respondent contends that "the ALJ seemed to infer that the Market Administrator's failure to seek payment adjustments for certain Connecticut . . . producers [who were not members of a cooperative association] amounted to an inconsistent enforcement policy." (Respondent's Appeal Petition at 25.) Respondent cites the following from the ALJ's Initial Decision and Order, as the basis for Respondent's contention that the ALJ seemed to infer that the Market Administrator inconsistently enforced Federal Milk Marketing Order No. 1:

> 4. While the Administrator asserts that the same laboratory protocols and statistical analyses obtained the same underpayment and overpayment values for shipments made by Connecticut farmers as for New York farmers detailed in the underpayment notice, the Administrator did not assert that any monies were owed by Garelick to Connecticut farmers.

Initial Decision and Order at 12.

Respondent does not cite any part of the Initial Decision and Order in which the ALJ draws the inference, based on Finding of Fact No. 4, (Initial Decision and Order at 12), that the Market Administrator inconsistently enforced Federal Milk

Marketing Order No. 1 based upon the location of producers from whom Petitioner received milk during February 1993. I do not find that the ALJ inferred that the Market Administrator inconsistently enforced Federal Milk Marketing Order No. 1 based upon the location of producers from whom Petitioner received milk during February 1993, and I find nothing in the record which would have supported such an inference.

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

Order

The relief requested by Petitioner is denied and the Petition is dismissed.

In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED ASSOCIATION; and ROBERT J. SAULSBURY, AN INDIVIDUAL.
AMAA Docket No. 94-2.
Order Denying Petition for Reconsideration filed January 29, 1997.

Civil penalties — Preponderance of the evidence — Reserve requirements — Reporting requirements — Failure to pay assessments — Failure to have raisins inspected — Hearsay — Credibility — Due process — Sanction policy — Article II of the U.S. Constitution — Article III of the U.S. Constitution — Right to jury trial.

The Judicial Officer denied Respondents' Petition for Reconsideration. Reliable hearsay is admissible in proceedings conducted under the Rules of Practice and hearsay is not made inadmissible by 7 C.F.R. § 1.141(h)(1)(i). Further, testimony that is relevant, material, and not unduly repetitious regarding the circumstances surrounding the taking of a written statement is admissible. The Judicial Officer gives great weight to the findings by ALJs. However, the Judicial Officer may reverse as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved; (2) the record is sufficiently strong to compel a reversal as to the facts; or (3) an ALJ's findings of fact are hopelessly incredible. Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. The burden of proof is on the Complainant and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Complainant met its burden of proof and Respondents failed to introduce sufficient evidence to overcome Complainant's evidence that the product that Respondents' shipped to Canada was raisins. Respondents were required by 7 C.F.R. § 989.58(d) to have their raisins inspected each time they acquired the raisins and Respondents were required by 7 C.F.R. § 989.59(d) to have their raisins inspected each time they shipped the raisins. Respondent Robert J. Saulsbury's age and gender, the number of acres on which Respondents grow raisins, and the amount of money Respondents spend a year lobbying are not relevant to any aspect of this proceeding. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. Neither disdain for Respondents nor the size of either Respondent

forms any part of the basis for the civil penalty assessed. The $219,000 civil penalty assessed against Respondents for 219 violations of the Raisin Order is authorized by 7 U.S.C. § 608c(14)(B), and is in accordance with the Department's sanction policy and the purpose of the civil penalty provision in 7 U.S.C. § 608c(14)(B). Respondents were given due process. Respondents have no right to a jury trial in an Article III court. Respondents' assertion that the Decision and Order violates Article II of the United States Constitution is without merit.

Colleen Carroll, for Complainant.
Brian C. Leighton, Fresno, California, for Respondents.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter AMAA), (7 U.S.C. § 608c(14)(B)); the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California (hereinafter Raisin Order), (7 C.F.R. pt. 989); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151), by filing a Complaint on May 23, 1994.

The Complaint alleges that Saulsbury Enterprises and Robert J. Saulsbury (hereinafter Respondents) violated sections 989.58, 989.59, 989.66, 989.73, 989.80, 989.241, 989.242, and 989.243 of the Raisin Order, (7 C.F.R. §§ 989.58, .59, .66, .73, .80, .241, .242, and .243). On June 13, 1994, Respondents filed an Answer denying the material allegations of the Complaint. On March 1, 1995, and March 2, 1995, a hearing was held before Administrative Law Judge James W. Hunt (hereinafter ALJ). Mr. Brian C. Leighton, Esq., represented Respondents and Ms. Colleen Carroll, Esq., represented Complainant.

The parties submitted proposed findings of fact, proposed conclusions of law, briefs in support of their respective proposed findings of fact and conclusions of law, and reply briefs.

On June 27, 1995, the ALJ issued an Initial Decision and Order in which the ALJ found that Respondents shipped approximately 2,247,879 pounds of raisins to Canada without having the raisins inspected and failed to file forms[1] with the

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[1]Specifically, the ALJ found that during the 1988-1989, 1989-1990, and 1990-1991 crop years, Respondents failed to file with the Raisin Administrative Committee: (1) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection; (2) eight RAC-30 Forms, reporting off-grade raisins; (3) three RAC-32 Forms, reporting disposition of off-grade or failing raisins, or residual material; (4) three RAC-35 Forms, applying to sell, ship, or dispose of raisins or raisin residual materials; and (5) three RAC-51 Forms, reporting inventory of off-grade raisins, by variety. (Initial Decision and Order at 17-18.)

Raisin Administrative Committee during the 1988-1989, 1989-1990, and 1990-1991 crop years. (Initial Decision and Order at 17-18.) The ALJ concluded that Respondents violated section 989.59 of the Raisin Order, (7 C.F.R. § 989.59), by shipping off-grade or failing raisins during the 1988-1989, 1989-1990, and 1990-1991 crop years and assessed a civil penalty of $3,000 ($1,000 for each crop year) against Respondents jointly. (Initial Decision and Order at 16, 18.)

On August 29, 1995, Complainant appealed to the Judicial Officer, to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557. (7 C.F.R. § 2.35.) On September 26, 1995, Respondents filed Respondents' Response to Complainant's Appeal of ALJ's Decision and Order, and on October 2, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, I issued a Decision and Order on May 7, 1996, in which I concluded that Respondents: (1) violated section 989.58 of the Raisin Order, (7 C.F.R. § 989.58), on 60 occasions during the 1988-1989, 1989-1990, and 1990-1991 crop years, by receiving natural condition raisins, without having them inspected; (2) violated section 989.59 of the Raisin Order, (7 C.F.R. § 989.59), on 60 occasions during the 1988-1989, 1989-1990, and 1990-1991 crop years, by shipping natural condition raisins without having them inspected; (3) violated sections 989.66 and 989.241 of the Raisin Order, (7 C.F.R. §§ 989.66, .241), from October 26, 1988, to April 26, 1990, by failing to hold raisins in reserve for the 1988-1989 crop year; (4) violated sections 989.66 and 989.242 of the Raisin Order, (7 C.F.R. §§ 989.66, .242), from October 25, 1989, to July 12, 1991, by failing to hold raisins in reserve for the 1989-1990 crop year; (5) violated sections 989.66 and 989.243 of the Raisin Order, (7 C.F.R. §§ 989.66, .243), from October 31, 1990, to June 15, 1992, by failing to hold raisins in reserve for the 1990-1991 crop year; (6) violated section 989.73 of the Raisin Order, (7 C.F.R. § 989.73), beginning in 1988, by failing to submit a total of 40 reports to the Raisin Administrative Committee for crop years 1988-1989, 1989-1990, and 1990-1991; and (7) violated section 989.80 of the Raisin Order, (7 C.F.R. § 989.80), by failing to pay $557.33 in assessments for raisins handled in the 1988-1989 crop year, $594.68 in assessments for raisins handled in the 1989-1990 crop year, and $521.29 in assessments for raisins handled in the 1990-1991 crop year. *In re Saulsbury Enterprises*, 55 Agric. Dec. 6, 20-21 (1996). Based upon these violations, I assessed Respondents, jointly and severally, a civil penalty of $219,000 and ordered Respondents to pay the Raisin Administrative Committee $1,673.30 in assessments for the 1988-1989, 1989-1990, and 1990-1991 crop years. *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 54-59.

On May 23, 1996, Respondents filed Respondents' Petition for Rehearing Before the Judicial Officer From His Decision of May 7, 1996 (7 C.F.R. § 1.146(a)(3)), (hereinafter Respondents' Petition for Reconsideration), and on June 28, 1996, Complainant filed Complainant's Reply to Respondents' Petition for Rehearing (hereinafter Complainant's Response). The case was referred to the Judicial Officer for reconsideration on July 1, 1996.

Respondents raise 12 issues in Respondents' Petition for Reconsideration. Each of the issues raised by Respondents is briefly discussed, *infra*. I do not find that Respondents have raised any issue that warrants my granting Respondents' Petition for Reconsideration, modifying the Decision and Order filed May 7, 1996, *In re Saulsbury Enterprises, supra*, or rehearing the proceeding.

First, Respondents contend that a written statement by Willie Harris, (CX 4), should not have been admitted into evidence because it is hearsay, as follows:

> The judicial officer states that "reliable hearsay is routinely admissible in administrative proceedings such as this one, *sub judice*." (JO at 28) The rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes, Rule 1.140(h) states that the testimony of a witness "at a hearing shall be on oath or affirmation and subject to cross-examination." Willie Harris was not subject to cross-examination. The judicial officer admits that Harris' statement was hearsay.

Respondents' Petition for Reconsideration at 2.

I disagree with Respondents' contention that Mr. Harris' statement, (CX 4), should not have been admitted into evidence because it is hearsay. Neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides with respect to the admission of evidence that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence.* (1) *In general*. . . .

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act, (5 U.S.C. § 556(d)), renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings). Moreover, responsible hearsay has long been admitted in the Department's administrative proceedings.[2]

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[2]*In re John T. Gray* (Decision as to Glen Edward Cole) 55 Agric. Dec. ___, slip op. at 24 (Aug. 19, 1996); *In re Mike Thomas*, 55 Agric. Dec. ___, slip op. at 29 (July 15, 1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Respondents contend that "Rule 1.140(h) states that the testimony of a witness 'at a hearing shall be on oath or affirmation and subject to cross-examination'" and that Mr. Harris' statement is not admissible evidence because Mr. Harris was not subject to cross-examination. (Respondents' Petition for Reconsideration at 2.) There is no "Rule 1.140(h)" in the Rules of Practice. However, section 1.141(h)(1)(i) of the Rules of Practice does provide, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence.* (1) *In general.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

7 C.F.R. § 1.141(h)(1)(i).

Mr. Harris was not a witness at the hearing in this proceeding and section 1.141(h)(1)(i) of the Rules of Practice is only applicable to witnesses that testify at a hearing. Section 1.141(h)(1)(i) of the Rules of Practice does not preclude the admission of a written statement because the individual who made the statement is not a witness at a hearing and is not subject to cross-examination.

Respondents further assert that Mr. Harris' statement should not be admissible because "[e]vidence was presented over two long days[,] Harris only lived 30 miles away from the place of the hearing," Complainant's attempt to serve Mr. Harris with a subpoena to compel Mr. Harris' attendance and testimony at the hearing "is not enough," and Complainant's investigator, Renee Wassenberg, testified that she was not involved with service or attempted service of the subpoena on Mr. Harris. (Respondents' Petition for Reconsideration at 2.) The record clearly establishes that Complainant attempted to serve Mr. Harris with a subpoena to compel Mr. Harris' appearance and testimony at the hearing, (Tr. 402, 410, 422). The length of the hearing, the distance between Mr. Harris' residence and the place of the hearing, and Ms. Wassenberg's lack of involvement with Complainant's efforts to compel Mr. Harris' attendance and testimony at the hearing are not relevant to the admissibility of Mr. Harris' written statement.

Second, Respondents contend that Ms. Wassenberg's testimony regarding Mr. Harris' testimony should not have been admitted, as follows:

> [T]he handwritten statement of purportedly Willie Harris was not even written by Willie Harris, but Rene[e] Wassenberg. Willie Harris never signed the statement. Rene[e] Wassenberg followed up with a typewritten

> statement for Willie Harris to sign, and Willie Harris did not sign it. No other effort was made to visit Willie Harris or to talk to him about appearing for his testimony. (RT 422-423) Therefore it was improper for the administrative law judge to allow the testimony of Rene[e] Wassenberg regarding Willie Harris' testimony[.]

Respondents' Petition for Reconsideration at 2-3.

Mr. Harris did not testify at the hearing in this proceeding and Ms. Wassenberg did not testify regarding any testimony Mr. Harris gave in any proceeding. However, Ms. Wassenberg did testify, *inter alia,* about the circumstances surrounding her taking a statement from Mr. Harris. (Tr. 401-14, 420-31.)

Ms. Wassenberg's testimony regarding the statement that she took from Mr. Harris was relevant, material, and was not unduly repetitious. Therefore, Ms. Wassenberg's testimony was properly admitted.

Third, Respondents contend that Mr. Harris' statement should not be given any weight, as follows:

> [I]t was error to allow the written statement into evidence, and the error was compounded by the judicial officer in not only permitting the statement to be used as evidence, but crediting the statement.

Respondents' Petition for Reconsideration at 3.

I disagree with Respondents. Mr. Harris' statement, (CX 4), was written for him by Ms. Wassenberg. However, the record reveals that Ms. Wassenberg wrote the statement in Mr. Harris' presence, the statement reflects what Mr. Harris told Ms. Wassenberg, Mr. Harris read and understood the statement, Mr. Harris made corrections to the statement, and Mr. Harris signed the statement. (Tr. 404-05, 423; CX 4.) Under these circumstances, I find no reason to reconsider the admissibility of Mr. Harris' statement or the weight given Mr. Harris' statement.

Even if I were to find Mr. Harris' statement inadmissible (which I do not find) or I were to find Mr. Harris' statement entitled to no weight (which I do not find), neither such finding would constitute a basis for modifying the Findings of Fact, Conclusions of Law, or the sanction imposed on Respondents. The Decision and Order filed May 7, 1996, explains that the relevance of Mr. Harris' statement is limited to corroboration of Phyllis Bond's testimony, as follows:

> Respondents' counsel objected to the affidavit, (CX 4), of Willie Harris, because, Respondents allege, Complainant did not properly serve the subpoena to compel Harris' appearance at the hearing. (RA, pp. 6-7; Tr.

401, 403, 408, 411, 594-95.) I agree with the ALJ, however, that USDA attempted to serve Mr. Harris. The AMS inspector who took Mr. Harris' affidavit, Renee Wassenberg, testified at the hearing about the circumstances of her taking Mr. Harris' statement and was available for and was subjected to Respondents' counsels' cross-examination. (Tr. 420-31.) The only relevant point from Harris' affidavit is that it corroborates Phyllis Bond's testimony that the product was raisins. Even if Harris' affidavit was not allowed, Bond's testimony about the product being raisins, which testimony the ALJ specifically found more credible than Respondents' witnesses' testimony, would have been sufficient to allow the ALJ's Finding of Fact that the product was raisins. But, I find that CX 4 was properly admitted, and that the Harris statement was properly corroborated by Wassenberg's hearsay testimony.

In re Saulsbury Enterprises, supra, 55 Agric. Dec. at 25.

Fourth, Respondents contend that the Judicial Officer erred by reversing the ALJ's credibility determinations regarding the testimony given by Robert J. Saulsbury and Ronald Mayes. Respondents' Petition for Reconsideration at 1, 3-4.

I disagree with Respondents. It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.[3] However, in some circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty, supra*, 43 Agric. Dec. at 1421; *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982),

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[3]*E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *compare In re Richard L. Thornton, supra*, 38 Agric. Dec. at 1426-28 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

remanded, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[4] The reasons for my rejection of the ALJ's credibility determinations with respect to Messrs. Saulsbury and Mayes are fully explained in the Decision and Order filed May 7, 1996. *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 38-41.

Fifth, Respondents contend that:

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[4]*See also In re Garelick Farms, Inc.*, 56 Agric. Dec. ___, slip op. at 50 (Jan. 14, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 95 (Jan. 13, 1997); *In re John T. Gray, supra*, slip op. at 9-10; *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 5 (July 23, 1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, No. 95-3552 (8th Cir. Jan. 7, 1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes, supra*, 45 Agric. Dec. at 548; *In re Gerald F. Upton, supra*, 44 Agric. Dec. at 1942; *In re Dane O. Petty, supra*, 43 Agric. Dec. at 1421; *In re Eldon Stamper, supra*, 42 Agric. Dec. at 30; *In re Aldovin Dairy, Inc., supra*, 42 Agric. Dec. at 1797-98; *In re King Meat Co., supra*, 40 Agric. Dec. at 1500-01. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc., v. CFTC*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); *3 Kenneth C. Davis, Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

The judicial officer seriously erred in refusing to attribute to the end use of the product as that stated in the letters from President Spear of Haida Sales (JO 36-37) There the judicial officer states that Spear's letters are purposely vague about "Haida Sales mysterious client and the use of Respondents' product." The JO further seriously errs by "inferring" that there is no such end user and that there is no mystery distillery product. First, the ALJ specifically found that the product was shipped to Canada for distillery purposes, were off-grade raisins which would have failed to qualify as standard raisins in the industry. (ALJ's D&O at pp. 10-11,14-16)

Secondly, USDA hid from the Respondent[s] the first letter from Mr. Spear to the Complainant, no doubt because it provided extremely exculpatory evidence that the product was not used to compete with raisins, but was used for distillery purposes. (Complainant's Exhibit "9") (See RX 7, RX 3) Spear[] specifically stated that he did not import California raisins, but imported some dried grapes for distillery purposes, and the product contained "leaves, branches, stems, grapes in various states of decay or dryness." (RX 7) In a letter to Respondents' counsel, (RX 3), the buyer stated that he had a customer in Vancouver who was looking for dried grapes for distillery purposes and "the product involved was dried grape still with a lot of moisture and greenness in it with sticks and leaves and pieces of vines." He also stated in this letter that he had received various phone calls from the Department of Agriculture asking about the same shipments and he provided them the same information that he was providing to Respondents' counsel. The product was not raisins. (RX 7, RX 3) That's precisely what he advised Renee Wassenberg. (CX 8, 9)

Respondents' Petition for Reconsideration at 4-5.

I disagree with Respondents' contention that it was error to find that Respondents' product was not used for distillery purposes, as described in Mr. Spear's letter dated February 8, 1995, to Respondents' counsel, (RX 3), and Mr. Spear's undated letter to Mr. Lewis, (RX 7). The Decision and Order filed May 7, 1996, fully explains my reasons for giving no weight to Mr. Spear's letters with respect to the product that Respondents shipped to Canada. *In re Saulsbury Enterprises, supra.* The primary reasons for giving no weight to Mr. Spear's letters are that I find that Mr. Spear's letters are inconsistent with statements that Mr. Spear made to Phyllis Bond regarding the nature of Respondents' product, *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 24, 32, 34; Mr. Spear's letters do not clearly identify the end use of the product or the end user, *In re Saulsbury Enterprises, supra*, 55 Agric. Dec.

at 32-34; and the purchase of Respondents' product for distillery purposes, as described in Mr. Spear's letters, (RX 3, 7), is not plausible, *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 28-32.

Moreover, the record does not support Respondents' contention that "USDA hid" from Respondents the letter from Mr. Spear to Mr. Lewis, (RX 7).

Sixth, Respondents contend that:

> The judicial officer makes a critically serious error by stating that it was up to the Respondents to bring in Mr. Spear to testify and "this mystery of the end user was always in the power of the Respondents to reveal." Where does the judicial officer find any authority for the Respondent[s] to subpoena a witness from Canada[?] There is no authority for the Respondent[s] to subpoena a witness from Canada.

Respondents' Petition for Reconsideration at 5.

The Administrative Procedure Act provides with respect to burden of proof that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. § 556(d).

The standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under section 8c(14)(B) of the AMAA is preponderance of the evidence, and Complainant, as the proponent of an order in this proceeding, has the burden of proof. However, the burden of proof does not require Complainant to disprove each of Respondents' assertions or theories of the case. I find that Complainant met its burden of proof in this case.

Respondents were free to introduce evidence supporting their contention that the product that they shipped to Canada was not raisins. I did not find in the Decision and Order filed May 7, 1996, as Respondents assert, that Respondents were required to call Mr. Spear as a witness. *In re Saulsbury Enterprises, supra.* However, I did find that Respondents failed to introduce sufficient evidence to

overcome Complainant's evidence that the product that Respondents' shipped to Canada was raisins, as follows:

> I specifically reject Respondents' assertion that Complainant bore the burden of disproving Respondents' "end user" defense, and that Complainant should have investigated more thoroughly in Canada for the end user. On the contrary, this mystery of the end user was always in the power of the Respondents to reveal. Respondents, and their export agent, President Spear of Haida Sales, could have made Respondents' case plausible at any time by revealing the end user, and the end use. Instead, Mr. Spear was virtually non-responsive both to AMS Compliance Director David N. Lewis' August 7, 1991, letter, and to investigator Wassenberg's August 19, 1991, telephone call, requesting Haida Sales, Ltd.'s, records to verify receipt of Respondents' raisins, as follows:
>
>> We request that you provide us with copies of the receiving manifests, bills of lading, and any other documentation you received from either Mr. Saulsbury or ABC Customs Brokers for the years 1985, 1987, 1988, 1989, and 1990, concerning Mr. Saulsbury's raisin shipments. We also request copies of the documents in your records (contracts with Mr. Saulsbury and/or ABC Customs Brokers, letters and other correspondence) which relate to the shipment of those raisins.
>
> CX 42; RX 8.
>
> President Stuart G. Spear's letter, in its entirety reads as follows:
>
>> In answer to your letter, date stamped August 7, 1991, I should like to answer as follows.
>>
>> I, nor my company, Haida Sales Ltd., has ever imported California raisins.
>>
>> We have brought in, each fall, totes (1500 lbs) of semi-dried grapes for distillery purposes. This product contains leaves, branches, stems, grapes in various states of decay or dryness.
>
> RX 7.

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

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

In re Saulsbury Enterprises, supra, 55 Agric. Dec. at 33-34.

Seventh, Respondents contend that the Judicial Officer erred by imposing a sanction of $120,000 for failing to have 60 shipments of raisins to Canada inspected, as follows:

The judicial officer then holds that since 60 ship[ments] of raisins to Canada did not have either incoming or outgoing inspections, there thus w[ere] 120 violations, mandating an assessment of $1,000.00 for each. Why is it that the judicial officer believes that an incoming and outgoing inspection, based upon these facts (even if this judicial officer finds it in this case) warrants two sanctionable violations for each shipment, as opposed to one, and therefore doubling the penalties for the same conduct[?]

Respondents' Petition for Reconsideration at 8.

I disagree with Respondents' contention that it was error to assess Respondents a civil penalty of $120,000 for failing to have incoming and outgoing inspections for 60 shipments of raisins which Respondents sent to Canada.

Section 8c(14)(B) of the AMAA provides:

> **§ 608c. Orders regulating the handling of commodity**
>
> . . . .
>
> **(14) Violation of order; penalty**
>
> . . . .
>
> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business.

7 U.S.C. § 608c(14)(B).

Section 989.58(d) of the Raisin Order, (7 C.F.R. § 989.58(d)), provides, with certain exceptions not relevant to this proceeding, that each handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by the handler. Section 989.59(d) of the Raisin Order, (7 C.F.R. § 989.59(d)), provides, with certain exceptions not relevant to this proceeding, that each handler shall, at the handler's own expense, before shipping or otherwise making final disposition of raisins, cause inspection to be made of raisins. Respondents were required by section 989.58(d) of the Raisin Order, (7 C.F.R. § 989.58(d)), to have their raisins inspected each of the 60 times they acquired the raisins, and Respondents were required by section 989.59(d) of the Raisin Order, (7 C.F.R. § 989.59(d)), to have their raisins inspected each of the 60 times they shipped the raisins. Thus, Respondents failed to have their raisins inspected on 120 separate occasions. Respondents thereby committed 120 distinct violations of the Raisin Order. In accordance with 7 U.S.C. § 608c(14)(B), Respondents were

assessed a civil penalty of $1,000 for each of the 120 violations. The assessment of $120,000 for 120 violations of the Raisin Order does not constitute a "doubling of the penalties for the same conduct," as Respondents assert.

Eighth, Respondents contend that:

> [T]he JO disregarded the ALJ's finding that since the raisins were off-grade or failing raisins, only 20 reports were required, not 40, the JO rejects this and hits Saulsbury with a $40,000.00 sanction. The JO makes the same mistake with respect to his assertion that since there was a 30% reserve in crop year 1988-89, a 27% reserve in crop year 1989-90, and a 31% in 1990-91, the Respondents failed to hold raisins for a total of 59 months and therefore Respondent[s] should be penalized for $1,000.00 a month, i.e., $59,000.00. There is absolutely no evidence that Saulsbury's product competed whatsoever with raisins sold out of the valley in California, and since reserves only apply to passing raisins that meet the grade requirements, there can be no violation of the reserve requirements.

Respondents' Petition for Reconsideration at 8.

I agree with Respondents that I do not find that Respondents' raisins were off-grade or failing raisins. My reasons for concluding that Respondents' raisins were not off-grade or failing raisins are fully explicated in the Decision and Order filed May 7, 1996, *In re Saulsbury Enterprises, supra*, and I find no basis in Respondents' Petition for Reconsideration for reconsidering my conclusion regarding the quality of Respondents' raisins. Therefore, Respondents are subject to the reporting and reserve requirements in the Raisin Order, and the assessment of a $40,000 civil penalty for Respondents' failure to file 40 reports is in accordance with the AMAA, and the assessment of a $59,000 civil penalty for failing to hold raisins in reserve for a total of 59 months is in accordance with the AMAA.

Moreover, I find nothing in the AMAA or the Raisin Order that limits the reserve requirements in the Raisin Order to raisins which "compete with raisins sold out of the valley in California," as Respondents assert.

Ninth, Respondents assert that:

> It is indeed unfortunate when the judicial officer for USDA will sanction a 75 year old man $219,000.00 for shipments of a product into Canada off of 160 acres when the judicial officer's own agency dismisses a $400,000.00 suit against Sunkist who controlled the orange and lemon marketing orders and used and violated with impugnity [sic] those

> marketing orders to advance their position to the detriment of every other competitor in the industry. Maybe if Saulsbury had spent $6,000,000.00 a year lobbying USDA (like Sunkist does) the case would not have been brought to begin with.

Respondents' Petition for Reconsideration at 8.

Mr. Saulsbury's age and gender, the number of acres on which Respondents grow raisins, and the amount of money Respondents spend a year lobbying are not relevant to the sanction assessed against Respondents in this proceeding or any other aspect of this proceeding. Based on the record in this proceeding, I find that Respondents committed 219 violations of the Raisin Order. Section 8c(14)(B) of the AMAA, (7 U.S.C. § 608c(14)(B)), authorizes the assessment of a civil penalty not exceeding $1,000 for each violation and further provides that each day during which each violation continues shall be deemed a separate violation. The civil penalty assessed against Respondents is clearly authorized by the AMAA and warranted under the circumstances, as fully explained in the Decision and Order filed May 7, 1996, *In re Saulsbury Enterprises, supra.*

Respondents do not identify the case which they assert was dismissed against Sunkist. Further, Respondents do not assert that the case against Sunkist was similar to the instant proceeding against Respondents. Even if I were to find that a proceeding had been instituted against Sunkist for violations identical to the violations which I find in this proceeding that Respondents committed, and no sanction had been imposed against Sunkist, such findings would not be a basis for my reconsideration of the civil penalty assessed against Respondents. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. CFTC*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Volpe Vito Inc., supra*, slip op. at 112.

Tenth, Respondents contend that:

> The penalties imposed upon the Respondents are draconian, violate Due Process, are not substantially related whatsoever to the harm caused but merely epitomize[] USDA's and the judicial officer's (past and present)

> disdain for any little guy regulated by a marketing order who is found to have violated it. *BMW of North America, Inc. v. Gore* (U.S. Sup. Crt. No. 94-986; decided May 20, 1996)

Respondents' Petition for Reconsideration at 8-9.

I disagree with Respondents' assertion that the penalties assessed against Respondents epitomize USDA's and the Judicial Officer's disdain for the "little guy." The basis for the civil penalty assessed against Respondents is fully explicated in the Decision and Order filed May 7, 1996, *In re Saulsbury Enterprises, supra*, and neither disdain for Respondents nor the size of either Respondent forms any part of the basis for the civil penalty assessed. (Contrary to Respondents' assertions, I do not disdain "any little guy regulated by a marketing order who is found to have violated it." Moreover, I find nothing in the record to support Respondents' assertions that the United States Department of Agriculture, as an institution, or that any current or former employee of the United States Department of Agriculture, disdains "any little guy regulated by a marketing order who is found to have violated it.")

Further, I disagree with Respondents' assertions that the civil penalty assessed against Respondents is draconian and is not related to the harm caused by Respondents. The $219,000 civil penalty assessed against Respondents for 219 violations of the Raisin Order is authorized by the section 8c(14)(B) of the AMAA, (7 U.S.C. § 608c(14)(B)), and, as discussed in the Decision and Order filed May 7, 1996, is in accordance with the Department's sanction policy and the purpose of the civil penalty provision in section 8c(14)(B) of the AMAA, (7 U.S.C. § 608c(14)(B)). *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 46-58.

I also disagree with Respondents' assertion that the civil penalty assessed against Respondents violates due process. Section 8c(14)(B) of the AMAA, (7 U.S.C. § 608c(14)(B)), provides that the Secretary may issue an order assessing a civil penalty only after notice and an opportunity for an agency hearing on the record. Respondents were served with notice in this proceeding on May 31, 1994; a 2-day hearing was conducted on the record on March 1, 1995, and March 2, 1995; and the entire proceeding has been conducted in accordance with the Rules of Practice, which accord Respondents due process. Moreover, Respondents have been represented by able counsel throughout the entire proceeding.

Eleventh, Respondents contend that:

> [B]ecause neither the ALJ nor the judicial officer are Article III courts, and the case involves penalties, not only was Saulsbury entitled to a trial, but a jury trial before its peers before an Article III court.

Respondents' Petition for Reconsideration at 9.

I disagree with Respondents' assertion that Respondents are entitled to a jury trial in an Article III court. Respondents do not cite any authority for their contention that they are entitled to a jury trial in an Article III court.

Article III of the United States Constitution provides:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. I, § 1.

However, Courts have long upheld Congressional delegations of adjudicatory power to administrative agencies where the delegation to the administrative agency involves power to adjudicate public rights rather than private rights.[5] Section

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[5]*See CFTC v. Schor*, 478 U.S. 833, 848 (1986) (Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 583 (1985) ("the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts[;]" "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts"); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982) (Congress has power to create three types of non-Article III tribunals: territorial courts, courts-martial, and legislative courts and administrative agencies that adjudicate cases involving public rights); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977) (the Court has often sustained statutes in which Congress has created statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred); *Crowell v. Benson*, 285 U.S. 22 (1932) (by virtue of its authority over maritime law, Congress may confer on an agency, which is not an Article III court, power to decide a case involving liability of one individual to another for death or disability from injuries arising out of the course of employment on the navigable waters of the United States); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (it is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking judicial power); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; at the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418, 1422-23 (9th Cir. 1994) (adjudication of allegations that officer of a savings and loan association engaged in unsafe or unsound practices by the Office of Thrift Supervision, a non-Article III tribunal, does not violate Article III of the United States Constitution),

8c(14)(B) of the AMAA, under which this proceeding was instituted, is clearly a Congressional delegation of adjudicatory power to the Secretary of Agriculture to conduct agency hearings involving public rights. Further any order issued by the Secretary assessing a civil penalty under section 8c(14)(B) is expressly made subject to judicial review. (7 U.S.C. § 608c(14)(B).)

Moreover, Respondents have no right to a jury trial. This proceeding is not a criminal prosecution and the constitutional provisions in Article III, § 2 of the United States Constitution and the Sixth Amendment to the United States Constitution which afford the right to a jury trial in criminal proceedings are not applicable to this proceeding. The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

The phrase "Suits at common law" has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not customary. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, supra*, 430 U.S. at 449; *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830). Congress is free to create new statutory public rights, as it did with the enactment of the AMAA, and assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's requirement that a jury trial is to be preserved in suits at common law. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, supra*, 430 U.S. at 455.

Twelfth, Respondents contend that the civil penalty assessed and the assessments which Respondents are ordered to pay to the Raisin Administrative Committee in this proceeding violate Article II of the United States Constitution. (Respondents' Petition for Reconsideration at 2.)

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cert. denied, 115 S.Ct. 1096 (1995); *Akzo N.V. v. United States Int'l Trade Comm'n*, 808 F.2d 1471, 1488 (Fed. Cir. 1986) (adjudication of actions instituted under section 337 of the Tariff Act of 1930 by the United States Trade Commission, a non-Article III tribunal, does not violate Article III of the United States Constitution), *cert. denied*, 482 U.S. 909 (1987).

I disagree with Respondents. Article II of the United States Constitution, *inter alia*, vests executive power in the President of the United States; sets the term of office for the President and Vice President of the United States; provides for the method of choosing electors; imposes eligibility requirements for assuming the Office of the President; prohibits the increase or decrease of the compensation for the President during the period for which the President is elected; requires that the President take an oath or affirmation before taking office; imposes duties on the President; gives the President powers; and provides for removal of the President, Vice President, and other civil officers of the United States by impeachment. The Decision and Order filed May 7, 1996, was not related in any way to any of the provisions of Article II of the Constitution of the United States, and Respondents fail to identify the manner in which they believe that the Decision and Order filed May 7, 1996, violates Article II of the Constitution of the United States. Respondents' assertion that the Decision and Order filed May 7, 1996, violates Article II of the Constitution of the United States is without merit.

For the foregoing reasons and the reasons set forth in the Decision and Order filed May 7, 1996, *In re Saulsbury Enterprises, supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice, (7 C.F.R. § 1.146(b)), provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration. *In re Andershock Fruitland Inc.*, 55 Agric. Dec. ___, slip op. at 1 (Oct. 29, 1996). Respondents' Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on May 7, 1996. Therefore, since Respondents' Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed May 7, 1996, is reinstated, with allowance for time passed, as follows:

Order

Paragraph I

Respondents, Robert J. Saulsbury and Saulsbury Enterprises, jointly and severally, are assessed a civil penalty in the amount of $219,000. Respondents shall send a certified check or money order in the amount of $219,000, made payable to "Treasurer of the United States," to Colleen Carroll, Esq., Office of the General Counsel, Room 2014-South Building, United States Department of Agriculture, Washington, DC 20250-1417, within 100 days after service of this Order on Respondents.

Paragraph II

Respondents, Robert J. Saulsbury and Saulsbury Enterprises, jointly and severally, are ordered to pay to the Raisin Administrative Committee $1,673.30 in assessments for crop years 1988-1989, 1989-1990, and 1990-1991, within 100 days after service of this Order on Respondents.

In re: MIDWAY FARMS, INC.
94 AMA Docket No. F&V 989-1.
Decision and Order filed April 18, 1997.

Standing — Dismissal with prejudice — Handler — Raisin Marketing Order — Disclosure of information — Tolling of civil penalties — Discharge of official duties.

The Judicial Officer vacated Chief Administrative Law Judge Victor W. Palmer's (Chief ALJ) dismissal without prejudice of the 15(A) Petition because the Judicial Officer determined that the Petition must be dismissed with prejudice to prevent the filing of the same Petition. Petitioner's allegation in its Petition that it is not a processor, packer, or handler means that it lacks standing to bring a 15(A) action. The Chief ALJ's views on the irrelevant issues of Petitioner's proprietary information; untrustworthiness of AMS inspectors; and tolling of civil penalties under 7 U.S.C. § 14(B), are vacated. The Judicial Officer dismissed the Petition with prejudice, preventing Petitioner from refiling this Petition if alleging that Petitioner is not a handler, but not prohibiting Petitioner from refiling alleging that it is a handler, if the proper documentation is simultaneously filed showing that it is a handler.

Sharlene Deskins, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Midway Farms, Inc. (hereinafter Petitioner), instituted this proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of Raisins Produced From Grapes Grown in California (7 C.F.R. pt. 989) (hereinafter Raisin Order); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) (hereinafter Rules of Practice), by filing a Petition To Modify Raisin Marketing Order Provisions/Regulations and/or Petition To Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order and Any

Obligations Imposed In Connection Therewith That Are Not In Accordance With Law (hereinafter Petition) on July 1, 1994.

On May 10, 1996, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) filed an Initial Decision and Order dismissing the Petition without prejudice. On June 4, 1996, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On August 9, 1996, the Administrator of the Agricultural Marketing Service (hereinafter Respondent) filed Opposition to Petitioner's Appeal Petition (hereinafter ROPAP), which included a cross-appeal. On September 6, 1996, Petitioner filed Petitioner's Reply to Respondent's Opposition to Petitioner's Appeal Petition (hereinafter PR). The proceeding was referred to the Judicial Officer for decision on September 9, 1996.

Based upon careful consideration of the record in this proceeding, I find that the Chief ALJ reached the correct result in dismissing the Petition, but I find that the Petition should be dismissed with prejudice. Therefore, the Chief ALJ's Initial Decision and Order is vacated, and the Petition is dismissed with prejudice.

PERTINENT STATUTES AND REGULATIONS

The pertinent portions of the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter AMAA), are as follows:

7 U.S.C.:

§ 608a. Enforcement of chapter

. . . .

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter

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

made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

7 U.S.C. § 608a(6).

§ 608c. Orders regulating handling of commodity

. . . .

(14) Violation of order; penalty

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). . . .

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

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

7 U.S.C. §§ 608c(14)(B), (15)(A).

§ 608d. Books and records; disclosure of information; notification of Congressional committees

. . . .

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section, as well as information for marketing order programs that is categorized as trade secrets and commercial or financial information exempt under section 552(b)(4) of title 5 from disclosure under section 552 of such title, shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired.

7 U.S.C. § 608d(2).

§ 610. Administration

. . . .

(h) Adoption of Federal Trade Commission Act; hearings; report of violations to Attorney General

For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. . . .

7 U.S.C. § 610(h).

The pertinent portion of the Federal Trade Commission Act of 1914, as amended, is as follows:

15 U.S.C.:

§ 49. Documentary evidence; depositions; witnesses

For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

15 U.S.C. § 49.

Section 900.51(i) of the Rules of Practice provides:

9 C.F.R:

PART 900—GENERAL REGULATIONS

. . . .

SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

. . . .

(i) The term *handler* means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable[.]

7 C.F.R. § 900.51(i).

Section 900.52(a) of the Rules of Practice provides:

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary.

7 C.F.R. § 900.52(a).

The Raisin Order provides as follows:

9 C.F.R.:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

. . . .

SUBPART—ORDER REGULATING HANDLING

DEFINITIONS

. . . .

§ 989.13 Processor.

Processor means any person who receives or acquires natural condition raisins, off-grade raisins, other failing raisins or raisin residual material and uses them or it within the area, with or without other

ingredients, in the production of a product other than raisins, for market or distribution.

§ 989.14 Packer.

Packer means any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins. . . .

§ 989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins[.] . . .

7 C.F.R. §§ 989.13, .14, .15.

PROCEDURAL HISTORY

On July 1, 1994, Petitioner filed a Petition under 7 U.S.C. § 608c(15)(A) challenging the interpretation of "handler" in the Raisin Order. Petitioner alleges that it is not a raisin handler, not a processor, and not a packer, except under an unlawful construction of 7 C.F.R. § 989.13 (Petition at 3).

On October 27, 1995, Petitioner was issued a *subpoena duces tecum*[2] for documents to allow Respondent to determine if Petitioner is a handler (ROPAP at 3 & Ex. E). On November 22, 1995, during a conference call with the Chief ALJ, Petitioner agreed to supply to Respondent by December 1, 1995, copies of Petitioner's records of off-grade raisin purchases and appropriately redacted copies

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[2]Respondent states that the October 27, 1995, subpoena was served on Petitioner on November 3, 1995, but I find no return receipt in the record. Petitioner does not claim that it was not served; but rather, the record reveals that Petitioner is fully familiar with the contents of the subpoena. Moreover, Petitioner agreed on separate occasions to deliver the same documents as demanded in the subpoena, *e.g.*, *see* the Summary of Teleconference, Nov. 22, 1995; and Summary of Teleconference and Postponement of Hearing, Dec. 4, 1995. Thus, I infer that Petitioner was properly served with the subpoena duces tecum

of sales records for the period 1992 through November 22, 1995 (Summary of Teleconference, Nov. 22, 1995). Petitioner supplied documents on December 6, 1995, but Respondent deemed them both non-responsive to the subpoena and not the documents Petitioner agreed to provide. The documents were not originals or copies of originals, but were summaries of other documents. The summaries did not contain original signatures or dates of preparation. Petitioner's claim that these documents were filed at the Raisin Administrative Committee (hereinafter RAC) was not verified by the RAC. Respondent could not verify handler status based upon the documents (ROPAP at 3-4).

On January 5, 1996, Respondent wrote Petitioner again requesting the documents described in the subpoena, but Petitioner wrote Respondent on January 12, 1996, informing Respondent that the documents already provided would be the only documents forthcoming (ROPAP at 4 & Ex. F).

On January 22, 1996, Respondent filed a motion seeking dismissal of the Petition since "Petitioner has failed to establish and in fact denies that it is a handler." (Motion to Dismiss at 3.) Petitioner did not respond.

On January 22 and 25, 1996, Petitioner and Respondent discussed with the Chief ALJ Respondent's Motion to Dismiss and the sufficiency of the documents provided by Petitioner. Also, Petitioner committed to meet with Mr. Nef and Mr. Stark of the RAC to discuss confidential document review. Petitioner promised to file the necessary documents with the Hearing Clerk and send them to Respondent on or before March 29, 1996 (Summary of Teleconferences and Rescheduling of Hearing). On April 2, 1996, Respondent received additional documents which Respondent again deemed not responsive to the subpoena and not in accordance with Petitioner's promise during the January 25, 1996, teleconference agreement (ROPAP at 5).

On April 10, 1996, the Chief ALJ held a conference call with the parties, and it was agreed that responsive records would be submitted by April 26, 1996 (Summary of Teleconference, Apr. 10, 1996).

On April 19, 1996, Respondent filed a motion stating that Respondent was entitled to select the person to review Petitioner's records (Motion to Consider Review of Petitioner's Records and to Postpone Hearing, Apr. 19, 1996). On April 30, 1996, Petitioner filed a Reply in which Petitioner (a) accused Respondent of seeking non-available discovery, (b) accepted the burden of proof in this proceeding, and (c) stated once more that Petitioner is not a handler (Petitioner's Reply to Respondent's "Motion to Consider Review of Petitioner's Records and to Postpone Hearing") (hereinafter PRRM). Also, on April 29, 1996, Petitioner sent Respondent 8 pages of what Respondent considered non-responsive documents of little use in determining Petitioner's status under the Raisin Order (ROPAP at 5).

On April 30, 1996, in a teleconference with the parties, the Chief ALJ outlined a procedure for an *in camera* inspection of Petitioner's "proprietary" records by appointing Terry Stark, manager of the RAC, as his agent. However, Respondent urged dismissal of the Petition because Petitioner continued to argue the contradiction that Petitioner was not a "first handler," but was, nonetheless, a handler under an investigatory subpoena (see PRRM at 1). The Chief ALJ "continue[d] to reserve ruling on respondent's motion to dismiss." (Summary of Teleconference, Apr. 30, 1996.)

On May 6, 1996, Respondent filed another Motion to Dismiss, contending that there are two bases for dismissal of the Petition: first, Petitioner cannot bring a 15(A) Petition because it has not established that it is a handler; and second, Petitioner has repeatedly failed to comply with the subpoena (Respondent's Second Motion to Dismiss).

On May 9, 1996, Respondent filed a response to the Chief ALJ's April 30, 1996, Summary of Teleconference, which response included a request that the Chief ALJ submit, as a Certified Question to the Judicial Officer, the Chief ALJ's planned procedure for an *in camera* inspection. Respondent objects to the characterization in the Chief ALJ's April 30, 1996, Summary of Teleconference, that Respondent agreed to the *in camera* inspection. Respondent states that both at that April 30, 1996, teleconference and in Respondent's Motion to Consider Review of Petitioner's Records and to Postpone Hearing, Respondent took the position that the Petitioner must provide Respondent unencumbered access to Petitioner's subpoenaed records (Respondent's Response to Summary of Teleconference; and Request to Certify Question of *In Camera* Inspection to Judicial Officer).

On May 10, 1996, the Chief ALJ dismissed the Petition without prejudice "on the technical grounds that Petitioner has not and, without producing its records, cannot show itself to be a handler subject to the Act as 7 U.S.C. § 608c(15)(A) requires," as follows:

DISMISSAL OF PETITION

The issue [in] this case is whether Petitioner is a first handler subject to assessments under the Raisin Marketing Order for "junk raisins" it has handled.

The dispositive evidence on this issue consists of the records of Petitioner's purchases and sales of raisins.

If as the Petitioner alleges, Petitioner's records show it not to be a first handler because it sold its raisins to outlets to which assessments are not intended to attach, Petitioner would be exempt from monetary obligations under the Raisin Marketing Order. But for that determination to be made, Petitioner's records need be produced for inspection. Petitioner is fearful that proprietary information respecting the comparative prices it pays and receives, and the identities of those who buy "junk raisins," will become a matter of public knowledge if it is compelled to produce these documents in an unredacted form. If that were to happen Petitioner states its now profitable "niche" business would probably be lost.

For that reason, Petitioner has requested that only redacted copies of its records be made part of the public record and that the unredacted originals be examined *in camera*. Unfortunately, the records are voluminous and require some expertise to properly understand them. Therefore, I have been seeking an agreement between the parties as to a suitable trustworthy person who would act as my agent to undertake the *in camera* inspection. Respondent wants one of its inspectors to perform this review. Petitioner does not believe the suggested inspector would keep the information completely confidential and has instead suggested Terry Stark, the manager of the Raisin Committee. I believe he would be a reasonable choice and made that part of my Summary of Teleconference of April 30, 1996.

However, Respondent has since advised that Mr. Stark is neither available nor inclined to perform this task. Respondent also challenges my authority to require an *in camera* inspection and has asked that the question be certified instead to the Judicial Officer for his ruling.

The present posture of this case and the predicaments confronting both Petitioner and Respondent are unique. Respondent cannot determine whether or not Petitioner is violating the Raisin Marketing Order and hence the Act, without reviewing its records. Petitioner is fearful its business will evaporate if the proprietary information contained within the records becomes public.

By filing this administrative petition under 7 U.S.C. § 608[c](15)(A), Petitioner has tolled the civil penalties which might be assessed if an administrative action is filed against it pursuant to 7 U.S.C. § 608c(14)(B). Secondly, Petitioner anticipates that should an injunctive action be initiated

against it in a federal district court under 7 U.S.C. § 608a(6), to compel the turnover of its records, it might not be permitted to defend on the ground that its activities are not covered by the Act and the Raisin Marketing Order because it did not first exhaust an available administrative remedy for determining the issue.

For these reasons, I have allowed this case to go forward. But upon reflection, a United States District Court Judge has the requisite powers that I lack to properly supervise an appropriate *in camera* inspection. Therefore, I am dismissing the petition without prejudice on the technical grounds that Petitioner has not and, without producing its records, cannot show itself to be a handler subject to the Act as 7 U.S.C. § 608c(15)(A) requires. Inasmuch as no action is presently pending against Petitioner for violation of the Act or the Raisin Marketing Order, this ruling causes it no harm. Should Respondent initiate a proceeding in a United States District Court to obtain Petitioner's records, Petitioner will be able to demonstrate by this ruling why an appropriate *in camera* inspection need be conducted under the District Court's auspices in exercise of its extensive powers which I do not possess. The power, for example, to dismiss the government action or otherwise sanction it, if the government refuses to accept the conditions prescribed for an *in camera* inspection. Moreover, inasmuch as the petition was filed as required by 7 U.S.C. § 608c(14)(B) and was dismissed on the technical grounds advanced by Respondent's two Motions to Dismiss, civil penalties against Petitioner are tolled until and unless a (14)(B) action is initiated in the future, at which time a (15)(A) petition may again be filed to continue tolling them.

Dismissal of Petition.

DISCUSSION

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) (7 U.S.C. § 608c(15)(A)) rests with Petitioner.[3] Petitioner, therefore,

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[3]*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978

bears the initial burden of coming forward with evidence sufficient for a prima facie case.[4] Petitioner has failed to carry its burden in this proceeding.

The only relevant issue in this 15(A) proceeding is whether Petitioner is a handler. Until and unless Petitioner can establish handler status, none of the other issues Petitioner raises can be addressed in this 15(A) proceeding. It is well-settled under the AMAA and the Rules of Practice that only a handler has standing to file a 15(A) Petition. "Under the Act (7 U.S.C. § 608c(15)(A)) and the rules of practice (7 C.F.R. §[§] 900.51(i), .52(a)), an administrative proceeding of this nature can be instituted only by a 'handler' subject to the applicable [commodity] order." *In re Kent Cheese Co., Inc.*, 43 Agric. Dec. 34, 36 (1984). *See also In re M&R Tomato Distributors, Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981).

The Department looks very carefully at a petitioner's status. In fact, a great deal of deference is accorded a petitioner's claim that it is a handler, when the question

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(3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp 209, 217 (E.D. Mo., 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3d Cir. 1945); *In re Garelick Farms, Inc.*, 56 Agric. Dec. ___, slip op. at 3 (Jan. 14, 1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965).

[4]*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

is a motion to dismiss for want of standing. In *Asakawa Farms*, it is explained that allegations of material fact in a petition must be construed in the light most favorable to a petitioner *claiming handler status* when considering a motion to dismiss:

> Respondent contends that Petitioners . . . are not handlers and as a result lack the necessary standing to file a petition pursuant to section 608c(15)(A) of the AMAA. All of the Petitioners, however, have stated in their petitions that they are handlers. Allegations of material fact contained in the petitions must be construed in the light most favorable to the Petitioners when considering a motion to dismiss for want of standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Therefore, I will assume for purposes of the motion to dismiss only, that each of the Petitioners was a handler at all times pertinent.

In re Asakawa Farms, Inc., 50 Agric. Dec. 1144, 1149 (1991), *appeal docketed*, No. CV-F-91-686-OWW (E.D. Cal. 1991).

On the other hand, Petitioner in this proceeding alleges that it is not a processor, packer, or handler subject to the Raisin Order. ("MIDWAY FARMS alleges that it is not a processor, not a packer and not a handler of California raisins pursuant to the Raisin Marketing Order." (Petition at 3.)) Petitioner's conclusory pleading leaves Petitioner no standing to bring a 15(A) Petition.

Therefore, the Chief ALJ was correct to dismiss the Petition on the grounds that Petitioner did not produce records sufficient to prove it was a handler (Dismissal of Petition at 2). However, the Chief ALJ erred by dismissing the Petition without prejudice because Petitioner alleges in the Petition that it is not a handler. The Chief ALJ's dismissal without prejudice would allow Petitioner to refile the same flawed Petition.

Therefore, I am dismissing the Petition with prejudice, since Petitioner should not again attempt to litigate the interpretation of "handler" in a 15(A) proceeding, while alleging itself not to be a handler. On the other hand, there is precedent in *Kent Cheese* for allowing Petitioner to refile essentially the same Petition, if it alleges that it is a handler and files simultaneously the pertinent documents to prove itself a handler:

> Petitioner alleges no facts, and makes no argument, to show that it is a handler, as thus defined. Instead, petitioner argues that it has some agency relationship with Certified Growers of Illinois, Inc., which is admittedly a

"handler," and that "Certified Growers of Illinois at Kent, Illinois and/or Kent Cheese Co. Inc. is a handler under the law" (Appeal Brief, at 12).

It is not enough for petitioner to show that Certified Growers "and/or" Kent Cheese is a handler. To have standing here, petitioner must show that Kent Cheese Co., Inc., is a handler. That has not been done.

. . . .

Since petitioner has not shown that it is a handler, and does not even argue that it meets the definition of "handler" in the Order, the petition should be dismissed with prejudice. This would not, of course, preclude the filing of a petition under § 8c(15)(A) of the Act by Certified Growers of Illinois, Inc.

In re Kent Cheese, supra, 43 Agric. Dec. at 36-37.

Petitioner may appeal this decision to a district court of the United States, and the Chief ALJ's views on irrelevant issues, including proprietary information; use of Agricultural Marketing Service (hereinafter AMS) inspectors to examine Petitioner's records based on unsubstantiated allegations regarding the inspectors' trustworthiness; and the tolling of 7 U.S.C. § 608c(14)(B) civil penalties during pendency of a good faith 7 U.S.C. § 608c(15)(A) Petition should not be part of the court's deliberations. Therefore, I vacate the Chief ALJ's Dismissal of Petition.

The Chief ALJ erred in according protection to Petitioner's "proprietary information." Petitioner's "proprietary information" is not protected from inspection and appropriate disclosure by the Secretary, and must be made available to the Secretary, when the Secretary is party to an administrative proceeding involving the relevant marketing order (7 U.S.C. § 608d(2)).

Further, the Chief ALJ erred by acquiescing to Petitioner's unfounded assertion that certain named AMS inspectors were untrustworthy. The Chief ALJ should have rejected Petitioner's unsubstantiated accusations against AMS inspectors Terry Kaiser and Rene Wassenberg. Even though I make no overall judgment in this Decision and Order as to the Chief ALJ's personal use of agents to perform inspections in all circumstances, the Chief ALJ was in error to give credence to Petitioner's unsubstantiated accusations that AMS personnel are not trustworthy,

because, in the absence of clear evidence to the contrary, there is a presumption of regularity in the discharge of official duties by federal officers.[5]

Therefore, I find that it was error to reject Respondent's investigators on unsubstantiated charges, when they were properly seeking to inspect Petitioner's records to determine if it was a handler.

Next, I disagree with and reject the Chief ALJ's apparent view that a petitioner may toll civil penalties (as provided in 7 U.S.C. § 608c(14)(B)) during the pendency of a 15(A) Petition, by merely filing a 15(A) Petition. The pertinent part of 14(B) provides that no civil penalty may be assessed during the pendency of a 15(A) Petition if "the Secretary finds that a petition . . . was filed and prosecuted . . . in good faith and not for delay" (7 U.S.C. § 608c(14)(B)). The Chief ALJ erroneously makes no provision for the requisite finding by the Secretary.

Moreover, the statute not only requires that the 15(A) Petition be found to have been filed in good faith and not for delay, but also requires that the Petition be found to have been prosecuted in good faith and not for delay. Thus, the Chief ALJ also makes no provision for the Secretary's requisite finding that the Petition was prosecuted in good faith and not for delay. These principles would be applied to Petitioner's situation in any subsequent 14(B) proceeding in the following manner. Petitioner is seeking, *inter alia*, declaratory relief from the reporting requirements described in the RAC's June 13, 1994, letter (Petition Ex. A). Such relief is not an unreasonable goal and could be considered a good faith reason to file a 15(A) Petition. However, I agree with Respondent that Petitioner could have easily avoided dismissal of the Petition by providing evidence that it is a handler (ROPAP at 8). An examination of the Procedural History, *supra*, reveals that during a teleconference with the Chief ALJ and Respondent on November 22, 1995, Petitioner promised to deliver the pertinent records to Respondent by

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[5]*United States v. Mezzanatto*, 115 S.Ct. 797, 806 (1995) (the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350 (1918) (the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party). *Accord In re Kim Bennett*, 55 Agric. Dec. 176, 210 (1996); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976)..

December 1, 1995, but that the promised documents were not delivered on that date or any subsequent date.

Should these same facts be adduced as evidence in a succeeding 14(B) proceeding, I would be inclined to find that the 15(A) Petition instituting this proceeding was filed in good faith and not for delay, but only prosecuted in good faith and not for delay until December 1, 1995. Any appropriate civil penalties would be calculated accordingly. However, my inclination is not prejudicial, because evidence could be introduced in any succeeding 14(B) proceeding to show that the 15(A) Petition in this proceeding was filed and prosecuted in bad faith and for delay, while the Petitioner would be free to refute that evidence, and my inclination, by showing that the Petition was filed and prosecuted in good faith and not for delay.

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

Order

The relief requested by Petitioner is denied, and the Petition is dismissed with prejudice.

In re: AUVIL FRUIT COMPANY, HOVERHAWK, INC., AND LYONS & SON, INC.
95-AMA-Docket No. F&V 923-1.
Decision and Order filed April 19, 1996.

Minimum size requirements of Rainier cherries - Rulemaking - Burden of proof - Presumption that agency action valid - Equal protection - No property right to market a commodity free from regulation.

Petitioner Auvil Fruit Company challenged the marketing order provisions relating to the minimum size of Rainier cherries on the grounds that the regulations: 1) are arbitrary and capricious in that the criteria was not determined based on objective, scientific evidence; 2) unfairly discriminate against high altitude growers and small family farms in violation of the Fourteenth Amendment's Equal Protection guarantees; and 3) constitute an inverse condemnation of private property under the Fifth Amendment. Administrative Law Judge Baker rejected all of Petitioner's arguments and dismissed the petition. The burden of proof rests with the Petitioner and deference must be given to the Secretary's actions. Petitioner failed to show that the agency's actions were arbitrary and capricious. There was sufficient evidence in the record to support the adoption of the marketing order provisions. The provisions do not violate the Equal Protection Clause, as the regulations impact all handlers who may be similarly situated; and they do not constitute a taking since there is no property right to market a commodity free from regulation. [Judge Baker dismissed the petition as to Petitioners Hoverhawk

Inc. and Lyons & Sons, Inc., on the basis that they are not handlers; and they appealed the decision to the Judicial Officer].
Robert L. Parlette, Wenatchee, WA, for Petitioners.
Sharlene A. Deskins, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement and Dismissal of Petition With Respect to Petitioner Hoverhawk, Inc., a Washington corporation and Petitioner Lyons & Son, Inc., a Washington corporation

This proceeding was instituted by reason of a Petition filed May 9, 1995 pursuant to the provisions of 7 U.S.C. § 608(c)(15)(A) being section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended. The said Petition seeks relief from certain provisions of Marketing Order No. 923 (7 C.F.R. Part 923) dated June 16, 1994. It is alleged in said Petition that: "Petitioner Auvil Fruit Company, is a handler of Rainier cherries. Petitioner Hoverhawk, Inc., is a sole proprietorship and acts as a handler of Rainier cherries when field packing and selling fruit directly to purchasers. Petitioner Lyons & Son[s], Inc., is a handler of Rainier cherries." The specific terms of Marketing Order No. 923 which are complained of are those sections which prohibit the sale and shipping of Rainier cherries of a size smaller than eleven row in interstate commerce.

In challenging the application of certain provisions of Marketing Order No. 923 the Petitioners allege that such provisions, as they may relate to the minimum size of Rainier cherries, are: (1) not in accordance with law in that they are unconstitutional; (2) are violative of the Fourteenth Amendment to the United States Constitution; (3) and such provisions constitute an unequal, discriminatory application of the law; (4) were adopted in an arbitrary and capricious manner; and (5) are not based on any objective scientific standard that is related to quality or edibility of Rainier cherries. It is further alleged that the provisions complained of are a mere pretext for shrinking supply in an attempt to improperly and, in contravention of guidelines of the United States Department of Agriculture, increase the price of Rainier cherries to consumers in interstate markets.

Petitioners' prayers for relief are those which would: declare null and void those portions of Marketing Order No. 923 which restrict the right of growers and handlers from dealing in, and packing and shipping, Rainier cherries from the State of Washington of a size smaller than eleven row.

Petitioners would seek to have the size twelve row substituted for eleven row.

In the alternative the Petitioners seek to have the Secretary direct that a continuance referendum on this Marketing Order be conducted.

A hearing was held on November 1 and 2, 1995, in Wenatchee, Washington, before Administrative Law Judge Dorothea A. Baker. The Petitioners were represented by Robert L. Parlette, Esquire, of Davis, Arneil, Dorsey, Kight and Parlette, [redacted], Wenatchee, Washington [redacted]. The Respondent was represented by Sharlene A. Deskins, Esquire, of the Office of the General Counsel, Washington, D.C. 20250. In addition to the initial briefing, additional briefing was required in this case, inasmuch as the Respondent seeks the dismissal of the Petition with respect to the two Petitioners, Hoverhawk, Inc., and Lyons & Son, Inc., on the basis they are not handlers and, accordingly, may not pursue this proceeding. The last brief was filed herein on March 13, 1996. Respondent does not dispute the standing of Auvil Fruit Company to pursue the remedies available to it. With respect to Hoverhawk, Inc. and Lyons & Son, Inc., the matter of dismissal arises by reason of the fact that within a few minutes from the close of the hearing, the Respondent made a motion to dismiss, the reason being that said Petitioners (Hoverhawk and Lyons) were not regarded as "handlers" under the Order. Respondent's challenge to these two Petitioners with respect to standing could have been pleaded and raised at an earlier time, even as an affirmative defense. It was not. The Petitioners maintained that they were surprised at the close of the hearing with respect thereto. Also, the Judge was surprised. Had this issue been raised earlier the Judge may have questioned, or, caused to have been questioned, some of the witnesses with a view to achieving a degree of specificity. Therefore, the Judge ordered additional briefing with respect to this issue, in lieu of reopening the hearing to receive additional evidence. The fact that this is an administrative proceeding does not diminish the fact that among its objectives is that of arriving at a correct legal solution to the issues presented. This requires a fair and impartial looking at the facts as opposed to reliance upon a technical pleading ambush.

The Agricultural Marketing Agreement Act of 1937 authorizes only handlers subject to marketing orders to obtain administrative review. See 7 U.S.C. § 608c(15)(A). This fact was among those cited by the Supreme Court for its conclusion that consumers are foreclosed by the Agricultural Marketing Agreement Act of 1937 from obtaining reviews of marketing orders. *Block v. Community Nutrition Institute,* 467 U.S. 340 (1984).

In reaching this conclusion, the Supreme Court reviewed the statutory scheme and found that it:

> . . .makes equally clear Congress' intention to limit the classes entitled to participate in the development of market orders. The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers - but not consumers - are entitled to participate in the adoption and retention of market orders. . . . Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.

467 U.S. at 346 (citations omitted).

The Response by the Respondent to the Order for Additional Briefing alleges, among other things, that the court erred to rely on evidence not in the record and that "* * * the court relied on evidence not presented at the hearing"; that the court "apparently accepts this document [Strutzel Affidavit] as explaining the operation of Hoverhawk, Inc. to such a degree that the Respondent must respond with this brief."; that the court erred by allowing the inclusion of a post-hearing submission which places the Respondent at a distinct and unfair disadvantage.

I do not believe that I erred in any of the afore-stated matters. To begin with, the affidavit referred to by the Government as having been sent to the Judge by Petitioners' counsel was, in fact, sent to the Acting Hearing Clerk on December 12, 1995, for filing with the case with courtesy copies to Attorney Deskins and the Judge. Secondly, as noted by the Judge in the Order for additional briefing the affidavit "was not admitted into evidence in this case" noting the objections of Respondent, and further:

> "Whether or not such affidavit is admissible, it adds nothing of material importance to the facts already established at the oral hearing, namely the method of paying the assessments with respect to the cherries."

The Judge has not admitted the Strutzel affidavit into evidence and is not going to do so. It shall remain a part of the record as an offer of proof which the Judicial Officer may admit or not.

Thirdly, the record evidence received at the oral hearing, in the presence of Government counsel, describes the operations of Hoverhawk, Inc. and Lyons & Son, Inc.. Mr. Lyons, the owner and President of Lyons & Son, Inc. described his operations in detail, including the following testimony:

By Mr. Lyons:

Q And, so, the people who actually pick the cherries also pack them in a box?

A Yeah. They -- yeah. That's right. And in fact, before the marketing order came, why, they picked Number 1 and Number 2, and we'd go in, and we'd pick them, and they'd pick them in a liner, and then when they'd get the poundage that they needed, they just pick this container -- this liner out and just place it in the field, and then we would take it over and put it on orchard trailers, and then inspect for grade and for size at that time, and weight.

Q And then you would mark the box with certain gross size?

A Yeah. (Tr. 176).

Q I see. So, prior to the marketing order, you . . . .

* * * * *

Q Where do you market your fruit now?

A We market our fruit through Holman's, H&H Orchards, and they -- they do the sales aspect of it and the handling of them, and then the inspectors check. The federal inspectors come in there at the plant and does the inspecting. (Tr. 181).

* * * * *

Q Do you pay assessments on Rainier cherries?

A Oh, yeah. You can't get them inspected unless you do.

Q Do you pay the assessments to the Washington Cherry Committee?

A We pay them -- H&H Orchards does the assessing -- not the assessing, but collects the money, and I end up paying it, yeah.

Q But H&H actually pays the assessment?

A Right. They do the marketing for my Rainier cherries. That's right. (Tr. 194-195).

Likewise, Mr. Gutzwiler (Tr. 91-116) and Mr. Parlette testified as to Mr. Parlette's operations relative to Rainier cherries.
Mr. Parlette's testimony contained the following description of his activities:

I market my fruit through the co-op known as Skookum or now Bluebird. My field man is Norm Gutzwiler, who has testified here today, and the gentleman who operated my orchard in 1995-94-93, Shad Snyder, previously testified. Previous to that time, I operated the orchard substantially by myself and contracted out the pruning. (Tr. 229)

* * * * *

Q Okay. Have you ever handled cherries? And I mean handle as defined in the marketing order.

A I have field packed cherries, just as Mr. Lyons has done.

Q Okay. What I mean by handle is -- let me refer you to the CFR. What -- in the interest of time, let me just show you what the definition is. It's 923.13, and just tell me -- that's what I mean by handle.

A What's your question?

Q Okay. Do you handle cherries as defined in that regulation?

A To the extent that my field pack cherries are marketed through Skookum, I am a handler of cherries.

Q Have you ever paid assessments on --

A Oh, absolutely. They collect them from me.

Q So, it's actually Skookum that pays the --

A Right. (Emphasis added) (Tr. 250-251).

Moreover, a review of the record as a whole reveals how Hoverhawk, Inc. and Lyons & Son, Inc. believed they were paying the assessments. The matter of their status as non-handlers was not brought up until a few minutes before the hearing closed.

Included among the allegations of the Petition were those that:

> "Petitioner Auvil Fruit Company, is a handler of Rainier cherries. Petitioner Hoverhawk, Inc., is a sole proprietorship and acts as a handler of Rainier cherries when field packing and selling fruit directly to purchasers. Petitioner Lyons & Son[s], Inc., is a handler of Rainier cherries."

The description of the Petitioners as being "handlers" is contained on page two of the Petition filed herein. Prior to the Hearing Clerk requesting of the Petitioners, the full document, the Hearing Clerk apparently had transmitted the full document to the Respondent Department and on June 8, 1995 the Answer of Respondent contained the following:

> 1. The allegations of page one and two contained descriptions of the Petitioners operating structure and the sections of the Cherry Marketing Order that the Petitioners seek to have reconsidered to which no response is required. However, to the extent that a response is required the Respondent is without sufficient knowledge to respond.

In its Response for Supplemental Briefing the Respondent notes that were the Petitioners Hoverhawk, Inc. and Lyons & Son, Inc. to be regarded as handlers they would have been required to file reports in addition to paying assessments. The Respondent does not set forth the time or number of reports which would have been filed.[1] However, this cannot be regarded as a determinative factor by itself

---

[1] The record evidence does not reveal whether said Petitioners filed reports or not, although

inasmuch as the failure to file a report does not necessarily mean that someone is not a handler and should be required to do so.

The Respondent, in its Supplemental Brief recognized the need to examine the full spectrum of activities in determining handler status:

> * * * the Order does not define a handler on the basis of who pays the assessments. A person does not become a handler under the Order by paying assessments. The payment of an assessments [sic] and the filing reports are relevant to the extent that these activities are required of handlers and are often indicative of who is the handler.[7] Thus, the claims that certain costs are passed down by a handler to a grower does not make the grower a handler and is irrelevant to determine who is a handler. * * * [Page 6, Respondent's Supp. Brief].
>
> [7] Under the terms of the Order a handler is still a handler even when a handler does not pay an assessment or file reports. In situations where a handler does not pay assessments or file reports, the handler is subject to enforcement actions pursuant to 7 U.S.C. § 608(c)(14)(A) and (B). The converse of this is not true. In other words, if a person pays an assessments [sic] and files reports this action does not make that person a handler unless the person also conforms with the statutory definition of handler.

However, because the Department has determined that growers such as Hoverhawk, Inc. and Lyons & Son, Inc. who field pack, and then have another entity palletize the boxes and achieve inspection (but which charges the growers for the assessments) are not handlers, the Administrative Law Judge is hereby dismissing the Petition as to Hoverhawk, Inc. and Lyons & Son, Inc. The Judicial Officer gives great weight to an Agency's own interpretation of its own Regulations and, accordingly, his views are followed herein. *All-Airtransport, Inc.*, 50 Agric. Dec. 412 (1991). Such views are in accord with *Chevron U.S.A. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 842-844 (1984):

inference to the contrary can be made from the testimony of the Committee's manager. Section 923.60, 7 C.F.R. § 923.60 of the Order requires the filing of reports. The Petitioners, for violations thereof, would be subject to an enforcement action pursuant to 7 U.S.C. § 608c(14)(B).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron's instruction to a court conducting a judicial review of an agency's construction of a statute which it administers has logical application to an administrative review by an administrative law judge whose neutrality requires distancing from those who are involved with the program's day-to-day operations. It is the experience and the sense of the legislative purpose those agency administrators possess that the Chevron court singled out for judicial deference; deference that should be given by an administrative law judge when a pertinent interpretation of this kind has been made prior to a petition for administrative review.

Hereinafter the term "Petitioner" shall refer to Auvil Fruit Company, unless otherwise indicated.

THE AGRICULTURAL MARKETING AGREEMENT ACT

OF 1937, AS AMENDED, AND SUPPLEMENTED:

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress--

* * * * *

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608(c)(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title [which includes fruits], such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. (Emphasis added).

* * * * *

§ 608. Powers of Secretary

Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

* * * * *

Section 608c of the Act contains inter alia the following provisions:

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits . . . .

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or produce thereof specified in subsection (2) of this section [which includes fruits], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or

affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade; size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

* * * * *

(14) Violation of order; penalty

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $5000 [changed from $500 to $5000 by P.L. 99-198] for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under

the subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

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

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

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the Untied States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS

TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS:
(7 C.F.R. § 900.50, et seq.)

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. and Sup. 601);

(b) The term "Department" means the United States Department of Agriculture;

(c) The term "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(d) The terms "administrative law judge" or "judge" means any Administrative Law Judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved;

(e) The term "Administrator" means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegate to act in his stead;

* * * * *

(h) The term "marketing order" means any order or any amendment thereto which may be issued pursuant to section 8c of the act;

(i) The term "handler" means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable;

(j) The term "proceeding" means a proceeding before the Secretary arising under subsection (15)(A) of section 8c of the act;

(k) The term "hearing" means that part of the proceeding which involves the submission of evidence;

(l) The term "party" includes the Department;

* * * * *

(o) The term "decision" means the judge's initial decision in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules on findings, conclusions and orders submitted by the parties;

(p) The term "petition" includes an amended petition.

§ 900.52 Institution of proceeding.

(a) Filing and service of petition. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

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

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

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

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

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

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

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

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

* * * * *

ADMINISTRATIVE PROCEDURE ACT[2]

THE ADMINISTRATIVE PROCEDURE ACT PROVIDES, IN PART, (5 U.S.C. 551, et seq.).

§ 551. Definitions

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * * * *

§ 553. Rule making

* * * * *

[2] The Petitioner has not directly raised issues relating to the Administrative Procedure Act. However, since Marketing Orders are subject to the notice and comment requirements of the Administrative Procedure Act (7 U.S.C. § 553), the Petitioner's claims relating to due process and the presence of arbitrariousness and capriciousness may make reference to the provisions of the Administrative Procedure Act desirable.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

* * * * *

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

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

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

(3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

Findings of Fact

1. In 1993, the marketing conditions for Rainier cherries was disorderly. Many buyers had purchased Rainier cherries that were small, immature, sour and of inconsistent quality. The sale of small, sour Rainier cherries in 1993 hurt the market for larger, sweeter cherries.
2. Marketing Order 923, which was promulgated by the Department of Agriculture originated from the Washington Cherry Marketing Committee. This administrative body is provided for in the Regulations:

ADMINISTRATIVE BODY

§ 923.20 Establishment and membership.

There is hereby established a Washington Cherry Marketing Committee consisting of fifteen members, . . .

* * * * *

§ 923.51 Recommendation for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of cherries in the manner provided in § 923.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply and demand for cherries during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 923.52 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of cherries whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that such regulations will tend to effectuate the declared policy of the act. Such regulations may:

(1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of cherries grown in any district or districts of the production area;

(2) Limit the shipment of cherries by establishing, in terms of grades, sizes, or both, minimum standards of quality and maturity during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging or handling of cherries.

(b) The committee shall be informed immediately of any such regulation issued by the Secretary, and the committee shall promptly give notice thereof to growers and handlers.

3. A special meeting of the Washington Cherry Marketing Committee was held August 24, 1993, to determine what direction the Committee should take. Among the many subjects covered were those pertaining to Rainier cherries:

RAINIER CHERRIES

Gary Ormiston brought up the subject of Rainier [sic] cherries. He feels it is time to consider a minimum grade for them. Also the problem of green cherries getting into the market.

His suggestion is that we should have a minimum sugar content. If they have the sugar content then they will have the size.

Some members felt that handling and packaging them is the real problem. If regulations are put on them, we may never learn how to handle them. What we need is more information on the best way to handle them.

The committee agreed they do not want Rainiers included in our state or federal regulations. They can have separate regulations and include whatever they want to regulate.

* * * * *

4. The Committee then held a special meeting on December 14, 1993, the official minutes of which are part of the record in this case. The notice thereof stated, among other things, the following:

> "Also, on the agenda, a discussion of the future of Rainier cherries. We would like to invite any Rainier cherry grower to contact your warehouse or sales agency to voice your opinion whether or not they need to be regulated

Among the concerns of the Committee at this meeting was the introduction into the market of immature sour cherries picked too early. The Committee adopted a motion to regulate the minimum size of Rainier cherries to ten and a half row and larger. The minutes of the Committee reveal:

> RAINIER CHERRIES
>
> Several committee members voiced the problem of small immature cherries on the market. These cherries hurt the rest of the good, quality growers.
>
> Some members felt we should regulate size, soluble solids and quality.
>
> It was stated that some warehouses would not take any Rainiers unless they were at least 10 1/4 Row. If they were brought into the warehouse they were automatically delivered to the briner.
>
> Some of the members felt that poor orchard practices are one of the main causes for small cherries. Some orchards use Rainiers as pollenizers and are not pruned as heavily as needed to grow the larger fruit.
>
> It was proven last season that the smaller, sour cherries hurt the market for the larger, sweeter ones. Consumers would not buy the larger cherries because of the poor quality of the earlier ones they had purchased.
>
> The committee was advised to be very careful in regulating the Rainier variety. Be sure the industry knows what they want and need first. The committee should do their research first and then decide on regulations.

> The committee felt that if size was regulated it would pretty much take care of the sugar content.
>
> STEWART made a motion to regulate the minimum size of Rainier variety only to 10 1/2 Row and larger. Seconded by COWIN. Motion carried with one nay vote. The reason behind the nay vote was that we would take about 50% of the cherries off the market or they would go outside the production area to be packed. He was advised that any fruit grown inside the production area must meet the Marketing Order Regulations.

The term ten and a half row refers to the diameter of the cherries. Historically, cherries are placed in a box, row sized. The more cherries on a row, the smaller the cherry. A twelve row cherry is smaller than a ten row cherry. That is to say, as the number goes up, the smaller the diameter of the cherry. Technically a ten and a half row cherry is one inch in diameter and an eleven row cherry is sixty-one/sixty-fourth inches in diameter; and an eleven and a half row cherry is fifty-seven/sixty-fourth inches in diameter; and a twelve row cherry is fifty-four/sixty-fourth inches in diameter.

5. By communication dated December 23, 1993, the Committee advised Agricultural Marketing Service, U.S. Department of Agriculture through its Portland, Oregon, Regional Office:

Dear Mr. Olson:

> The Washington Cherry Marketing Committee met on December 14, 1993. As a result of that meeting they would like to request a change in the cherry regulations for Rainier cherries.
>
> Section 923.52 authorizes the regulation and Section 923.53 allow[s] modification of the regulation.
>
> The committee voted to recommend that the minimum size for Rainier cherries be 10½ row or larger. The reason for this change is that the larger cherries have the sugar content that is needed for a better tasting cherry. With Rainiers, [sic] the larger cherries have the sugar content that is needed for a better quality and tasting cherry, where the smaller cherries tend to be immature and sour. Consumers will not buy the larger cherries once they have purchased the earlier, smaller ones.

Some warehouse have set their minimum at 10½ row or larger. Smaller cherries are automatically diverted to the briner.

The committee feels this regulation is necessary to bring a better product to the consumer.

We would like to have this regulation in place by mid-May for the 1994 season.

Enclosed you will find the ten informational points to substantiate this request for a regulation change.

If you need further information, please call.

Sincerely,

WASHINGTON CHERRY MARKETING COMMITTEE
/s/
Lucille McFarland, Manager

Encl

(RESPONDENT EXHIBIT NO. 3)

TEN INFORMATIONAL POINTS

1. **Specific section of the order authorizing the rule or regulation.**

   Section 923.52 authorizes the regulation and section 923.53 allows modification of the regulation.

2. **Recommended effective date and reason that date is needed.**

   Effective date by mid-May. Rainier harvests begins in June but we need time to notify the industry of the regulations.

3. **Clear definition of the problem.**

   Small, sour cherries getting to the market. These cherries ruin the later market for the larger, sweeter cherries.

4. **Conditions that led to the problem.**

Small, sour cherries getting the early market. Consumers will not buy the larger cherries after buying the earlier small fruit.

5. **How recommendation will address or correct the situation.**

By regulating the row, size, the cherries will have the sugar content that is needed for this variety. The larger the cherry the sweeter it is.

6. **Whether there are viable alternatives to the recommended action.**

The only viable alternative would be for the Committee to recommend the warehouses set their own row size. Some warehouses have done this with good results.

7. **Expected results of the regulation.**

A larger, sweeter product for the consumer.

8. **Impact of recommendation on small business.**

Most Rainier growers are small business people. The acreage is small compared to the dark sweet cherries. Larger cherries on the market would bring greater returns to the growers.

9. **Vote on the recommendation and a discussion of the reasons for dissenting votes.**

Yea - 13 Nay - 1. Nay voted against the 10½Row because he felt it would take too much fruit off the market and they would only go out of the production area to be packed. Not true.

10. **Indications that the action is controversial or raises special problems.**

Growers with poor farming practices will naturally have smaller fruit. Some orchards use Rainiers as pollenizers and do not prune as heavily as they should. These are the cherries that are not

doing the industry a favor. Most Rainier growers have specific blocks of Rainiers. This regulation has long been mentioned by the Rainier growers as what the industry needs to have a good marketable product for the consumer.

6. There was opposition, to the aforesaid action of the Committee, including the submission of various written letters. A typical reply by the Department to various commentators was similar to, or the same, as:

Dear Mr. * * *:

This is in response to your letter regarding the Washington Cherry Marketing Committee's (committee) recommendation to limit the size, to 10 1/2 row and larger, of Rainier variety cherries that can be sold on the fresh market.

The Department of Agriculture (Department) has received a number of letters from Washington cherry growers and shippers both in support of, and in opposition to, the committee's recommendation. Given this lack of consensus, we have asked the committee to reconsider the need to regulate Rainier variety cherries, particularly in light of the concerns raised in these letters. (Copies have been supplied to the committee.) The committee has agreed to hold a meeting March 15, 1994, where it will further discuss this issue. We at the Department encourage you to participate in this meeting to express any further concerns you have.

We appreciate your interest regarding this proposal.

Sincerely,

/s/ Anne M. Dec
for Ronald L. Cioffi, Chief
Marketing Order Administration Branch

cc: Gary Olson, OIC, NWMFO

7. The Chairman of the Washington Cherry Marketing Committee was advised by Mr. Cioffi, Chief, Marketing Order Administration Branch, under date of February 14, 1994:

* * * * *

As you may be aware, we have received a number of letters from Washington cherry growers and shippers both in support of, and in opposition to, the committee's recommendation. Some of the handlers raised concerns that were not addressed in the information we received from the committee in support of this rulemaking action. We would appreciate the committee responding to the concerns raised in these letters to assist us in making a decision on this matter. (Copies of the letters are enclosed for your information.) This reconsideration should take place in an open committee meeting to allow all interested parties to participate in the discussion of this issue.

* * * * *

8. A special meeting was called and held on March 15, 1994, to reconsider the matter and to include the views of those who were opposed to the Committee's actions. In addition to hearing statements by growers and handlers, the Committee heard a presentation by Robert A. Brown, an Engineering Consultant from Wenatchee, Washington. Inherent in some of the discussions of the March 15, 1994, special meeting was the fact that a minimum Brix sugar content would be a desirable factor. As a result, the Committee on March 15, 1994, proposed recommending the minimum size of eleven row and a composite sample of seventeen Brix minimum per grower lot.

9. The Committee's recommendation on size and Brix was forwarded to the Agricultural Marketing Service; was published in the Federal Register on May 19, 1994 (59 Fed. Reg. 26148); was adopted by the Department and incorporated in 7 C.F.R. Part 923. The final rule was published on June 21, 1994 (59 Fed. Reg. 31917). Among other things, the final rule stated:

. . .

The general consensus of the Washington cherry industry is that the shipment of poor quality Rainier cherries is disrupting the marketplace and that some minimum quality standards are needed to maintain the Rainier cherry market. However, some disagreement was expressed at the committee meeting as to precisely what those minimum standards should be.

Some questioned, for example, the 10½ row size requirement initially recommended by the committee, saying that this requirement would result

in too many cherries being diverted to processors (an outlet exempt from regulation). Others stated that the smaller 11 row cherries have adequate sugar content. Still others opposed any size requirement, believing that other criteria (e.g., maturity levels) are more important than size and that size bears no relationship to those criteria.
Additionally, concern was expressed that producers at higher elevations would be more adversely impacted than other producers by a minimum size requirement.

In regards to this last concern, the committee concluded that producers at higher elevations should not be adversely impacted by the 11 row minimum size regulation, since these producers have demonstrated the ability to produce other varieties at acceptable sizes (e.g., Bing cherries). Further, a number of producers who farm at higher elevations attended the meeting, and stated that they would not have a problem meeting the proposed minimum size requirement, and that proper cultural practices (including pruning) would ensure that other producers achieve appropriate sizing.

In an attempt to reach an industry compromise, the committee rescinded its December recommendation to establish a minimum size requirement for Rainier cherries at 10½ row size. It recommended instead a lower minimum size requirement of 11 row, coupled with a maturity requirement of at least 17 percent soluble solids. This recommendation is considered to be conservative, in that most handlers in the Washington cherry industry pack to higher standards. The committee intends to conduct research during the 1994 and subsequent seasons to determine whether further refinements in Rainier variety cherry standards are needed.

* * * * *

In so doing the Department noted that prices for fresh cherries tend to be highest early in the season and that this "price trend serves as an incentive for producers to harvest early, which has resulted in immature, sour Rainier cherries being marketed." The Department placed emphasis on the maturity of Rainier cherries being marketed when it adopted the minimum seventeen Brix level. In the final rule, Agricultural Marketing Service discussed parity price: "The AMS has calculated an equivalent parity price for Washington sweet cherries of $2,083 per ton, and does not expect that prices received during the 1994 season will exceed parity levels." 59 Fed. Reg. 31920 (1994).

10. The Act provides that only "handlers" may bring 15-A Petitions. 7 U.S.C. § 608c(15)(A) provides that only handlers may file a written petition. *See, In re: Sequoia Orange Co., Inc., et al.*, 40 Agric. Dec. 1908 (1981). "Only a handler subject to a Marketing Order can bring a petition pursuant to section 15(A)." *In re: M & R Tomato Distributors, Inc.*, 41 Agric. Dec. 33 (1982). Order No. 923.41, Assessments, provides among other things:

> (a) each person who first handles cherries shall, with respect to the cherries so handled by him, pay to the committee upon demand such person's *pro rata* share of the expenses which the Secretary finds would be incurred by the committee doing each fiscal period. Each such person's share of such expenses shall be equal to the ratio between the total quantity of cherries handled by him as the first handler thereof during the applicable fiscal period and the total quantity of cherries so handled by all persons during the same fiscal period. . . . (Emphasis added)

Section 923.12 of the Order indicates that "handler is synonymous with shipper and means any person (except a common or contract carrier transporting cherries owned by another person) who handles cherries. Sectiön 923.13 expands upon what is meant by handle. Said section provides:

> Handle and ship are synonymous and mean to sell, consign, deliver, or transport cherries or cause the sale, consignment, delivery, or transportation of cherries or in any other way to place cherries, or cause cherries to be placed, in the current of the commerce from any point within the production area to any point outside thereof: Provided, That the term "handle" shall not include the transportation within the production area of cherries from the orchard where grown to a packing facility located within such area for preparation for market, or the delivery of such cherries to such packing facility for such preparation.

11. Hoverhawk, Inc. and Lyons & Son, Inc. describe themselves as growers of Rainier cherries. (Tr. 175, 181-189, 392). They do not meet the definition of "handler" and have been dismissed as Petitioners herein.

Conclusions

The Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to promulgate Marketing Orders for certain fruits and vegetables.

Marketing Orders are implemented by Committees composed of members of the regulated industry. The Committees recommend rules and Regulations to the Secretary to effectuate the Marketing Orders and to govern such matters as fruit size, fruit maturity and advertising. The Secretary may adopt the Committees' recommendations through informal rule making. The expenses to administer the Marketing Orders are funded through assessments imposed on fruit handlers based upon the volume of fruit they ship. The Committees are required to submit annual budgets to the Secretary, along with a recommendation as to the rate of assessment for the year. The Secretary approves the Committees' budget and the assessment to be imposed on handlers for each year in the form of a Regulation.

The Petitioner Auvil maintains that the criteria of size designation were arrived at without determining the scientific relationship between size and sugar content and the further distinction between cherries grown at lower elevations (500 feet to 1500 feet) and those grown at higher elevations (1500 feet to 2500 feet). Moreover it is asserted by Petitioner that such criteria did not include the sugar content. Petitioner Auvil maintains that size is an unreliable indicator of maturity and flavor.

In addition, Petitioner Auvil maintains that the Committee's recommendation of a minimum size of eleven row and a seventeen Brix minimum was without objective basis and that absolutely no scientific evidence was presented to support size as an indicator of maturity. Further, the Petitioner alleges that the Committee did not discuss certain vital matters such as whether a parity price had been set for Rainier cherries, what such price was and how its proposal would affect high altitude growers and small family farms. Moreover, it is alleged that the Committee's actions were an attempt to drive prices up for the benefit of some farmers and to the detriment of other farmers in the higher elevations.

The Petitioner alleges that the Rainier Cherry Marketing Order constitutes an inverse condemnation of private property under the Fifth Amendment of the United States Constitution. It is further alleged that the Department acted arbitrarily and capriciously when it adopted the Rainier Cherry Marketing Order. In addition, it is alleged that the Department violated Petitioner's substantive due process rights guaranteed by the Fifth Amendment to the United States Constitution.

It is well settled that the burden of proof in a (15)(A) proceeding rests with the Petitioner, who has the burden of proving that the challenged Marketing Order provisions or obligations are not in accordance with law. *In re: Borden, Inc., et al.*, 46 Agric. Dec. 1315 (1987) *aff'd* No. H-88-1863 (S.D. Tex. Feb. 13, 1990).

The scope of review is set forth in section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2) which provides that a reviewing body shall set aside agency action that it finds to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; and

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

* * * * *

Petitioner has the burden of proving that the rule making record does not provide the requisite level of support for the Secretary's findings and conclusions. *Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201 (1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971) *cert. denied*, 405 U.S. 917 (1972). In the absence of clear evidence to the contrary, administrative Regulations are presumed to be based on facts justifying the Secretary's exercise of statutory authority. *Lewes Dairy Inc., et al. v. Freeman*, 401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

This proceeding does not afford Petitioner a forum to debate questions of policy, desirability or effectiveness of order provisions. *In re: Sunny Hill Farms Dairy Co., supra*. The responsibility for selecting the best means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative expertise. *In re: Defiance Milk Products Co.*, 44 Agric Dec. 11 (1985), *aff'd*, 857 F.2d 1065 (6th Cir. 1988).

The fact that Petitioner has the burden of proof in this proceeding, and that this is not a proceeding to "second guess" the Secretary's policy judgments, is set forth in many decisions, e.g., *In re: Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), which states:

It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)).

See Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 316-317 (C.A. 3), *certiorari denied,* 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman,* 358 F.2d 681, 682 (C.A. 2); *United States v. Mills,* 315 F.2d 828, 836, 838 (C.A. 4), *certiorari denied,* 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman,* 230 F. Supp. 632, 635-636 (D.N.J.) *affirmed,* 350 F.2d 978 (C.A. 3), *certiorari denied,* 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones,* 61 F. Supp. 209, 217 (E.D. Mo.), *affirmed,* 157 F.2d 87 (C.A. 8), *certiorari denied,* 329 U.S. 788; *Wawa Dairy Farms v. Wickard,* 56 F. Supp. 67, 70 (E.D. Pa), *affirmed,* 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee,* 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.,* 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. *See In re Independent Milk Producer-Distributors' Assoc.,* 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms,* 16 Agriculture Decisions 1209, 1220 (1957), *affirmed,* Southern Dist. Miss., January 5, 1959. *See, also, Pacific States Co. v. White,* 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.,* 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.,* 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield,* 236 F.2d 719, 722 (C.A.D.C.), *certiorari denied,* 352 U.S. 976; *Reed v. Franke,* 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.,* 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation,* 272 U.S. 1, 14-15. *Accord: [Panno v. United States,* 203 F.2d 504, 509 (9th Cir. 1953);] Reines v. Woods, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg.*

Co., 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate,* 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States,* 169 F.2d 375, 381 (C.A. 9), *certiorari denied,* 335 U.S. 853; *Laughlin v. Cummings,* 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.,* 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.,* 300 U.S. 55, 69; *Pacific States Co. v. White,* 296 U.S. 176, 185-186.

The "narrow" scope of review under the arbitrary and capricious standard of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971), as follows:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The court further stated in *Bowman Transp., Inc. v. Ark-Best Freight System, Inc.,*

419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under section 706(2)(A), i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, "and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA,* 541 F.2d 1, 34-37 (D.C. Cir.) *(en banc) (footnotes omitted), cert. denied,* 426 U.S. 941 (1976), as follows:

> This standard of review is a highly deferential one. It presumes agency action to be valid. . . . Moreover, it forbids the court's substituting its

judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision.[73] . . .

This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors * * *."[74] Moreover, it must engaged in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.

> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied,* 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971). . . .

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a

superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. . . . The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. . . . It is settled that we must affirm decisions with which we disagree so long as this test is met.[76] . . .

Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.[77] "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra* 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitrary or capricious.[78] [Footnotes Omitted]

The "narrow" scope of review under the "arbitrary and capricious" standard, under which "a court is not to substitute its judgment for that of the agency," with examples of when a court should reverse an agency, is set forth in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as follows:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* at 285; *Citizens to Preserve Overton Park v. Volpe, supra,* at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *In re: Schepp's Dairy, Inc.*, 35 Agric. Dec. 1477 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepp's Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rule making capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

> Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra*, [401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969)], at page 319.
>
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> While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.
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> In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra*, pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its

purposes. The existence of regulatory altematives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra*, pages 317, 319.

This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co., 26 A.D. 201, 217 [*, aff'd, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).[5] It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

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[5]Sunny Hill cites (26 Agric. Dec. at 217):

> *See, e.g., United States v. Howeth M. Mills, et al., supra* [, 315 F.2d 828, 838 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove, Farms*, 16 A.D. 1209, 1220 (1957), *aff'd*, S.D. Miss., Jan. 5, 1959; *In re Clover Leaf Dairy Company*, 15 A.D. 339 (1956), *aff'd*, N.D. Ind., Sept. 10, 1958. *Cf. Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 182 (1935).

Moreover, under 5 U.S.C. § 706(2)(E), to the extent there is an evidentiary issue, Petitioners must limit any section 8c(15)(A) challenge to the agency's formal rule-making record, and the existence (or absence) of substantial evidence in that record for the Secretary's actions. The above views and cases are set forth in greater length by the Judicial Officer in *Mil-Key Farm, Inc.*, 93 AMA Docket No. M 124-4, (May 25, 1995.

In sum, there is more than sufficient basis in the record evidence to support the provisions of the Secretary's Order No. 923 relating to the handling of Rainier cherries. In exercising his discretionary power, the Secretary considered various approaches and contentions of those favoring and opposing the regulation. His attention to the matter is reflected in his advice to the Committee to hold an open meeting to reconsider the proposed regulation, which was done. The Secretary's action is supported by record evidence.

Petitioner has not demonstrated that the actions complained of are arbitrary or capricious, an abuse of discretion, or, otherwise not in accordance with law. In this type of proceeding the Petitioner cannot claim as a basis for changing the

Regulation that the evidence supports a different result. Rather, the Petitioner must show that the rule making record lacks substantial evidence to support the Regulation that was issued. Herein the Petitioner has not claimed nor did it attempt to establish that anything was erroneous with respect to the process[3] for issuing the rule relative to Rainier cherries. Instead, Petitioner claims that the Committee and the Secretary should have arrived at different results.

In *In re: Schepp's Dairy Inc.*, 35 Agric. Dec. 1477 (1976), aff'd No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom., Schepp's Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rule making capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

> Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier; there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra* [401 F.2d 308 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969)], at page 319.
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> While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.
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[3] Various provision of the Administrative Procedure Act have been cited, *supra*. The Petitioner does not claim lack of due process by reason thereof.

In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely alleged that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra,* pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory altematives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra,* pages 317, 319.

The rule making record of the promulgation of 9 C.F.R. § 923, as it pertains to Rainier cherries, establishes that substantial evidence supported the Regulation. There is record evidence herein that at the time there were those who believed that there were disorderly marketing conditions. The Cherry Committee is composed of growers and handlers with a large amount of experience with cherries in general and also Rainier cherries. The minutes of the meetings reflect that those experienced growers discussed and considered various ways of solving the disorderly marketing conditions which were hurting the ability of anyone to sell Rainier cherries. The minutes reflect that the Committee at first thought that a size only requirement would result in quality Rainier cherries being marketed. After several people raised concerns that the change in size should be discussed more, the Agricultural Marketing Service requested that the Committee reconsider the proposal. The Committee then held an additional meeting to discuss a means of correcting the disorderly marketing conditions. As a result thereof it was determined that both a size requirement and a sugar content (Brix) requirement would provide a quality product. The size was chosen at row eleven because most growers could grow fruit at this size. The combination of both size and Brix content would assure that buyers and consumers were receiving a quality product. The process of review is limited to determining whether the agency presented some rational basis for its decision. The Regulation in size and Brix was a rational means of establishing quality. The Petitioner does not dispute that Brix is an appropriate basis for establishing quality. Both a size Regulation and a sugar content Regulation were rational bases of establishing quality Rainier cherries and the Petitioner presented no evidence to establish that the choice was irrational or contrary to law. However, it is argued that there was not proper attention given to certain other aspects relating to the growing and marketing of Rainier cherries, namely, the relationship of size to maturity, the difference in growing season with respect to the altitude at which the cherries are grown, and that the Committee

lacked reliable scientific evidence that Rainier cherries must be eleven- row size or greater to protect the Rainier market from immature sour fruit. It is also contended by Petitioner that many of the growers at high elevations have a significant portion of their crops reach maturity (seventeen Brix minimum) yet never reach the eleven-row size and that this was a failure by the Department and the Committee to recognize the unique problems of altitude. The evidence of record does not support these contentions of Petitioner Auvil.

The Committee promulgated the Regulation which was adopted by the Secretary that would establish quality fruit so that consumers would continue to buy Rainier cherries. Sour, immature fruit, early in the season was just one of the problems - there was concern that the fruit was small and that the Rainier cherries shipped were of inconsistent quality. A minimum size requirement was needed for Rainier cherries that were being shipped and which were of inconsistent quality. The minimum-size requirement provided a consistency after the Regulation took effect. The Petitioner has not shown that the Brix and size Regulation were not appropriate means of preventing the marketing of poor-quality fruit. This is not to say that a different approach to the problem could have been forthcoming. However, that does not render the actions of the Secretary arbitrary, capricious, or without substantial basis.

The Petitioner has raised various constitutional issues. Initially it will be noted that it cannot be expected that an agency will declare its own actions unconstitutional However, with respect to those issues raised by the Petitioner it will be noted that the decisions of the Judicial Officer and the courts indicate that the Petitioner's arguments in these regards lack merit. The Regulation with respect to Rainier cherries does not violate the Petitioner's equal protection rights since it impacts all handlers, who may be similarly situated, the same. Moreover, the Petitioner's argument that high altitude creates a special problem for growing cherries lacks merit. All farmers have problems due to weather or features of the land that can affect the yield of the commodity grown. Accordingly, all farmers have different but also special problems in growing cherries from floods to being in a location with wind. The high altitude grower is no different than other growers in that there will always be some problem with the condition of the land that will affect the yields of a crop. Moreover, the cultivation practices that growers use will also affect the size of the fruit on the tree. Where there is a lack of a "solid block" of Rainier cherries, the Rainier cherry trees are pollenizers for the dark sweet cherries. (Tr. 171). The use of a Rainier cherry tree as a pollenizer will reduce the size of the cherries the tree produces. (Tr. 107, 159, 309). The vigor of trees and pruning practices are also factors that may affect cherry size. (Tr. 304, 310-312, 343).

The decisions of the Judicial Officer and the courts negate the argument of the Petitioner that the applicable Regulation constitutes an unlawful taking in violation of the Fifth Amendment. In this case the Agricultural Marketing Service regulated the size and sugar content of Rainier cherries in order to eliminate the sale of poor quality fruit. The Regulation was a valid exercise of administrative and statutory power and furthered a legitimate governmental objective. *United States v. Rock Royal Co-op Inc.*, 307 U.S. 533; *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Furthermore, the courts have found that handlers did not have a property right to market a commodity (almonds) free of regulation. 30 Fed.Cl. at 247, *aff'd, Cal-Almond, Inc. et al. v. United States* (Fed. Cir. 1995). As that decision points out, the Petitioner's property rights and reasonable expectation of a profit are limited by the existing regulatory scheme. The Petitioner herein knew about the existence of the proposal for the Regulation prior to it being published in the Federal Register. There was no unconstitutional taking of property from Petitioner.

All of Petitioner's arguments and contentions have been carefully considered. An evaluation of the record as a whole results in the conclusions that there is substantial record evidence to support the promulgation of 9 C.F.R. § 923.322; that Petitioner Auvil Fruit Company has not met its burden of proof; and, that the provisions of the Regulation complained of are not violative of Petitioner's constitutional rights.

Accordingly, the following Order is issued.

Order

Petitioner Hoverhawk, Inc., and Petitioner Lyons & Son, Inc., are not handlers and the Petition is dismissed as to them.

The Petition filed by Auvil Fruit Company is dismissed on its merits as lacking factual or legal basis for the relief sought therein.

All motions, requests, proposals, or suggestions of the parties have been duly considered. To the extent not granted, they are denied.

This Decision and Order shall become final thirty-five (35) days after service on Petitioners unless there is an appeal to the Judicial Officer within thirty (30) days from the receipt hereof.

Copies hereof shall be served upon the parties.

[This Decision and Order became final as to Auvil Fruit Company May 24, 1996.-Editor]

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: JOHN TESAR d/b/a COTTONTAIL GOLF.
AWA Docket No. 95-0048.
Decision and Order filed November 5, 1996.

Failure to appear at hearing - Failure to maintain facilities in good repair - Failure to provide adequate shelter from inclement weather - Failure to provide sufficient potable water - Failure to sanitize water receptacles - Failure to keep primary enclosures clean - Failure to provide for the removal and disposal of dead animals so as to minimize vermin infestation, odors, and disease hazards - Failure to provide a suitable method to rapidly eliminate excess water - Operating as an exhibitor without a license - Cease and desist order - Civil penalty - License disqualification.

Administrative Law Judge Dorothea A. Baker imposed a $12,000 penalty, issued a cease and desist order, and disqualified Respondent from becoming licensed for a period of two years. Respondent failed to appear at the hearing in Knoxville, Tennessee, after being duly notified of the time and place, and without showing good cause. Failure to appear acted as a waiver of the right to an oral hearing and constituted an admission of all material allegations. Judge Baker, accordingly found that Respondent willfully violated the Animal Welfare Act, and the regulations and standards issued pursuant thereto by: keeping rabbits in facilities which were not structurally sound, and were not maintained in good repair so as to protect the animals from injury, contain the animals or restrict the entrance of other animals; failing to provide the rabbits with adequate shelter from rain; failing to provide the rabbits with sufficient potable water; failing to sanitize the water receptacles; failing to keep primary enclosures clean; failing to provide for the removal and disposal of dead animals so as to minimize vermin infestation, odors, and disease hazards; failing to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities; and operating as an exhibitor without a license. Judge Baker imposed the Complainant's recommended sanctions after concluding that such sanctions were appropriate to the case and consistent with departmental policy.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (hereinafter sometimes referred to as the Act), and the regulations and standards issued under the Act (9 C.F.R. § 1.1 *et seq.*). It was instituted by a Complaint filed on April 11, 1995 by the Acting Administrator, Animal and Plant Health Inspection Service (APHIS).

The Complaint alleges that the Respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*). The

Respondent filed an Answer to the Complaint on May 18, 1995. Complainant filed a Motion for Hearing on January 24, 1996. A telephone conference call took place on March 5, 1996 and an agreement was reached with respect to the time and place of the hearing which was set for June 18, 1996, in Knoxville, Tennessee. On May 13, 1996, an order was filed setting the location of the hearing room as Room 125, John Duncan Federal Building, 710 Locust Street, Knoxville, Tennessee.

On June 18, 1996, the hearing in this matter was called to order at 9:00 a.m., Eastern Standard Time, in the John Duncan Federal Building, 710 Locust Street, Knoxville, Tennessee. James D. Holt, Esquire, Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the Complainant. Respondent was neither present nor represented.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) of the United States Department of Agriculture's administrative regulations apply to all adjudicatory proceedings under the statutory provisions of the Animal Welfare Act. Section 1.141(e) of the Rules of Practice (7 C.F.R. §1.141(e)) provides that a Respondent who, after being notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to 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 material allegations of fact contained in the Complaint.

At the oral hearing a briefing schedule was established:

> "Complainant's Proposed Findings of Fact, Conclusions, Order and Brief in Support thereof were to be filed by August 2, 1996 and the Respondent's Proposed Findings of Fact, Conclusions, Order and Brief in Support thereof were to be filed by September 16, 1996."

The Respondent was notified of the aforesaid briefing schedule by document dated June 19, 1996. The Complainant timely filed its brief. The Respondent filed nothing. The case was referred to the Administrative Law Judge for Decision on September 27, 1996.

Discussion

Section 2.1, Title 9, Code of Federal Regulations, requires any person operating as an exhibitor to have a valid license issued by APHIS, United States Department of Agriculture. An "exhibitor," as defined by section 1.1, Title 9, Code of Federal

Regulations, includes carnivals, circuses, animal acts, zoos and educational exhibits, exhibiting such animals whether operated for profit or not.

Each exhibitor is required to comply in all respects with the regulations set forth in Part II and the standards set forth in Part III of the Animal Welfare Subchapter of Title 9, Code of Federal Regulations, for the humane handling, care, treatment, housing and transportation of animals.

Section 3.50(a), Title 9, Code of Federal Regulations, requires that indoor and outdoor housing facilities for rabbits must be structurally sound and be maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

Section 3.50(d), Title 9, Code of Federal Regulations, requires that provisions must be made for the removal and disposal of animal and food waste, bedding, dead animals and debris. This section also provides that disposable facilities must be operated as to minimize vermin infestation, odors, and disease hazards.

Section 3.52(b), Title 9, Code of Federal Regulations, requires that rabbits kept outdoors must be provided with access to shelter to allow them to remain dry during rain or snow.

Section 3.52(e), Title 9, Code of Federal Regulations, requires that a suitable method must be provided to rapidly eliminate excess water.

Section 3.55, Title 9, Code of Federal Regulations, requires that sufficient potable water must be provided daily, except as might otherwise be required to provide adequate veterinary care. This section also provides that all watering receptacles must be sanitized when dirty.

Section 3.56(a), Title 9, Code of Federal Regulations, requires that primary enclosures must be kept reasonably free of excreta, hair, cobwebs and other debris by periodic cleaning.

If the Secretary has reason to believe that any person licensed as an exhibitor subject to the Act has violated any provision of the Act, or any of the rules or regulations or standards promulgated by the Secretary thereunder, he might suspend such person's license temporarily, but not to exceed twenty-one days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

Any exhibitor subject to the Act that violates any provision of the Act or any rule, regulation or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500.00 for each such violation, and the Secretary may also make an Order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense.

Premised upon the record as a whole and the admission by the Respondent of all material allegations of fact contained in the Complaint by reason of his nonappearance at the hearing, the record justifies the following Findings of Fact.

Findings of Fact

1. John Tesar, doing business as Cottontail Golf, is an individual whose business address was Respondent operated a miniature golf course on which he allowed pet rabbits to roam freely. (Tr. 9).

2. The Respondent, at all times material herein, was operating as an exhibitor as defined in the Act and the regulations. Respondent was licensed as an exhibitor but allowed his license to expire on October 15, 1994.

3. When the Respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On April 26, 1994, Respondent's housing facilities for rabbits were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. (Ex. 1; Tr. 8, 10).

5. On April 26, 1994, Respondent's rabbits kept outdoors were not provided with adequate shelter to allow them to remain dry during rain. (Ex. 1; Tr. 11).

6. On April 26, 1994, Respondent's rabbits were not provided with sufficient potable water and water receptacles were not sanitized. On April 26, 1994, Respondent's primary enclosure for rabbits were not kept clean as required. (Ex. 1; Tr. 11-12).

7. On June 8, 1994, Respondent had not made provisions for the removal and disposal of dead animals so as to minimize vermin infestation, odors, and disease hazards. (Ex. 2; Tr. 15).

8. On June 8, 1994, Respondent had not provided a suitable method to rapidly eliminate excess water from outdoor housing facilities for rabbits. (Ex. 2-11; Tr. 14-16).

9. On June 8, 1994, Respondent's housing facilities for rabbits were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. (Ex. 2-11; Tr. 15).

10. On June 8, 1994, Respondent's rabbits which were kept outdoors were not provided with adequate shelter to allow them to remain dry during rain. (Ex. 2-11; Tr. 16).

11. On June 8, 1994, Respondent's rabbits were not provided with sufficient potable water and water receptacles were not sanitized. (Ex. 2-11; Tr. 15-19).

12. On June 8, 1994, Respondent's primary enclosures for rabbits were not kept clean as required. (Ex. 2-11; Tr. 15-18).

13. On October 15, 1994 through April 26, 1995, Respondent operated as an exhibitor as defined in the Animal Welfare Act and the regulations, without a license.

Discussion

Respondent became a Class "C" exhibitor, License No. 63-C-115, under the Animal Welfare Act on August 8, 1993. His facility, Cottontail Golf, was a miniature golf course on which he allowed approximately sixty-five to one-hundred rabbits to roam free. (CX 4-5; Tr. 9).

Dr. John Guedron has been a Veterinary Medical Officer employed by the United States Department of Agriculture, APHIS, Regulatory Enforcement and Animal Care, for three years and testified at the hearing. As a Veterinary Medical Officer, Dr. Guedron conducts inspections of facilities licensed or registered under the Animal Welfare Act for compliance. Dr. Guedron notes his inspection findings on an Animal Care Inspection Report. (APHIS Form 7008). Noncompliance items noted during the inspection were designated as category three violations. Noncompliance items previously identified that had not been corrected were designated as a category four violations. (Ex. 1; Tr. 6-9, 14).

As part of his duties, Dr. Guedron, on April 26, 1994, conducted an inspection of Respondent's facility at [illegible], Tennessee. During his inspection, Dr. Guedron noted the following category three violations:

1. Housing facilities for rabbits were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, in violation of 9 C.F.R. § 3.50(a):

2. Rabbits kept outdoors were not provided with adequate shelter to allow them to remain dry during rain in violation of 9 C.F.R. § 3.52(b);

3. Rabbits were not provided with sufficient potable water and water receptacles were not sanitized in violation of 9 C.F.R. § 3.55; and,

4. Primary enclosures for rabbits were not kept clean in violation of 9 C.F.R. § 3.56(a). (Ex 1; Tr. 7-13).

As part of his duties as a Veterinary Medical Officer, Dr. Guedron, on June 8, 1994, conducted an inspection of Respondent's facility , , Tennessee. During his inspection Dr. Guedron noted the following three and four violations:

(1) Provisions were not made for the removal and disposal of dead animals so as to minimize vermin infestation, odors, and disease hazards in violation of 9 C.F.R. § 3.50(d);

(2) A suitable method was not provided to rapidly eliminate excess water from outdoor housing facilities for rabbits in violation of 9 C.F.R. § 3.52(e);

(3) Housing facilities for rabbits were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals in violation of 9 C.F.R. § 3.50(a);

(4) Rabbits kept outdoors were not provided with adequate shelter to allow them to remain dry during rain in violation of 9 C.F.R. § 3.52(b);

(5) Rabbits were not provided with sufficient potable water, and water receptacles were not sanitized in violation of 9 C.F.R. § 3.55; and

(6) Primary enclosures for rabbits were not kept clean in violation of 9 C.F.R. § 3.56(a). (Ex. 2-11; Tr. 13-22).

By letter dated August 2, 1994, and signed for on or about August 4, 1994, Respondent was advised that his license was due for renewal on or before October 15, 1994. He was also advised that if his license was canceled and he continued to operate as a dealer or exhibitor, he would be in violation of the Animal Welfare Act and subject to prosecution. (Ex. 15). The License No. involved was 63-C-115. Subsequently, by undated letter, Respondent was advised that his license renewal documents and fee had not been received and that his Class "C" license had been automatically terminated on the anniversary date of October 15, 1994. (Ex. 16; Tr. 26-27). On November 4, 1994, Dr. Guedron, as part of his duties as a Veterinary Medical Officer, conducted an inspection of Respondent's facility at 1007 Parkway, Gatlinburg, Tennessee, and Dr. Guedron

determined that the Respondent was still operating as a Class "C" exhibitor even though his Class "C" license had been terminated on October 15, 1994. (Ex. 19-21; Tr. 22-24).

Mr. Michael Notingham is an Investigator for Regulatory Enforcement, APHIS, United States Department of Agriculture. On April 26, 1995 Dr. Guedron and Investigator Notingham visited Respondent's facility at 1007 Parkway, Gatlinburg, Tennessee. They determined that Respondent was still operating as a Class "C" exhibitor even though his Class "C" license had been terminated on October 15, 1994. (Tr. 28-33). On May 2, 1995 in a sworn affidavit provided to Investigator Notingham, Respondent stated, among other things:

> I am presently self employed as sole owner of Cotton Tail Golf for 3 years. At this time I am not licensed with the USDA. The end of March 1995, I opened Cotton Tail Golf. I was told by Dr. Guedron on the telephone in February 1995 that he would come to Cotton Tail Golf in March 1995 to inspect my facility. I did not realize I was to call Dr. Guedron when I open Cotton Tail Golf. I am open this date and do have rabbits on my golf course. At time I have around 64 rabbits on my Golf course.
>
> I know I am in violation of the Animal Welfare Act by exhibiting rabbits on my golf course without a USDA license. I was under the impression that I was in the process of being re-licensed. I mailed a check for my USDA license to the Tampa Office, in December, 1994 or January, 1995. (Ex. 13; Tr. 33).

Respondent's exhibition of rabbits without a USDA license for over seven months is a violation that strikes at the very heart of the Act. Additionally, Respondent's failure to provide structurally sound housing facility for his rabbits, as was noted during the April 26 and June 8, 1994 inspections, subjected the animals to injury, failed to contain the animals in a protective environment, and failed to protect the rabbits from harm from other animals. Respondent's failure to provide a clear exhibit area, adequate shelter, and potable water in sanitized receptacles, as was noted during the April 26, and June 8, 1994 inspections, affected, or had a strong potential to affect, the health of the animals exhibited at Respondent's facility. Also, affecting the health of the animals was Respondent's failure to provide for the removal and disposal of dead animals so as to minimize vermin infestation, odors, and disease hazards. Both inspection reports included numerous violations of the regulations. The continuation of the violations demonstrates that the Respondent did not make serious efforts to comply with the Act and that his failure was willful.

The Complainant seeks a Cease and Desist Order, a civil penalty of $12,000.00, and a disqualification for a period of two years from becoming licensed. Such sanctions sought by the Complainant are consistent with sanctions imposed in other Animal Welfare Act cases of a somewhat similar nature.

The evidence herein is meager or non-existent, as to the size of Respondent's business and the history of any prior violations. However, with respect to the violations involved, the record contains an abundance of evidence that Respondent was given clear notice of the many deficiencies of his facility and ample opportunity to correct them. Also, Respondent had unequivocal notice that after October 15, 1994 he was operating without a license, a violation of the Act. The purpose of sanction is to deter Respondent, as well as others, from committing the same or similar violations. Although there is no indication that the rabbits suffered harm, many of the violations herein were serious and could have impaired the health of the animals. See *In re: Ronald DeBruin,* 54 Agric. Dec. 876 (1995) ($5,000.00 civil penalty and a thirty-day suspension of a license for twenty-one violations of the Act and regulations and standards issued under the Act); *In re: Patrick D. Hoctor,* 54 Agric Dec. 114 (1995) ($7,500.00 civil penalty and a forty-day suspension of a license for "more than" fifteen violations of the Act and regulations and standards issued under the Act), *appeal docketed* No. 95-2571 (7th Cir. July 3, 1995); *In re: James Petersen, et al.,* 53 Agric. Dec. 80 (1994) ($5,000.00 civil penalty and a one year license disqualification); *In re: Alex Pasternak,* 52 Agric. Dec. 180 (1993) ($10,000.00 civil penalty and a minimum one-year license suspension); *In re: Dwight Carpenter et al.,* 51 Agric. Dec. 239 (1992) ($3,000.00 civil penalty and a minimum six-month license suspension). *See, also, Big Bear Farm Inc., et al.,* AWA Docket No. 93-32 (March 15, 1996). The Department's current sanction policy is set forth in *In re: S.S. Farms Linn County, Inc., et al.,* 50 Agric Dec. 476 (1991), *aff'd,* 991 F.2d 803 (9th Cir. 1993).

A consideration of the record as a whole, including the testimony and exhibits adduced at the oral hearing, leads to the conclusion that the Respondent willfully has violated the Act, and the regulations and standards issued thereunder, and, that the following Order is authorized by the Act and warranted under the circumstances.

Order

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

and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of Twelve Thousand Dollars ($12,000.00). Respondent shall send a certified check or money order for Twelve Thousand Dollars ($12,000.00) payable to "Treasurer of the United States," to United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Post Office Box 3334, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the Docket Number of this proceeding.

3. Respondent is disqualified for a period of two (2) years from becoming licensed under the Act and regulations.

The suspension provisions of this Order shall be effective Thirty (30) days after the date of service of this Order on Respondent unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (9 C.F.R. § 1.145). The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

All motions, contentions and request of the parties have been carefully considered and, to the extent not ruled upon or to the extent they may be inconsistent with this decision, they are hereby denied.

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 27, 1997.-Editor]

In re: VOLPE VITO, INC., d/b/a FOUR BEARS WATER PARK AND RECREATION AREA.
AWA Docket No. 94-08.
Decision and Order filed January 13, 1997.

Cease and desist order — Civil penalty — License revocation — Recordkeeping violations — Failing to provide appropriate veterinary care and facilities — Failing to maintain programs for nonhuman primates — Preponderance of the evidence — Substantial evidence — Correction dates —Proportionality of sanction — Willful — Sanction policy.

The Judicial Officer affirmed Judge Kane's (ALJ) Decision and Order revoking Respondent's license and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the regulations and standards issued under the Act. However, the Judicial Officer assessed a civil penalty of $26,000. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. The Judicial Officer found inspection reports introduced by Complainant and Complainant's witness' testimony to be substantial evidence of 51 violations alleged in the Complaint; consequently, the Judicial Officer reversed the ALJ's dismissal of 45 of those violations. The inspection reports were not prepared in

anticipation of litigation, and the facts surrounding the preparation of the inspection reports are not similar to the facts surrounding preparation of the documents at issue in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995). Off-the-record discussions between counsel and counsel's witness are not prohibited by the Administrative Procedure Act or the Rules of Practice, and the record does not reveal any instruction by the ALJ that counsel and counsel's witness were not to discuss testimony off-the-record. Respondent's violations were willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)). Respondent's argument that the sanction imposed is disproportionate to sanctions imposed in two previous disciplinary proceedings under the Animal Welfare Act is without merit because Respondent is not entitled to a sanction no more severe than that applied to others, and the facts in the two previous cases cited by Respondent are not similar to the facts in the proceeding against Respondent. Respondent's failing health is not a mitigating factor. The ALJ erred by excluding from evidence a warning letter concerning previous alleged violations by Respondent. While the warning letter is not relevant to the violations alleged in the Complaint, it is relevant to the sanction. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Animal Welfare Act and the Department's sanction policy.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) (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 Regulations and Standards). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151), and the Rules of Practice Governing Proceedings Under the Animal Welfare Act, (9 C.F.R. §§ 4.1-.11) (hereinafter the Rules of Practice), by a Complaint filed on March 1, 1994, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant).[1]

The Complaint alleges that Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area (hereinafter Respondent), willfully violated the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act. On March 22, 1994, Mr. Louis Stramaglia, president of Respondent, filed an Answer on behalf of Respondent admitting the allegations in paragraph I of the Complaint and denying the allegations in paragraphs II-X of the Complaint. On April 13, 1994, George M. Foote, Esq., Leslie M. Alden, Esq., and the law firm of Verner,

[1]On June 23, 1994, Complainant filed a Motion to Correct Errors in the Complaint, which was not opposed by Respondent. On June 24, 1994, Administrative Law Judge Paul Kane (hereinafter ALJ) issued an Order to Correct Typographical Errors in the Complaint, which amended the date of the violations alleged in paragraphs II(B) and II(C) of the Complaint to read "September 19, 1991."

Liipfert, Bernhard, McPherson and Hand, McLean, Virginia, entered an appearance on behalf of Respondent.

The ALJ presided over a hearing on August 16-17, 1994, in Detroit, Michigan. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture (hereinafter USDA), represented Complainant. Leslie M. Alden, Esq., represented Respondent. On January 27, 1995, counsel for Respondent filed a Motion Seeking Leave to Withdraw as counsel for Respondent, which was granted by the ALJ on February 2, 1995.

On September 15, 1995, the ALJ issued an Initial Decision and Order revoking Respondent's Animal Welfare Act license and directing Respondent to cease and desist from various practices.

On November 17, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[2] On January 5, 1996, Complainant filed Complainant's Appeal of Decision and Order and Brief in Support of the Complainant's Appeal; Complainant's Opposition to the Respondent's Appeal (hereinafter Complainant's Appeal). On March 11, 1996, Respondent filed Respondent's Response in Opposition to Complaintant's [sic] Appeal of Decision and Order; and, Respondent's Response to Complaintant's [sic] Appeal of Respondent's Appeal (hereinafter Respondent's Response), and on March 13, 1996, Complainant filed Complainant's Response to Respondent's Pleadings. On March 15, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I agree with the ALJ that Respondent willfully violated the Animal Welfare Act and the Regulations. Specifically, I agree with the ALJ's conclusions that Respondent failed to maintain complete records in violation of section 10 of the Animal Welfare Act, (7 U.S.C. § 2140), and section 2.75(b)(1) of the Regulations, (9 C.F.R. § 2.75(b)(1)), as alleged in paragraphs III(A),[3] IV(A), V(A), and VI(A)

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

[3]The ALJ's conclusions in the Initial Decision and Order (Initial Decision and Order at 27-28) do not include a conclusion that Respondent failed to maintain records on January 2, 1992, as alleged in paragraph III(A) of the Complaint. However, the ALJ found that Respondent violated section 10 of the Animal Welfare Act, (7 U.S.C. § 2140), and section 2.75(b)(1) of the Regulations, (7 C.F.R. § 2.75(b)(1)), as alleged in paragraph III(A) of the Complaint, as follows:

of the Complaint and refused to allow the Animal and Plant Health Inspection Service (hereinafter APHIS), USDA, to inspect Respondent's animals, facilities, and records in violation of section 16 of the Animal Welfare Act, (7 U.S.C. § 2146), and section 2.126 of the Regulations, (9 C.F.R. § 2.126), as alleged in paragraphs III(C) and X(A) of the Complaint. (Initial Decision and Order at 27.)

However, I agree with Complainant that the ALJ dismissed many violations alleged in the Complaint that Complainant has proven by at least a preponderance of the evidence.[4] Specifically, I agree that Complainant has carried its burden of proof by a preponderance of the evidence that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in paragraphs II(A); II(B); II(C)(1)-(6), (8); III(B); III(D)(1)-(2), (4)-(5), (7); IV(B); IV(C)(1); V(B)(1)-(4); VI(B)(1)-(2); VII(B); VII(C)(1)-(4); VIII(A)(1)-(2), (5)-(7); IX(B)(2)-(4), (6); X(B); and X(C)(2), (5)-(7), (9)-(11) of the Complaint.

Count II(A), Count III(A), Count IV(A), Count V(A), Count VI(A), Count VII(A)

. . . .

. . . While proof of events which allegedly occurred on September 19, 1991 having failed for technical reasons, (Finding #9) the record is sufficiently clear that [R]espondent failed to maintain adequate records on January 2, 1992, (Finding #10), January 16, 1992 (Finding #12A), July 15, 1992 (Finding #13A), and October 20, 1992 (Finding #14A). . . .

Initial Decision and Order at 15-16.

[4]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part and remanded*, No. 96-1317 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

While the Complainant has a prima facie case with respect to the violations alleged in paragraphs II(C)(7), (9); III(D)(3), (6); IV(C)(2)-(6); V(B)(5)-(6); VII(A); VII(C)(5)-(6); VIII(A)(4); IX(A); IX(B)(1), (5); and X(C)(1), (3)-(4), (8) of the Complaint, I find that the evidence is not as strong as that customarily necessary in these types of cases to support reversal of the ALJ. Further, I find that Complainant does not have a prima facie case with respect to the violation alleged in paragraph VIII(A)(3) of the Complaint.

Since I found numerous violations not found by the ALJ, and I disagree with much of the ALJ's discussion, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order.

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

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

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

7 U.S.C. § 2140.

§ 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).

9 C.F.R.:

PART 2 — REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

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

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

9 C.F.R. § 2.75(b)(1).

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

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

(1) To enter its place of business;

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

(3) To make copies of the records;

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

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

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

9 C.F.R. § 2.126.

. . . .

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(a)(1).

. . . .

PART 3—STANDARDS

. . . .

SUBPART D—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF NONHUMAN PRIMATES

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.75 Housing facilities, general.

. . . .

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures and equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other businesses. If a housing facility is located on the same premises as any other businesses, it must be physically separated from the other businesses so that animals the size of dogs, skunks, and raccoons, are prevented from entering it.

(c) *Surfaces—(1) General requirements.* The surfaces of housing facilities—including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or objects within the facility—must be

constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(ii) Be free of jagged edges or sharp points that might injure the animals.

. . . .

(3) *Cleaning*. Hard surfaces with which nonhuman primates come in contact must be spot-cleaned daily and sanitized in accordance with § 3.84 of this subpart to prevent accumulation of excreta or disease hazards. If the species scent mark, the surfaces must be sanitized or replaced at regular intervals as determined by the attending veterinarian in accordance with generally accepted professional and husbandry practices. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material, and planted enclosures must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be removed or replaced whenever raking and spot cleaning does not eliminate odors, diseases, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done by any of the methods provided in § 3.84(b)(3) of this subpart for primary enclosures.

. . . .

(e) *Storage*. Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Food requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. Only the food and bedding currently being used may be kept in animal areas, and when not in actual use, open food and bedding supplies must be kept in leakproof containers with tightly fitting lids to

prevent spoilage and contamination. Substances that are toxic to the nonhuman primates but that are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

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

9 C.F.R. § 3.75(b), (c)(1), (c)(3), (e), (f).

§ 3.76 Indoor housing facilities.

(a) *Heating, cooling, and temperature.* Indoor housing facilities must be sufficiently heated and cooled when necessary to protect nonhuman primates from temperature extremes and to provide for their health and well-being. The ambient temperature in the facility must not fall below 45 °F (7.2 °C) for more than 4 consecutive hours when nonhuman primates are present, and must not rise above 85 °F (29.5 °C) for more than 4 consecutive hours when nonhuman primates are present. The ambient

temperature must be maintained at a level that ensures the health and well-being of the species housed, as directed by the attending veterinarian, in accordance with generally accepted professional and husbandry practices.

9 C.F.R. § 3.76(a).

. . . .

§ 3.78 Outdoor housing facilities.

. . . .

(b) *Shelter from the elements.* Outdoor housing facilities for nonhuman primates must provide adequate shelter from the elements at all times. It must provide protection from the sun, rain, snow, wind, and cold, and from any weather conditions that may occur. The shelter must safely provide heat to the nonhuman primates to prevent the ambient temperature from falling below 45 °F (7.2 °C), except as directed by the attending veterinarian and in accordance with generally accepted professional and husbandry practices.

9 C.F.R. § 3.78(b).

. . . .

§ 3.80 Primary enclosures.

Primary enclosures for nonhuman primates must meet the following minimum requirements:

(a) *General requirements.* . . .

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

. . . .

(ix) Enable all surfaces in contact with nonhuman primates to be readily cleaned and sanitized in accordance with § 3.84(b)(3) of this subpart, or replaced when worn or soiled[.]

9 C.F.R. § 3.80(a)(2)(ix).

§ 3.81 Environmental enhancement to promote psychological well-being.

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

9 C.F.R. § 3.81.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.82 Feeding.

(a) The diet for nonhuman primates must be appropriate for the species, size, age, and condition of the animal, and for the conditions in which the nonhuman primate is maintained, according to generally accepted and professional and husbandry practices and nutritional standards. The food must be clean, wholesome, and palatable to the animals. It must be of sufficient quantity and have sufficient nutritive value to maintain a healthful condition and weight range of the animal and to meet its normal daily nutritional requirements.

. . . .

(d) Food and food receptacles, if used, must be located so as to minimize any risk of contamination by excreta and pests. Food receptacles must be kept clean and must be sanitized in accordance with the procedures listed in § 3.84(b)(3) of this subpart at least once every 2 weeks. Used food receptacles must be sanitized before they can be used to provide food to a different nonhuman primate or social grouping of nonhuman primates. Measures must be taken to ensure there is no molding, deterioration, contamination, or caking or wetting of food placed in self-feeders.

9 C.F.R. § 3.82(a), (d).

. . . .

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

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from inside .each indoor primary enclosure daily and from

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

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

(1) A used primary enclosure must be sanitized in accordance with this section before it can be used to house another nonhuman primate or group of nonhuman primates.

(2) Indoor primary enclosures must be sanitized at least once every 2 weeks and as often as necessary to prevent an excessive accumulation of dirt, debris, waste, food waste, excreta, or disease hazard, using one of the methods prescribed in paragraph (b)(3) of this section. However, if the species of nonhuman primates housed in the primary enclosure engages in scent marking, the primary enclosure must be sanitized at regular intervals determined in accordance with generally accepted professional and husbandry practices.

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

(i) Live steam under pressure;

(ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, such as in a mechanical cage washer;

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

(4) Primary enclosures containing material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as sand, gravel, dirt, absorbent bedding, grass, or planted areas, must be sanitized by

removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.

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

9 C.F.R. § 3.84(a), (b), (c).

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

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

. . . .

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

9 C.F.R. § 3.125(a), (c).

§ 3.126 Facilities, indoor.

(a) *Ambient temperatures.* Temperature in indoor housing facilities shall be sufficiently regulated by heating or cooling to protect the animals from the extremes of temperature, to provide for their health and to prevent their discomfort. The ambient temperature shall not be allowed to fall below nor rise above temperatures compatible with the health and comfort of the animal.

. . . .

(c) *Lighting.* Indoor housing facilities shall have ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Such lighting shall be uniformly distributed and of sufficient intensity to permit routine inspection and cleaning. Lighting of primary enclosures shall be designed to protect the animals from excessive illumination.

9 C.F.R. § 3.126(a), (c).

§ 3.127 Facilities, outdoor.

. . . .

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

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. . . .

9 C.F.R. § 3.127(b), (c).

§ 3.128 Space requirements.

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

9 C.F.R. § 3.128.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

9 C.F.R. § 3.129(a).

§ 3.130 Watering.

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

9 C.F.R. § 3.130.

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

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

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

9 C.F.R. § 3.131(a), (c), (d).

§ 3.132 Employees.

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

9 C.F.R. § 3.132.

. . . .

TRANSPORTATION STANDARDS

. . . .

§ 3.137 Primary enclosures used to transport live animals.

No dealer, research facility, exhibitor, or operator of an auction sale shall offer for transportation or transport, in commerce, any live animal in a primary enclosure which does not conform to the following requirements:

(a) Primary enclosures, such as compartments, transport cages, cartons, or crates, used to transport live animals shall be constructed in such a manner that (1) the structural strength of the enclosure shall be sufficient to contain the live animals and to withstand the normal rigors of transportation[.] . . .

9 C.F.R. § 3.137(a)(1).

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

(a) The animal cargo space of primary conveyances used in transporting live animals shall be designed and constructed to protect the health, and ensure the safety and comfort of the live animals contained therein at all times.

9 C.F.R. § 3.138(a).

Discussion

Respondent, Volpe Vito, Inc., doing business as Four Bears Water Park and Recreation Area, is a corporation whose address is 3000 Auburn Road, Utica, Michigan 48087. (Answer ¶ I(A); CX 2, 10.) Four Bears Water Park and Recreation Area covers approximately 125 acres in Utica, Michigan. (Tr. 425.) Respondent has been in business since 1983 and has exhibited animals for "[a]bout seven years." (Tr. 384.) Four Bears Water Park and Recreation Area consists of two separate sites that are regularly inspected by APHIS. Site one is the water park that is open to the public from Memorial Day to Labor Day, (Tr. 398-99), and located at [redacted] Utica, Michigan. Site two is a winter holding area for the animals when the water park is closed, (Tr. 32), and located at [redacted], Utica, Michigan. Approximately 100,000 people visit Four Bears Water Park and Recreation Area during the summer, (Tr. 425). While the price of admission ranges from $11.95 to $0 per person, the average price for admission is $5 per person, (Tr. 425).

At all times material to this proceeding, Respondent was licensed and operating as an exhibitor as defined in the Animal Welfare Act and the Regulations, (Answer ¶ I(B)). When Respondent became licensed, and annually thereafter, Respondent received copies of the Animal Welfare Act, the Regulations, and the Standards and agreed in writing to comply with the Animal Welfare Act, the Regulations, and the Standards, (Answer ¶ I(C)). From September 19, 1991, through February 1, 1994, Respondent's premises was inspected on nine different occasions by Dr. Lisa Dellar, a veterinarian employed by APHIS. Dr. Dellar described her background and experience with APHIS and the Animal Welfare Act, as follows:

BY MS. DESKINS:

Q. Dr. Dellar, could you please tell us about your educational background since high school?

[BY DR. DELLAR:]

A. Since high school I've received a Bachelor's in Science, Animal Science, at Michigan State University. And from there I went on to the College of Veterinary Medicine and I graduated with a Doctorate in Veterinary Medicine in 1983.

Q. Okay. And what did you do after graduating from veterinary school?

A. In 1983 I went into private practice which was mostly 90 percent small animals and 10 percent large animals. I practiced for about three years. Then I left private practice and went into industry where I was a laboratory animal veterinarian working on cancer research at Dow Chemical in Midland, Michigan.

After working a year at Dow Chemical I applied to the United States Department of Agriculture and got a job -- entered into the PVPC Program which is an accelerated program for veterinarians given special training and special overview for the USDA. And at the end of the program I was given an option of where I would like to go and I picked veterinary services in Michigan.

Q. Okay. Now, what are your job duties -- what year did you start to work for the Animal and Plant Health Inspection Service?

A. I started in September of 1987.

Q. Okay. And what are your current job duties?

A. Currently I'm with the Regulatory Enforcement of Animal Care. I perform animal welfare inspections throughout the State of Michigan, both the Lower and the Upper Peninsula, and I also enforce the Horse Protection Act throughout the United States.

Q. Now, how long have you held this position?

A. I have been with REAC since the origination of the agency, and it originated in October of 1988.

Q. And REAC stands for Regulatory Enforcement of Animal Care?

A. Correct.

Q. Can you tell us what training courses you've had relative to the Animal Welfare Act?

A. I've had several courses during my PVPC training and in REAC. I have attended the basic animal care training course. I have attended the

animal transportation course. I've attended the records keeping inspection course. And the best course which I felt really gave me insight into my job was the zoo animal inspection course held at the Atlanta Zoo which focused mainly on primates and elephants.

Q. How long -- approximately how many inspections of animal dealers or exhibitors under the Animal Welfare Act do you perform per year?

A. I, approximately, inspect 350 sites a year. And approximately two-thirds of those -- a third to two-thirds of those are dealers and exhibitors.

Q. Okay. And of those, what number -- just approximately, what number of those involve people that have exotic animals?

A. Out of all of my dealers and exhibitors I would have to say 75 percent -- close to 75 percent have exotic or wild animals.

Q. And can you please define for us what the term "exotic animals" means under the Animal Welfare Act?

A. The Department defines "exotic" as animals that are not native to the United States and are imported from other countries.

Tr. 12-14.

Immediately after each inspection of Respondent's premises, Dr. Dellar completed APHIS inspection forms on which Dr. Dellar recorded the findings she made during each inspection of Respondent's premises.[5] Dr. Dellar described the method by which she inspected Respondent's premises and completed the APHIS inspection forms, as follows:

[BY MS. DESKINS:]

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[5]The form used to record findings made during inspections conducted in accordance with the Animal Welfare Act was modified in August 1991. The form used by Dr. Dellar to record her findings immediately after her September 19, 1991, January 2, 1992, and January 16, 1992, inspections of Respondent's premises is entitled *Inspection of Animal Facilities, Sites or Premises.* The form used by Dr. Dellar to record her findings immediately after her July 15, 1992, October 20, 1992, August 10, 1993, September 14, 1993, January 3, 1994, and February 1, 1994, inspections of Respondent's premises is entitled *Animal Care Inspection Report.*

Q. Okay. Dr. Dellar, can you just tell us what your normal inspection procedures are?

[BY DR. DELLAR:]

A. Sure. Normally I arrive at a facility and tell the facility that I'm there, and I'm there to conduct an Animal Welfare Inspection. After notifying them, I'm usually assigned to someone who will then take me around and tour the animal facilities. I'm required to look at every single animal, and I do. If questions arise I would look at medical records at that time. I would ask questions and that may lead me to other areas. I check food, storage areas; any area that's animal related.

Once I've completely looked at the physical facility, then I come back and I check the records. These would be acquisition disposition forms and animal inventory forms. If there are further questions I may talk to the attending veterinarian, I may talk to the owner or the caretakers, depending on what my inspection turns up.

At the end I write a comprehensive report detailing what I've found and the correction dates for the non-compliant items. Then I conduct an exit interview with either the person who's been assigned to take me around or the owner of the facility. And I go over every single point, what I found, when the correction date is and make sure that they both can read my writing, because my writing isn't all that great, and that they understand what they're being cited for.

Then I ask for a signature so that they can obtain a copy of the inspection form, and then I leave.

. . . .

Q. Okay. And could you please just -- let's just go over what's contained in the inspection form. Why don't you start with the top of this particular form?

A. Okay. This is the old-style inspection form. Recently, the Department has changed over forms. This is the original style that we had to work with. In block number one is the facility's license number. Thirty-

four means that it's in the State of Michigan. C, means that they are a licensed exhibitor. And then the last three digits are their arbitrary number that has been assigned to them as an identification.

Block two tells me how many pages my report contains. Block three tells me what type of facility it is again, and I marked "Exhibitor." Block four tells me the date of the inspection. Block five tells me the time that I arrived at the facility. Block six tells me the date of the last inspection. And block seven tells me the time of the last inspection. Block eight tells me the name and mailing address of the facility, which is Volpe Vito; their mailing address is in Rochester Hills. Block nine tells me what they're doing business as, and it also tells me that this is their first site and their address of their first site is [redacted] in Utica, Michigan.

Q. Okay. Now let's look at blocks 12 through 45, can you just describe what those blocks are meant to show?

A. Lines 12 through 45 are the standards that I inspect, and the numbers that correspond under the animal tie -- under the animal listings are the exact paragraphs where that particular standard can be found.

So, if you look under "primates," and you look at Line 14, "Structural strength," you'll see the 3.75. And that's the paragraph of the regulation that covers structural strength.

So, in this report, as you can see, way over under column M, I wrote in "zebras, 3.125" has been crossed off and on this report that means that that particular standard for zebras was in compliance. NS as I wrote in means "not seen," that means that at that particular inspection it just wasn't there or I failed to look at it, or something along that line.

NA means "non-applicable," that means I did not see -- the facility doesn't have that particular item at that time. And if I circle it, it means that that particular standard and that particular paragraph has a narrative written on the next page.

Q. Okay. Let's look at the next page. This is page two of CX3. Now, for all the inspection forms if you circled something on the front, you would then write a narrative on the next page?

A. Correct.

Q. Okay. Now there's also some boxes 50 through 54, could you just explain what those boxes are?

A. Fifty is the box that I sign saying that I prepared this report. Fifty-three and 54 are a signature of the person who receives a copy of the report, their title and the date that they receive it.

Q. Also, there's a 57, can you tell us what that box typically has?

A. That box is my supervisor. After every report I mail it into my sector office and then my supervisor goes over everything that I have written, making sure that I was correct in my citations, making sure that I actually had the ability -- the legal ability to cite what I did.

Q. Okay. Now, also you said in this there was a site number one and a number two. So in cases where there are two sites, you prepared two different inspection reports?

A. Correct.

Tr. 14-15, 17-20.

Dr. Dellar testified that the manner in which she completed the APHIS inspection forms did not change when she began using the new form,[6] as follows:

[BY MS. DESKINS:]

Q. Okay. Now, Dr. Dellar, this form is a little different from the other inspection forms that you've looked at before. Can you tell us what the differences are?

[BY DR. DELLAR:]

A. After the Department had some regulation changes they went ahead and revised the inspection form, made it into a normal size sheet of paper,

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[6]See note 5.

renumbered the paragraphs because the regulations had changed and they were renumbered. Added some categories to inspect and added some research categories at the bottom. So it's a redesigned form.

Q. Okay. Now, but when the form changed did your normal procedures also change?

A. In a way they did, because we were now inspecting new requirements like the psychological enrichment plan for the primates, dog exercise plans. So, my routine didn't change, I normally did the same things in the same manner, but I had more things to look at.

Q. Okay. And other than that were there any other changes that you recall in your inspection procedure?

A. No, not that I can recall.

Q. All right. Now I noticed on this form that you circled things on the front. Was it still your procedure then to write a description on the back page?

A. Correct.

Q. And did you follow that procedure in this case?

A. Yes, I did.

Tr. 50-51.

Each of the APHIS inspection forms on which Dr. Dellar recorded her findings was admitted into evidence. (CX 3 is a record of Dr. Dellar's findings which she completed immediately after her September 19, 1991, inspection of Respondent's premises; CX 4 is a record of Dr. Dellar's findings which she completed immediately after her January 2, 1992, inspection of Respondent's premises; CX 5 is a record of Dr. Dellar's findings which she completed immediately after her January 16, 1992, inspection of Respondent's premises; CX 8 is a record of Dr. Dellar's findings which she completed immediately after her July 15, 1992, inspection of Respondent's premises; CX 9 is a record of Dr. Dellar's findings which she completed immediately after her October 20, 1992, inspection of Respondent's premises; CX 12 is a record of Dr. Dellar's findings which she completed immediately after her August 10, 1993, inspection of Respondent's

premises; CX 14 is a record of Dr. Dellar's findings which she completed immediately after her September 14, 1993, inspection of Respondent's premises; CX 19 is a record of Dr. Dellar's findings which she completed immediately after her January 3, 1994, inspection of Respondent's premises; CX 21 is a record of Dr. Dellar's findings which she completed immediately after her February 1, 1994, inspection of Respondent's premises.) I find each of the inspection forms completed by Dr. Dellar to be reliable, probative, and substantial evidence of her findings at Respondent's premises.

Paragraphs II(A), III(A), IV(A), V(A), VI(A), and VII(A) of the Complaint allege that on September 19, 1991, January 2, 1992, January 16, 1992, July 15, 1992, October 20, 1992, and August 10, 1993, respectively, APHIS inspected Respondent's premises and records and found that Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1). Although the humane treatment of animals by dealers, exhibitors, and others is a principal purpose of the Animal Welfare Act, the Act also requires exhibitors and others to make and retain records which show acquisitions, disposition, and identification. These records are an important indicator of the level of animal husbandry and veterinary care provided by exhibitors. *In re Big Bear Farm, Inc.*, *supra*, 55 Agric. Dec. at 118; *In re Cecil Browning*, 52 Agric. Dec. 129, 141 (1993), *aff'd per curiam*, 15 F.3d 1097 (11th Cir. 1994) (Table).

Each of the APHIS inspection forms, completed by Dr. Dellar immediately after her inspections of Respondent's premises on September 19, 1991, January 2, 1992, January 16, 1992, July 15, 1992, and October 20, 1992, states that Respondent's records were not complete. (CX 3 at 1 item 47, 2, 3 item 47, 4; CX 4 at 1 item 47, 2, 3 item 47, 6; CX 5 at 1 item 47, 2, 3 item 47, 4; CX 8 at 1 item 46, 2, 3 item 46, 4; CX 9 at 1 item 46, 2, 3 item 46.) Dr. Dellar testified that Respondent had a continuing problem keeping its records current, (Tr. 21-22), and that she met with at least one of Respondent's employees after each inspection in which she found that Respondent failed to maintain records in accordance with the Animal Welfare Act and the Regulations and discussed the records that are required to be maintained, (Tr. 122, 156-57). Moreover, Mr. Stramaglia, president of Respondent and the person who oversees the operation of Four Bears Water Park and Recreation Area, (Tr. 384), testified that he did not always keep Respondent's records of animals current, as follows:

[BY MS. ALDEN:]

Q. All right. Now, Mr. Stramaglia, running through those inspection reports that have been submitted today, there is a constant, or maybe I should say, a recurring complaint about the facility's record keeping.

[BY MR. STRAMAGLIA:]

A. Yes.

Q. Would you explain why that problem exists or existed?

A. Well, my record keeping hasn't been the best, you know, so, but a lot of times what occurs is that we'll have animals that we've bought or we've sold, depending on the time of the year, which, like, in the spring and in the fall, and we buy farm animals for the petting zoo in the spring, and in the fall we sell them, and sometimes animals are born in between time.

Well, I don't initially enter them into the log until I get my bill of sales and stuff from them. Sometimes they deliver the animals and the bill or sale doesn't come for a week or two later, and then I enter them in. In between time, inspector could come and they could possibly not be on the order or I don't have the paperwork to put them on. But, when I do get it, I put it on.

What I've been trying to do now, is that -- she stated that we should get them on within a week, so I've been trying to expedite my paperwork so I would get that during the week. And then I have assigned another gentleman in my office who's actually an accountant to be able to get my records out when I'm not in the office in case they need to be inspected.

. . . .

Q. I'm going to show you what's previously been marked as RX-2 and ask you if you can identify this document.

A. It's a record of animals on hand. It looks like 1991, the year 1991.

Q. Are those the records that the park has kept for the acquisition and disposition of animals in 1991?

A. Yes.

Q. Let me hand to you what's previously been marked as RX-3 and ask you if you can identify this document.

A. 1992 record on hand of animals.

Q. Please take a look at what's been marked as RX-4 and tell us whether you can identify this document.

A. 1993 animals on hand.

Q. That's the record of the acquisition and disposition of animals that the park has kept?

A. Yes.

Q. Let me show you what's been marked as RX-5 and ask you if you can identify this document.

A. 1994 animals on hand, record of animals on hand for the USDA.

Q. Mr. Stramaglia, even though your records may not have been up to date at the time that the inspection was made, did you later make any effort to bring your records into compliance?

A. Yes.

Tr. 389-90, 405-06.

I agree with the ALJ that on January 2, 1992, January 16, 1992, July 15, 1992, and October 20, 1992, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals, in violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1), as alleged in paragraphs III(A), IV(A), V(A), and VI(A) of the Complaint. (Initial Decision and Order at 16, 27, Conclusions 2-4.) Moreover, I find that the evidence clearly establishes that on September 19, 1991, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1), as alleged in paragraph II(A) of the Complaint.

Dr. Dellar's inspection report, which she completed after her August 10, 1993, inspection of Respondent's premises, indicates that Dr. Dellar found that Respondent was in compliance with the records requirements in 7 U.S.C. § 2140

and 9 C.F.R. § 2.75(b)(1). (CX 12 at 1 item 46, 4 item 46.) I agree with the ALJ that Complainant has not proven by a preponderance of the evidence that on August 10, 1993, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals, as alleged in paragraph VII(A) of the Complaint.

Paragraphs II(B), III(B), IV(B), VII(B), and IX(A) of the Complaint allege that on September 19, 1991,[7] January 2, 1992, January 16, 1992, August 10, 1993, and January 3, 1994, respectively, APHIS inspected Respondent's premises and found that Respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40.

Each of the APHIS inspection forms, completed by Dr. Dellar after her inspections of Respondent's premises on September 19, 1991, January 2, 1992, January 16, 1992, August 10, 1993, and January 3, 1994, specifies the manner in which Respondent failed to provide veterinary care to animals in need of care, (CX 3 at 3 item 40, 4; CX 4 at 4; CX 5 at 4; CX 12 at 4 item 48, 5; CX 19 at 1 item 48, 2-3).

After her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #40 Veterinary Care (2.40) The elephant needs to have her feet trimmed — the left front was the worst. Also the elephant has a bilateral ocular discharge which needs to be evaluated by the attending veterinarian Correction: 09-20-91.

CX 3 at 4.

Similarly, during her August 10, 1993, inspection of site one on Respondent's premises, Dr. Dellar found that:

> #48 Vet Care (2.40) The elephants right rear and left front feet had deep cracks or fissures showing lack of timely foot care. An animal caretaker said that the feet are trimmed 2x a year. More frequent foot care prevents foot problems which can be fatal. Correct by: 08-17-93.

CX 12 at 5.

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[7]See note 1.

Mr. Walt King, the overseer of the animal department and the amusement ride department at Four Bears Water Park and Recreation Area, (Tr. 342), testified that Twiggy, the elephant that is the subject of Dr. Dellar's September 19, 1991, and August 10, 1993, inspection reports, (CX 3, 12), is provided with extensive foot care, as follows:

[BY MS. DESKINS:]

Q. Excuse me, Mr. King.

Mr. King, what is the optimal foot care for elephants?

[BY MR. KING:]

A. Yes, ma'am, I'm familiar with that.

Q. Okay. Can you tell us what us what the optimal care is?

A. Yes. We're on a program with two of the people from the Detroit Zoo that work in the elephant department of the Detroit Zoo, and every three months they come out and examine and clean and trim the elephant's feet, and they are very, very good at it. They've written papers on -- from the AAZP, or whatever -- the zoological people, on the care and training of the elephant's feet and trimming and so forth like that.

Q. And you said they're called in every three months. If the elephant's foot, Twiggy, needs foot care more often than that, are they called in?

A. Oh, yes ma'am. They would be. Or if the lady from the USDA finds something she doesn't like, we call them in and he comes in a day or two.

Tr. 382-83.

Moreover, Mr. Stramaglia testified as to the foot care generally provided to Twiggy, as follows:

[BY MS. ALDEN:]

Q. Do you have anyone to attend to the elephant's feet?

[BY MR. STRAMAGLIA:]

A. Yes. We have a person that does it at the Detroit Zoo, and he comes to our facility, I think every three months, or if we call him in between and does the elephant's feet.

. . . .

[BY MS. DESKINS:]

Q. Okay. So, I understand what you're saying, I'm just trying to clarify. So you're saying you don't have particular expertise in the --

[BY MR. STRAMAGLIA:]

A. Trimming of the feet?

Q. Well, in the care of an elephant's foot.

MS. ALDEN: Objection, Your Honor. That's inconsistent to what he just testified to.

THE WITNESS: I just tried to tell you what my expertise was with the elephant and where I got my training.

BY MS. DESKINS:

Q. Okay. Now what I'm trying to ask about in particular, is about the elephant's feet. If you --

A. The feet --

Q. If you don't have any --

A. I personally have never trimmed elephant's feet. No.

Q. Okay. Do you know about the care of their feet?

A. Yes.

Q. And you got that from an Army McGuire?

A. Army McGuire, yes. Army gave me like, a six week training with elephants.

Tr. 388, 416-17.

Although I find that Messrs. King and Stramaglia are aware of the need to care for an elephant's feet and Respondent provides some veterinary care for its elephant's feet, Complainant has proven by a preponderance of the evidence that on September 19, 1991, and August 10, 1993, Twiggy's feet were in need of veterinary care and Respondent failed to provide veterinary care to the elephant. Further, Respondent has not rebutted the evidence that on September 19, 1991, Twiggy was in need of veterinary care for a bilateral ocular discharge and Respondent failed to provide such veterinary care. Therefore, I find that Respondent failed to provide veterinary care to an animal in need of veterinary care, in violation of 9 C.F.R. § 2.40, as alleged in paragraphs II(B) and VII(B) of the Complaint.

During her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar found that:

> #40 Veterinary Care (2.40) The camel was found to be bleeding from the nose/mouth. The zoo manager wanted to pour peroxide on the camel's face — but I suggested that the peroxide would go down his nose and into his lungs. Instead the animal shall be examined by a veterinarian. Correction date: 01-02-92 close of business.

CX 4 at 4.

Respondent offered nothing to rebut the evidence that the camel was in need of veterinary care on January 2, 1992, and that Respondent failed to provide veterinary care to the camel.

After her January 16, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #40 Veterinary Care (2.40) 2 new born goats were found frozen in the goat shelter. Goat #27 had blood on her fur, was slow and listless and appeared cold (humped up and pressed next to another goat). The dead goats and the ill goat was not detected by the animal care taker. The ill goat shall be immediately taken to a veterinarian for examination by close of business.

CX 5 at 4.

Dr. Dellar testified that the goat that had blood on her fur was the goat that had given birth to the two new born goats which she found frozen during her January 16, 1992, inspection, that it is not unusual for a goat that has just given birth to have discharge on her hindquarters, and that the blood on the fur did not concern her, (Tr. 145.) Dr. Dellar also testified that she did not know the cause of death of the new born goats, (Tr. 145-47, 271). Moreover, Mr. Stramaglia testified as to the cause of the death of the new born goats, as follows:

[BY MS. ALDEN:]

Q. You heard testimony about an inspection in January of 1992, at which time it was discovered that there were two diseased kids at the barn.

[BY MR. STRAMAGLIA:]

A. Yes, I did.

Q. Can you tell the Court what you know about the mother goat and the condition of her milk?

A. Well, what happened is, the following winter, that goat -- I had the people there specifically watch that goat; it was a pygmy goat and she was pregnant again. Sometimes it's hard to tell on pygmy's whether they're pregnant or not.

Q. Why is that?

A. Well, they bulge out all the time, you know, so you can't usually tell until they're far advanced. So we brought her in and put her in a horse stall to watch her and she had three goats this time, and the reason the goats died is she didn't have any milk.

So, the same thing occurred that time we had taken her to the vet right away, and the vet said she didn't have milk and she said that the three goats that she had were going to die. She said they have to have this particular mother's milk which has a certain chemical in it that the babies have to have within the first 24 hours or they'll die. She tried to prescribe some kind of a, like a formula, but it didn't work and those three died. So she suggested we, you know, not have the goat get pregnant anymore or

find somebody that has those kind of goats, extract some milk from them and freeze it and keep it, or just to sell the goat, you know, and tell somebody that -- the problem with the goat.

Q. Did you have any information about that problem with the mother in January of 1992?

A. No.

Tr. 399-400.

Nonetheless, the record clearly demonstrates that the goat that Dr. Dellar described as "ill," (CX 5 at 4), was in need of care and that Respondent failed to provide that care.

After her January 3, 1994, inspection of site two on Respondent's premises, Dr. Dellar noted on her inspection report that:

> #48 Veterinary Care (2.40) Recently a male chimp died at this facility. Records show that the animal was initially diagnosed with a respiratory problem on
>
> Continued from page # 2
>
> III #48 Vet Care (2.40) 10/28/93. By 11/2/93 the condition had worsened and antibiotics were prescribed. Twenty days later, the animal was brought back in - an died that day. The antibiotics were not correctly given by the employees and were still left. The animal was extremely yellow from jaundice, and the employees did not notice. The elephant was diagnosed with a parasite and the medication still sits in the barn ½ full. Animals must be observed daily and given adequate veterinary care. Correct by -01-10-94.

CX 19 at 2-3.

The record establishes that Respondent provided substantial veterinary care for Mr. Washington, the male chimpanzee that is the subject of Dr. Dellar's January 3, 1994, inspection report. (CX 15, 19 at 2-3; Tr. 73-78, 401-03.) Moreover, Dr. Dellar testified that the records of the veterinarian who provided veterinary services for Mr. Washington indicate that the chimpanzee did receive "a lot of care." (Tr. 200-01.) Further, Dr. Dellar's inspection report, (CX 19 at 2-3), indicates that the elephant was receiving veterinary care. While CX 19 at 2-3 indicates that

Respondent may not have followed all of the veterinarian's instructions for the care of the chimpanzee and the elephant, I do not find that the Complainant has proven by a preponderance of the evidence that Respondent failed to provide veterinary care to animals in need of care, in willful violation of 9 C.F.R. § 2.40, as alleged in paragraph IX(A) of the Complaint.

Paragraphs II(C)(1), V(B)(1), VI(B)(1), and VIII(A)(5) of the Complaint allege that on September 19, 1991,[8] July 15, 1992, October 20, 1992, and September 14, 1993, respectively, surfaces of housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted, in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(c)(1), and 3.80(a)(ix).[9] Paragraph

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[8]See note 1.

[9]Paragraphs II(C)(1), V(B)(1), VI(B)(1), and VIII(A)(5) of the Complaint erroneously cite 9 C.F.R. § 3.80(a)(ix). The correct citation for the violations alleged in paragraphs II(C)(1), V(B)(1), VI(B)(1), and VIII(A)(5) of the Complaint is 9 C.F.R. § 3.80(a)(2)(ix). The failure to cite the correct regulation alleged to be violated is harmless error. *Cf. Williams v. United States*, 168 U.S. 382, 389 (1897) (a conviction may be sustained on the basis of a statute other than that cited in the indictment); *United States v. Lipkis*, 770 F.2d 1447, 1452 (9th Cir. 1985) (a conviction may be sustained on the basis of a statute or regulation other than that cited or even where none is cited at all, as long as it is clear that the defendant was not prejudicially misled); *In re SSG Boswell, II*, 49 Agric. Dec. 210, 212 (1990) (the failure of the Complaint to include a citation to the statute authorizing the civil penalty is harmless error). Further, it is well settled that the formalities of court pleading are not applicable in administrative proceedings. *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940). Due process is satisfied when the litigant is reasonably apprised of the issues in controversy. *In re Pet Paradise, Inc., supra*, 51 Agric. Dec. at 1066; *In re Dr. John H. Collins*, 46 Agric. Dec. 217, 233 n.8 (1987). It is only necessary that the Complainant in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Big Bear Farm, Inc., supra*, 55 Agric. Dec. at 132; *In re James Petersen*, 53 Agric. Dec. 80, 92 (1994); *In re Pet Paradise, Inc., supra*, 51 Agric. Dec. at 1066; *In re SSG Boswell, II, supra*, 49 Agric. Dec. at 212; *In re Floyd Stanley White*, 47 Agric. Dec. 229, 264-65 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Sterling Colorado Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (Ruling on Certified Questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*,

X(C)(2) of the Complaint alleges that on February 1, 1994, surfaces of housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted, in willful violation of 9 C.F.R. §§ 2.100(a)) and 3.75(c)(1).

Each of the APHIS inspection forms, completed by Dr. Dellar after the inspections on September 19, 1991, July 15, 1992, October 20, 1992, September 14, 1993, and February 1, 1994, identifies the surfaces of housing facilities for nonhuman primates which were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted, (CX 3 at 3 item 22, 4; CX 8 at 1 item 12, 2; CX 9 at 3 item 12, 4; CX 14 at 4 item 12, 5; CX 21 at 1 item 12, unnumbered page between page 1 and page 2).

After her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #22 Interior surfaces (3.76) The chimp enclosure is rusting — mostly at the feed doors. Rust is not readily sanitizable. Correction: 09-30-91.

CX 3 at 4.

During the July 15, 1992, inspection of site one on Respondent's premises, Dr. Dellar found that:

> III #12 Surfaces and Cleaning (3.75c1i) The new chimp enclosure is rusting and is in need of resealing. Correction date: 08-15-92.

CX 8 at 2.

After her October 20, 1992, inspection, Dr. Dellar listed the "surfaces and cleaning" violation found during the July 15, 1992, inspection of site one as having been corrected, (CX 9 at 2), but found that there was a similar violation at site two on Respondent's premises, as follows:

> III #12 Surfaces and Cleaning (3.75c1) The built in chimp cage is rusting and is in need of resealing. The wall behind the chimp enclosure has

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No. 80-1293 (10th Cir. Aug. 11, 1980); *In re A.S. Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976). The record does not reveal that Respondent was in any way misled by Complainant's citation of "9 C.F.R. § 3.80(a)(ix)" rather than the correct citation, "9 C.F.R. § 3.80(a)(2)(ix)," and the record reveals that Respondent was reasonably apprised of the issues in controversy.

> unsealed cement which needs to be sealed. Raw wood, concrete and rusty metal can not be readily sanitized. Correction: 11-20-92.

CX 9 at 4.

After her September 14, 1993, inspection of site two on Respondent's premises, Dr. Dellar recorded on her inspection report that:

> III #12 Surfaces and Cleaning (3.75c1i) The primates are scheduled to move back into winter housing (this site) today. The primate enclosures at this facility are [illegible] rusting and are in need of resealing. The wooden benches and boxes also need to be resealed. Correct by: 10-14-93.

CX 14 at 5.

After her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #12 Surfaces and Cleaning (3.75 3) The dirt floor in the primate area was in need of cleaning and/or raking. Correct by: 02-08-94 (3.75c1) The enclosures are rusting and need to be resealed to be properly cleaned and sanitized. Correct by 03-01-94. . . .

CX 21 at unnumbered page between page 1 and page 2.

During her February 1, 1994, inspection, Dr. Dellar took pictures of the primate enclosures, each of which show that the enclosures were rusting, (CX 22D, E, F), and Dr. Dellar testified that, in addition to the rust on the outside of the enclosures depicted in CX 22E and CX 22F, there was rust on the inside of those enclosures. (Tr. 247-48.)

The evidence clearly establishes that on September 19, 1991, July 15, 1992, October 20, 1992, September 14, 1993, and February 1, 1994, the surfaces of Respondent's housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted, in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(c)(1), and 3.80(a)(2)(ix), as alleged in paragraphs II(C)(1), V(B)(1), VI(B)(1), and VIII(A)(5) of the Complaint, and in willful violation of 9 C.F.R. §§ 2.100(a) and 3.75(c)(1), as alleged in paragraph X(C)(2) of the Complaint.

Paragraphs II(C)(2) and III(D)(1) of the Complaint allege that on September 19, 1991,[10] and January 2, 1992, respectively, Respondent had failed to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.75(e).

Each of the APHIS inspection forms, completed by Dr. Dellar after the inspections on September 19, 1991, and January 2, 1992, specifies the manner in which Respondent failed to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin, (CX 3 at 3 item 16, 4; CX 4 at 3 item 16, 6).

During her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar found that:

> #16 Storage of food (3.75 . . .) The peaches stored for the primates are rotting and need to be disposed of. . . . Correction: 09-20-91.

CX 3 at 4.

After her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> IV Noncompliant Standards noted on 09-19-91 that have not been corrected by 01-02-92: #16 Storage of food (3.75 3.125) The pears stored for the animals are rotting and need to be thrown away. The oranges were beginning to rot and need to be stored in a refrigerator.

CX 4 at 6.

I find, based upon CX 3 and CX 4, that Complainant has proven by a preponderance of the evidence that on September 19, 1991, and January 2, 1992, Respondent failed to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.75(e), as alleged in paragraphs II(C)(2) and III(D)(1) of the Complaint.

Paragraph II(C)(3) of the Complaint alleges that on September 19, 1991,[11] Respondent failed to develop, document, and follow an appropriate plan for

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[10]See note 1.

[11]See note 1.

environmental enhancement, adequate to promote the psychological well-being of nonhuman primates, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.81.

The APHIS inspection form, completed by Dr. Dellar after her inspection of site two on Respondent's premises on September 19, 1991, specifically states that Respondent failed to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote psychological well-being of nonhuman primates, (CX 3 at 3 item 28, 4), as follows:

> #28 General Requirements/Primate Enrichment Plan (3.81) This facility has not developed, documented, and followed an appropriate plan for environmental enhancement, adequate to promote the psychological well being of primates. Correction: 10-19-91.

CX 3 at 4.

While Respondent did correct this violation by the time of Dr. Dellar's January 16, 1992, inspection, (CX 5 at 4), I find that Complainant has proven by a preponderance of the evidence that on September 19, 1991, Respondent failed to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote psychological well-being of nonhuman primates, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.81, as alleged in paragraph II(C)(3) of the Complaint.

Paragraphs II(C)(4), IV(C)(1), VII(C)(2), IX(B)(4), and X(C)(6) of the Complaint allege that on September 19, 1991,[12] January 16, 1992, August 10, 1993, January 3, 1994, and February 1, 1994, respectively, Respondent failed to provide facilities for animals that were structurally sound and maintained in good repair, so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a).

The APHIS inspection forms, completed by Dr. Dellar after her inspections on September 19, 1991, January 16, 1992, August 10, 1993, January 3, 1994, and February 1, 1994, specify the structural and maintenance deficiencies which she found on Respondent's premises, (CX 3 at 3 item 14, 4; CX 5 at 1 item 14, 2, 3 item 14, 4; CX 12 at 1 item 10, 2, 4 item 10, 5; CX 19 at 1 item 10, 2; CX 21 at 1 item 10, unnumbered page between page 1 and page 2).

After the September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar noted the following on her inspection report:

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[12]See note 1.

> #14 Structural Strength (3.125) The llama pasture fence is bent, loose has bent poles and loose wire that could cause a puncture type injury. The camel pasture wire is also bent, broken and has a hole in it large enough for dogs to enter. Correction date: 09-21-91.

CX 3 at 4.

While Dr. Dellar testified that she saw no dogs in the camel pasture and no evidence that dogs had ever been in the pasture, (Tr. 127-28), the actual entry of animals is not a prerequisite to finding Respondent in violation of 9 C.F.R. §§ 2.100(a) and 3.125(a).

During her January 16, 1992, inspection, Dr. Dellar found structural strength violations relating to a pig enclosure located at site one on Respondent's premises. (CX 5 at 2.) However, there is some evidence in the record that the pig may not belong to Respondent, (Tr. 46-47, 144-45, 393), and the pig may not have been within the Secretary's jurisdiction under the Animal Welfare Act. Therefore, despite the evidence introduced by Complainant concerning the structural strength and maintenance of the facility housing the pig, no part of my finding that Respondent violated 9 C.F.R. § 3.125(a) on January 16, 1992, is based upon the facility housing the pig described in Dr. Dellar's January 16, 1992, inspection report. However, after her January 16, 1992, inspection of site two on Respondent's premise, Dr. Dellar noted the following structural and maintenance violations:

> III Noncompliant Standards, newly noted on 01-16-92:
>
> #14 Structural Strength (3.125) The deer enclosure fence is broken on the east fence line — Broken wire which protrudes may injure an animal. The wires used to attach the gate to the fence (to patch a hole) also has protruding ends which may injure an animal. Correction date: 01-17-92.

CX 5 at 4.

After her August 10, 1993, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> IV #10 Structure and Construction (3.125a) A pasture fence, which now contains the deer, has been broken down and has broken wires which may injure the animal in that enclosure.

CX 12 at 2.

Complainant introduced a picture of the fence that is the subject of Dr. Dellar's report into evidence, (CX 13A). The back of the picture indicates that it depicts "broken fence wire in deer enclosure" and was taken by Dr. Dellar at site two on Respondent's premises at 1:30 p.m., August 10, 1993. (CX 13A.)

After her August 10, 1993, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> III #10 Structure and Construction(3.125a). This inspection was conducted in the driving rain, and it was noted that the camel/llama shelter had leaks in three different areas. Omal [sic] the camel could not stay dry in his shelter. Correct by: 09-10-93.

CX 12 at 5.

The record establishes that by the date of the next inspection of Respondent's premises, September 14, 1993, Respondent had repaired the roof of the camel/llama shelter, (CX 14 at 2).

After her January 3, 1994, inspection of site two on Respondent's premises, Dr. Dellar noted the following on her inspection report:

> III #10 Structure and Construction (3.125a) The roof on the llama/sheep shelter has collapsed and is in need of repair. Correct by: 01/10/94.

CX 19 at 2.

After the February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> IV #10 Structure and Construction (3.125a) The roof of the llama/sheep shelter has collapsed and is now only supported by one board. This is not safe should an animal break the brace.

CX 21 at unnumbered page between page 1 and page 2.

During her February 1, 1994, inspection, Dr. Dellar took pictures of the llama/sheep shelter, which is the subject of her report, that clearly depict the structural deficiencies in the shelter. (CX 22J, K, L.)

I find that Complainant has proven by a preponderance of the evidence that on September 19, 1991, January 16, 1992, August 10, 1993, January 3, 1994, and February 1, 1994, Respondent failed to provide facilities for animals that were structurally sound and maintained in good repair so as to protect animals from injury, to contain the animals, and to restrict the entrance of other animals, in

willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(a), as alleged in paragraphs II(C)(4), IV(C)(1), VII(C)(2), IX(B)(4), and X(C)(6) of the Complaint.

Paragraphs II(C)(5) and V(B)(3) of the Complaint allege that on September 19, 1991,[13] and July 15, 1992, respectively, Respondent failed to store supplies of food so as to adequately protect them against deterioration, molding, or contamination by vermin, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(c). Paragraphs III(D)(5), IV(C)(2), VII(C)(4), and VIII(A)(2) of the Complaint allege that on January 2, 1992, January 16, 1992, August 10, 1993, and September 14, 1993, respectively, Respondent failed to store supplies of food and bedding so as to adequately protect them against deterioration, molding, or contamination by vermin, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(c). Paragraph X(C)(7) of the Complaint alleges that on February 1, 1994, Respondent failed to store supplies of food and bedding so as to adequately protect them against deterioration, molding, or contamination by vermin, and refrigeration was not provided for supplies of perishable food, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(c).

The APHIS inspection forms, completed by Dr. Dellar after her inspections on September 19, 1991, January 2, 1992, January 16, 1992, July 15, 1992, August 10, 1993, September 14, 1993, and February 1, 1994, identify the manner in which Respondent stored supplies of food, (CX 3 at 3 item 16, 4; CX 4 at 3 item 16, 6; CX 5 at 1 item 16, 2; CX 8 at 1 item 13, 2; CX 12 at 4 item 13, 5; CX 14 at 1 item 13, 2; CX 21 at 1 item 13, unnumbered page between page 1 and page 2).

After her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #16 Storage of food (. . . 3.125). . . . There were several sacks of feed noted to be stored on the ground, opened, and next to bags of lime. Correction: 09-20-91.

CX 3 at 4.

After her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded the following findings on her inspection report:

> IV Noncompliant Standards noted on 09-19-91 that have not been corrected by 01-02-92: #16 Storage of food (3.75 3.125) The pears stored

[13]See note 1.

> for the animals are rotting and need to be thrown away. The oranges were beginning to rot and need to be stored in a refrigerator.

CX 4 at 6.

During the January 16, 1992, inspection, Dr. Dellar found that the pig food was stored in an open container. (CX 5 at 2; Tr. 46.) However, there is some evidence in the record that the pig may not belong to Respondent, (Tr. 46-47, 144-45, 393), and the pig may not have been within the Secretary's jurisdiction under the Animal Welfare Act. Therefore, despite the evidence introduced by Complainant concerning storage of pig food, I find that the record is not quite strong enough to reverse the ALJ with respect to the violation alleged in paragraph IV(C)(2) of the Complaint. Moreover, despite evidence of the violations alleged in paragraphs IV(C)(3), IV(C)(4), and IV(C)(5) of the Complaint, all of which relate solely to the pig referenced in Dr. Dellar's January 16, 1992, inspection report, (CX 5), I find that the evidence is not quite strong enough to reverse the ALJ with respect to the violations alleged in paragraphs IV(C)(3), IV (C)(4), and IV(C)(5) of the Complaint.

After her July 15, 1992, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #13 Storage (3.125c) The petting area storage barn was found to have cleaning type chemicals stored with the feed, which may contaminate the feed. Also an open feed bag was found - which needs to be placed in a container with a tight lid. Correction date: 07-16-92.

CX 8 at 2.

After her August 10, 1993, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #13 Food storage (3.125c) The door to the storage barn had been left open causing some of the feed to become wet from the rain. Bags of feed were also found open, stored on the floor and insecticides were being stored directly above the feed bags. Correct by 08-10-93 close of business.

CX 12 at 5.

Dr. Dellar took a picture of the manner in which the feed was stored next to the door of the storage barn. (CX 13E.) The back of CX 13E indicates that it depicts "open bags of feed, wet from rain in feed storage area" and that it was taken by Dr. Dellar at 10:45 a.m., during her August 10, 1993, inspection of site one on Respondent's premises. (CX 13E)

After her September 14, 1993, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> IV #13 Food storage (3.125c) Spilled feed was on the floor in the storage area. Open bags were stored on the floor and many of the feed containers do not have lids.

CX 14 at 2.

After the February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar noted the following:

> #13 Storage (3.125c) . . . . Food that needed to be refrigerated was being kept on a shelf . . . perishable foods shall be stored in the refrigerator. Correct by 02-01-94 close of business.

CX 21 at unnumbered page between page 1 and page 2.

During the February 1, 1994, inspection, Dr. Dellar took a picture of the food that she found needed to be refrigerated and, instead, was kept on a shelf. (CX 22H (upper left-hand corner).) The back of CX 22H indicates that it depicts "food prep area - spilled trash on floor — produced [sic] stored outside of refrigerator" and that the picture was taken by Dr. Dellar at 11:30 a.m., during her February 1, 1994, inspection of site two on Respondent's premises.

I find that Complainant has proven by a preponderance of the evidence that on September 19, 1991, January 2, 1992, July 15, 1992, August 10, 1993, September 14, 1993, and February 1, 1994, Respondent stored supplies of food, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.125(c), as alleged in paragraphs II(C)(5), III(D)(5), V(B)(3), VII(C)(4), VIII(A)(2), and X(C)(7) of the Complaint.

Paragraphs II(C)(6) and VIII(A)(7) of the Complaint allege that on September 19, 1991,[14] and September 14, 1993, respectively, Respondent failed to keep water receptacles clean and sanitary, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.130.

The APHIS inspection forms, completed by Dr. Dellar after the inspections on September 19, 1991, and September 14, 1993, identify the water receptacles that were not kept clean and sanitary, (CX 3 at 3 item 33, 4; CX 14 at 4 item 35, 5).

After her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

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[14]See note 1.

> #33 Watering (3.130) The goat and llama water receptacles were green with algae and had debris in them - indicating that they are not cleaned and sanitized often enough. Correction: 09-21-91.

CX 3 at 4.

After her September 14, 1993, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #35 Watering (3.130) The llama/deer water receptacle was green and cloudy and contained hay — indicating that it had not been cleaned often enough. Correct by: 09-16-93.

CX 14 at 5.

I find that Complainant has proven by a preponderance of the evidence that on September 19, 1991, and September 14, 1993, Respondent failed to keep water receptacles clean and sanitary, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.130, as alleged in paragraphs II(C)(6) and VIII(A)(7) of the Complaint.

Paragraph II(C)(7) of the Complaint alleges that on September 19, 1991,[15] Respondent failed to keep primary enclosures clean, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.131(a). The APHIS inspection form, completed by Dr. Dellar after her inspection on September 19, 1991, identifies the primary enclosures that were not kept clean, (CX 3 at 3 item 35, 4).

During the September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar found that:

> #35 Cleaning (3.131) The sheep and goat pasture had a build up of feces — also the shelter was in need of cleaning. Correction 09-21-91.

CX 3 at 4.

Despite the evidence that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.131(a) on September 19, 1991, in light of Dr. Dellar's testimony on cross-examination regarding the quantity of feces that she found, (Tr. 131-33), I do not find the record strong enough to reverse the ALJ with respect to the allegations in paragraph II(C)(7) of the Complaint.

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[15]See note 1.

Paragraphs II(C)(8) and III(D)(7) of the Complaint allege that on September 19, 1991,[16] and January 2, 1992, respectively, and paragraphs VII(C)(1) and VII(C)(6) of the Complaint allege that on August 10, 1993, Respondent failed to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.131(c). Paragraph X(C)(11) of the Complaint alleges that on February 1, 1994, Respondent failed to keep the premises (buildings and grounds) clean and in good repair, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.131(c). The APHIS inspection forms, completed by Dr. Dellar after her inspections on September 19, 1991, January 2, 1992, August 10, 1993, and February 1, 1994, identify portions of Respondent's premises that were not kept clean and repaired, (CX 3 at 3 item 36, 4; CX 4 at 3 item 36, 4; CX 12 at 1 item 37, 2; CX 21 at 1 item 37, unnumbered page between page 1 and page 2).

After her September 19, 1991, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #36 Housekeeping (3.81 3.131) The goat pasture had boards, wire and an old gate which need to be removed. The camel pasture has wood, paper, plastic, blocks and sheet metal which needs to be removed. The barn had old rugs, paper, wood and other junk around it and the pastures.

CX 3 at 4.

After her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded the following findings on her inspection report:

> #36 Housekeeping (3.8 3.131) The food prep area was stacked with empty cereal boxes, overflowing trash receptacle was beneath the sink. The refrigerator needed cleaning and outdated food items need disposing of. Correction date: 01-02-92 close of business.

CX 4 at 4.

During her August 10, 1993, inspection of site two on Respondent's premises, Dr. Dellar found that:

> #37 Housekeeping (3.131c) The deer, llama and horse enclosures contained numerous bale ropes, boards, chewed hose, paper and other

[16]See note 1.

debris which may cause injury if ingested. Trash needs to be removed on a regular basis.

CX 12 at 2.

Dr. Dellar took two pictures of the debris that she observed in animal enclosures during her August 10, 1993, inspection. (CX 13B, 13D.) The back of CX 13B indicates that the picture depicts Respondent's "animal caretaker removing debris from deer enclosure during [the August 10, 1993,] inspection" of site two on Respondent's premises. The back of CX 13D indicates that the picture depicts "bale rope, chewed hose, rope, ect [sic] removed from animal enclosure," during the August 10, 1993, inspection of site two on Respondent's premises.

The Complaint alleges that on August 10, 1993, Respondent violated 9 C.F.R §§ 2.100(a) and 3.131(c) by failing to keep the premises clean and in good repair and free of accumulations of trash on two occasions. (Complaint ¶¶ VII(C)(1) and VII(C)(6).) While Complainant has proven by much more than a preponderance of the evidence that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.131(c), at site two on Respondent's premises, on August 10, 1993, there is no evidence that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.131(c) at site one, on August 10, 1993. Therefore, under the circumstances in this case, I am reversing the ALJ only with respect to one of the violations of 9 C.F.R. §§ 2.100(a) and 3.131(c) alleged in paragraph VII(C) of the Complaint.

After her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #37 Housekeeping (3.131c) The sheep/llama hay feeder is broken and in need of repair to protect the animals from injury. Correct by 02-08-94.

CX 21 at unnumbered page between page 1 and page 2.

I find that Complainant has proven by a preponderance of the evidence that on September 19, 1991, January 2, 1992, and August 10, 1993, Respondent failed to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.131(c), as alleged in paragraphs II(C)(8), III(D)(7), and VII(C)(1) of the Complaint, and that on February 1, 1994, Respondent failed to keep the premises (buildings and grounds) clean and in good repair, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.131(c), as alleged in paragraph X(C)(11) of the Complaint.

Paragraph II(C)(9) of the Complaint alleges that on September 19, 1991,[17] the primary enclosure used to transport live animals lacked sufficient structural strength to contain live animals and to withstand the normal rigors of transportation, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.137. The APHIS inspection form, completed by Dr. Dellar after the inspection on September 19, 1991, identifies the particular primary enclosure that lacks structural strength sufficient to contain animals and to withstand the normal rigors of transportation, (CX 3 at 1 item 43, 2).

After her September 19, 1991, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her report:

> III Noncompliant Standards noted (newly) on 09-19-91:
>
> #43 Transport Enclosures (3.137) The horse trailer has a hole in the right side which is large enough for a foot to slip into. The hole is on the side of the wall at the bottom. The exposed metal edges are a possible injury site. Correction: 09-30-91.

CX 3 at 2.

Dr. Dellar testified that, during her September 19, 1991, inspection of Respondent's premises, Respondent's animal caretaker told her that the trailer was used to transport Respondent's animals. (Tr. 118-20.) However, it is unclear from Mr. King's testimony whether Respondent uses the trailer that is the subject of Dr. Dellar's September 19, 1991, inspection report to transport animals. (Tr. 351-52.) Further, Mr. Stramaglia testified that the trailer that is the subject of Dr. Dellar's September 19, 1991, inspection report does not belong to Respondent, and the trailer is generally used to transport hay only. (Tr. 414.) While Mr. Stramaglia testified that the trailer has been used "to transport horses in the past," (Tr. 414), and Respondent's use of the trailer to transport animals would be sufficient to find Respondent in violation of 9 C.F.R. §§ 2.100(a) and 3.137, it is unclear when Respondent used the trailer to transport animals and whether the hole that Dr. Dellar found, existed at the time Respondent used the trailer to transport animals. Therefore, I do not find the record strong enough to reverse the ALJ with respect to the violation alleged in paragraph II(C)(9) of the Complaint. Similarly, I do not find that the record clearly identifies the trailer that is the subject of the allegation

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[17] See note 1.

in paragraph V(B)(6) of the Complaint as a trailer used by Respondent to transport animals.

Paragraphs III(C) and X(A) of the Complaint allege that on January 2, 1992, and February 1, 1994, respectively, Respondent refused to allow APHIS to inspect its animals, facilities, and records, in willful violation of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126. The APHIS inspection forms, completed by Dr. Dellar after her January 2, 1992, and February 1, 1994, inspections, describe Respondent's refusals to allow her to conduct her inspections, (CX 4 at 2; CX 21 at 1 item 51, unnumbered page between page 1 and page 2).

After her January 2, 1992, inspection of Respondent's premises, Dr. Dellar recorded Respondent's refusal to allow her to make a complete inspection of the premises, as follows:

> 2.126 Access and Inspection: After zoo manager Ben Merzer began using profanities — I was asked to leave and return to conduct my inspection another day. Each exhibitor shall during business hours allow APHIS officials to enter its place of business and to inspect and photograph the facilities, property and animals — to enforce the provisions of the Act. Correction date: 01-02-92 Close of business.

CX 4 at 2.

Dr. Dellar's inspection report reveals that she arrived at Respondent's premises to conduct her January 2, 1992, inspection at 11:00 a.m. (CX 4 at 1 item 5.) Dr. Dellar testified that she specifically recalled being unable to complete the January 2, 1992, inspection because Respondent's employee asked her to leave, as follows:

> [BY MS. DESKINS:]
>
> Q. And let's just clarify this. Now, it was your normal procedure to fill this document out at the end of your inspection?
>
> [BY DR. DELLAR:]
>
> A. Normally, yes.
>
> Q. And did you think you followed that procedure for this particular inspection?
>
> A. This form was filled out after I was asked to leave.

Q. And you specifically recall that?

A. Yes. And I was not able to complete my inspection so that's not the normal inspection procedure, but that's what happened.

Q. Were you able to discuss what you had found with the zoo manager?

A. No.

Q. And is that the reason that there is no signature by someone who received a copy of the inspection report?

A. Correct.

Tr. 39-40.

Mr. Stramaglia testified that he terminated Ben Merzer's employment by Respondent after Ben Merzer denied Dr. Dellar access to the facility, as follows:

[BY MS. ALDEN:]

Q. One of the inspection reports contains a complaint that one of your employees, Ben, used profanity to the inspector on at least one occasion and did not permit the inspector access to the facility. What action did you take with respect to Ben regarding that conduct?

[BY MR. STRAMAGLIA:]

A. Well, I believe my sister Nancy conducted inspections with Lisa for a period of time after that.

Q. Was Ben's employment with the park terminated after that?

A. Not long after that, yes.

Tr. 395.

Moreover, Dr. Dellar testified that she believes she was not accompanied on inspections of Respondent's premises by Ben Merzer after the January 2, 1992, inspection.

[BY MS. ALDEN:]

Q. You testified that the only thing you remember about the visit on January 2nd, 1992 was the fact that you were greeted by an employee named Ben who was profane to you?

[BY DR. DELLAR:]

A. Correct, that's what I testified too.

Q. Is it true that Ben was taken off the responsibility of guiding you through inspections[] after that?

A. I don't know.

Q. You don't know?

A. I don't know.

Q. Well, isn't it true that Ms. Nancy Stramaglia accompanied you during your inspecitons, [sic] or someone else, from that inspection forward?

A. I don't have specific recall of that, but I don't know if he was taken off, mabye [sic] he was busy, maybe he was at lunch. I don't know why.

Q. Well, let me ask it a different way then. Isn't it true that from the next inspection forward you were accompanied by someone other than Ben on your inspections?

A. I don't have specific recollections of that, I think that's right. But I don't recall specifically.

Tr. 137-38.

After the February 1, 1994, inspection of Respondent's premises, Dr. Dellar recorded Respondent's refusal to allow her to inspect records, as follows:

#51 Others (2.126a2) Access to the records was not allowed by the employees of this facility because of the owners absence. Correct by: 02-01-94 close of business.

CX 21 at unnumbered page between page 1 and page 2.

Dr. Dellar testified that she specifically recalled being unable to inspect Respondent's records during the February 1, 1994, inspection, as follows:

BY MS. DESKINS:

Q. Okay. Can you please tell us what your memories are for that particular inspection. And by "that inspection", I'm referring to the inspection of February 1 of 1994.

[BY DR. DELLAR:]

A. I had two things that I remember distinctly about this. . . .

. . . .

BY MS. DESKINS:

Q. You can continue, Dr. Dellar.

[BY DR. DELLAR:]

A. . . . And then the second thing I remember distinctly is the employees at the office didn't have access to the records and when I asked to do the record inspection, they couldn't obtain the files because they didn't have either keys to the office or they didn't have permission to go in and get the files. And that I was not allowed to do a record inspection and that the main secretary or receptionist or whoever that person was, wouldn't sign the inspection report either. He said he didn't have authorization to sign for any type of inspection document, so I had to leave with this inspection report not signed.

Tr. 88-89.

Mr. Stramaglia testified that Dr. Dellar was denied access to Respondent's records, but that he has taken steps to correct the problem, as follows:

[BY MS. ALDEN:]

Q. We've heard a complaint that -- on at lease [sic] one and perhaps two occasions, access to the records was unavailable.

[BY MR. STRAMAGLIA:]

A. Yes. That was last winter.

Q. All right. What steps have you taken to correct that?

A. What I did is I took the file that I have locked up and I've given the key to my accountant so that he can get into my office, and he knows exactly where that file is and he can get it out and bring it out.

Q. All right. Have you assigned the duties of upkeeping the records to anyone in your facility?

A. No, I haven't. I've been trying to maintain that myself.

Tr. 390-91.

Despite Respondent's efforts to ensure that APHIS has access to Respondent's facility to conduct inspections in accordance with the Animal Welfare Act, it is undisputed that, on January 2, 1992, and February 1, 1994, Dr. Dellar was refused access to Respondent's facility, in willful violation of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126, as alleged in paragraphs III(C) and X(A) of the Complaint, and I agree with the ALJ's conclusion that Respondent violated 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 on January 2, 1992, and February 1, 1994, (Initial Decision and Order at 27).

Paragraph III(D)(2) of the Complaint alleges that on January 2, 1992, Respondent failed to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.75(f). The APHIS inspection form, completed by Dr. Dellar after the inspection on January 2, 1992, identifies the housing facilities that were not equipped with drainage systems and operated so that water is rapidly eliminated, (CX 4 at 3 item 23, 4).

After her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

<u>#23 Drainage (3.76 3.126)</u> The entire facility was flooded due to a hose break. The elephant was standing in 3-5" of water. The primate (chimp) enclosure was flooded on 1 side and the zebra and camel stalls were wet. Correction date: 01-02-92 close of business.

CX 4 at 4.

Dr. Dellar testified that she remembered that she was informed that the cause of the water problem was a broken water pipe. (Tr. 35, 138, 270-71.) Despite the reason for the water in the housing facility for nonhuman primates, it is clear that there was a substantial amount of water in a primate enclosure on January 2, 1992, and that it was not rapidly eliminated by a drainage system. Therefore, I find that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.75(f), as alleged in paragraph III(D)(2) of the Complaint. Respondent is also alleged, in paragraph III(D)(6) of the Complaint, to have failed to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities for animals on January 2, 1992, in violation of 9 C.F.R. §§ 2.100(a) and 3.127(c). The evidence does not clearly establish which, if any, of the housing facilities that Dr. Dellar identified in her January 2, 1992, inspection report as flooded, were outdoor facilities. Therefore, I cannot find on this record that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.127(c), as alleged in paragraph III(D)(6) of the Complaint.

Paragraph III(D)(3) of the Complaint alleges that on January 2, 1992, Respondent failed to provide nonhuman primates with food that was wholesome and free from contamination, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.82(d). The APHIS inspection form, completed by Dr. Dellar after her January 2, 1992, inspection of site two on Respondent's premises, identifies the placement of a bowl under the metal mesh of the primate enclosure in a manner that did not protect the food from contamination by the primates' feces and urine. (CX 4 at 4.) However, Dr. Dellar's inspection report does not indicate that Respondent failed to provide nonhuman primates with food that was wholesome and free from contamination or that any food in the bowl identified in her report was unwholesome or contaminated. While the record indicates that the location of the bowl may have been in violation of 9 C.F.R. §§ 2.100(a) and 3.82(d), paragraph III(D)(3) of the Complaint does not allege that Respondent violated the standards by failing to locate the food receptacle so as to minimize risk of contamination, and I find no basis for reversing the ALJ's dismissal of paragraph III(D)(3) of the Complaint.

Paragraph III(D)(4) of the Complaint alleges that, on January 2, 1992, Respondent failed to keep the premises, including buildings and surrounding grounds, clean and in good repair in order to protect nonhuman primates from

injury, to facilitate the required husbandry practices, and to reduce or eliminate breeding and living areas for rodents, pests, and vermin. More specifically, paragraph III(D)(4) of the Complaint alleges that the premises were not kept free of accumulations of trash, junk, waste, and discarded matter, including food items, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.84(c). Paragraph VIII(A)(6) of the Complaint alleges that on September 14, 1993, Respondent failed to keep the premises clean and free of accumulations of trash and debris, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.84(c). The APHIS inspection forms, completed by Dr. Dellar after her January 2, 1992, and September 14, 1993, inspections, identify the manner in which Respondent failed to keep the premises clean and in good repair, (CX 4 at 3 item 36, 4; CX 14 at 4 item 37, 5).

After her January 2, 1992, inspection of site two on Respondent's premises, Dr. Dellar recorded her findings as follows:

> #36 Housekeeping (3.8 3.131) The food prep area was stacked with empty cereal boxes, overflowing trash receptacle was beneath the sink. The refrigerator needed cleaning and outdated food items need disposing of. Correction date: 01-02-92 close of business.

CX 4 at 4.

After her September 14, 1993, inspection of site two on Respondent's premises, Dr. Dellar recorded the following:

> #37 Housekeeping (3.84c) The (celebes) primate area had [illegible] materials that need to be removed before the animals are brought to this site. Also the enclosures need to have cobwebs, dead insects, ect [sic] removed — as well as the food prep room. Correct by: 10-14-93 (before animals are moved).

CX 14 at 5.

Based upon CX 4 and CX 14, I find that Complainant has proven by a preponderance of the evidence that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.84(c) on January 2, 1992, and September 14, 1993, as alleged in paragraphs III(D)(4) and VIII(A)(6) of the Complaint.

Paragraph IV(C)(6) of the Complaint alleges that on January 16, 1992, Respondent failed to utilize a sufficient number of employees to maintain the prescribed level of husbandry practices, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.132. The APHIS inspection form, completed by Dr. Dellar after her January 16, 1992, inspection of site two on Respondent's premises, identifies Dr. Dellar's concern with respect to the ability of one of Respondent's employees to care for

animals, (CX 5 at 3 item 38, 4). However, Dr. Dellar's inspection report does not address the sufficiency of the number of employees, as alleged in paragraph IV(C)(6) of the Complaint, and I agree with the ALJ's dismissal of paragraph IV(C)(6) of the Complaint.

Paragraph V(B)(2) of the Complaint alleges that on July 15, 1992, Respondent failed to provide outdoor housing which protect nonhuman primates from temperatures falling below 45 °F., in willful violation of 9 C.F.R. §§ 2.100(a) and 3.78(b). The APHIS inspection form, completed by Dr. Dellar after her July 15, 1992, inspection of site one on Respondent's premises, identifies Respondent's failure to provide outdoor housing facilities for nonhuman primates which protect the primates from temperatures below 45 °F., (CX 8 at 1 item 23, 2).

After Dr. Dellar's July 15, 1992, inspection of site one on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> 23 Shelter (3.78b) The primate shelters do not provide heat (they cannot provide heat) should the temperature fall below 45 °F. The primates are not easily moved to warmer quarters if the temp should fall below 45 °F. either. Correction date 08- [illegible].

CX 8 at 2.

The record indicates that Respondent corrected this violation by the time of the next inspection, October 20, 1992, by moving the primates out of the facility that did not have any heat, (CX 9 at 2). Nonetheless, the evidence is clear that on July 15, 1992, Respondent violated 9 C.F.R. §§ 2.100(a) and 3.78(b), as alleged in paragraph V(B)(2) of the Complaint.

Paragraphs V(B)(4) and VIII(A)(1) of the Complaint allege that on July 15, 1992, and September 14, 1993, respectively, Respondent failed to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities for animals, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.127(c). The APHIS inspection forms, completed by Dr. Dellar after her July 15, 1992, and September 14, 1993, inspections of Respondent's premises, identify the outdoor facilities which did not have a suitable method to rapidly eliminate excess water, (CX 8 at 1 item 24, 2, 3 item 24, 4; CX 14 at 1 item 14, 2).

After her July 15, 1992, inspection of site one on Respondent's premises, Dr. Dellar recorded the following findings in her inspection report:

> #24 Drainage (3.127) — Shelter for the llamas and the zebra had standing water in them. Correction date: 07-17-92.

CX 8 at 2.

Similarly, at site two on Respondent's premises, Dr. Dellar found that:

> #24 Drainage (3.127) The deer shelter floor was extremely wet and muddy from the holes in the roof and from the slope of the floor — It allowed water from the pasture to flow into the shelter. Correction date: 07-22-92.

CX 8 at 4.

By the time Respondent's premises was next inspected, October 20, 1992, Respondent had corrected the drainage problems described in Dr. Dellar's July 15, 1992, inspection report. (CX 9 at 2, 4.)

After her September 14, 1993, inspection of site one on Respondent's premises, Dr. Dellar recorded the following:

> III #14 Drainage (3.125) Due to the rain, the zebra shelter was very muddy and actually is lower than the surrounding ground causing water to enter. The zebra could not stay dry in that shelter. Correct by 09-21-93.

CX 14 at 2.

Respondent did not offer any evidence to rebut Dr. Dellar's July 15, 1992, and September 14, 1993, findings regarding the drainage problems at the shelters, which are the subject of Dr. Dellar's inspection reports. (CX 8, 14.)

Paragraphs V(B)(5), VI(B)(2), VII(C)(5), VIII(A)(4), and X(C)(10) of the Complaint allege that on July 15, 1992, October 20, 1992, August 10, 1993, September 14, 1993, and February 1, 1994, respectively, Respondent failed to provide animals with wholesome and uncontaminated food, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.129(a). The APHIS inspection forms, completed by Dr. Dellar after her July 15, 1992, October 20, 1992, August 10, 1993, September 14, 1993, and February 1, 1994, inspections of Respondent's premises, identify circumstances in which Respondent failed to provide animals with wholesome and uncontaminated food, (CX 8 at 1 item 34, 2; CX 9 at 3 item 34, 4; CX 12 at 4 item 34, 5; CX 14 at 1 item 34, 2; CX 21 at 1 item 34, unnumbered page between page 1 and page 2).

After her July 15, 1992, inspection of site one on Respondent's premises, Dr. Dellar recorded the following:

> #34 Feeding (3.129b) The sheep, goats, and cow were noted to be laying in, and contam [illegible] feed. Measures need to be taken to prevent feed contamination by excreta. Correction date: 07-17-92.

CX 8 at 2.

On the next inspection of Respondent's premises, October 20, 1992, Dr. Dellar found that Respondent had corrected the feeding problem identified in her July 15, 1992, inspection report, (CX 9 at 2), but found a similar problem at site two on Respondent's premises, as follows:

> #34 Feeding (3.129a) The elephant was being fed moldy bread buns. Mold is not wholesome and should not be fed to animals. Correction date: 10-20-92 close of business.

CX 9 at 4.

After her August 10, 1993, inspection of site one of Respondent's premises, Dr. Dellar found that:

> #34 Feeding (3.129b) Some of the animals were provided feed bags, but most were not. Animals were found laying in, defecating and urinating on their hay. The deer hay was rained on and placed on the ground (mud). Correct by 08-12-93.

CX 12 at 5.

During the next inspection of site one on Respondent's premises, September 14, 1993, Dr. Dellar found a similar violation of 9 C.F.R. §§ 2.100(a) and 3.129(a), as follows:

> #34 Feeding (3.129b) Some feed receptacles were available but none were use at this inspection. Animals were found to be standing in and contaminating their feed with urine and/or feces.

CX 14 at 2.

Finally, after her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following findings concerning feed:

> #34 Feeding (3.82a 3.129a) The rotten produce from the last inspection was fed to the elephant. Other old and deteriorating vegetables were still being stored and fed to the animals.

CX 21 at unnumbered page between page 1 and page 2.

Mr. Stramaglia testified that the hay that Dr. Dellar found to be contaminated may have been bedding rather than feed. (Tr. 395-96.) Therefore, I find that the

record is not quite strong enough to warrant reversing the ALJ with respect to the violations alleged in paragraphs V(B)(5), VII(C)(5), and VIII(A)(4) of the Complaint, and I have reversed the ALJ only with respect to Respondent's failure to provide animals with wholesome and uncontaminated food, as alleged in paragraphs VI(B)(2) and X(C)(10), which clearly relate to food other than hay.

Paragraphs VII(C)(3), IX(B)(6), and X(C)(9) of the Complaint allege that on August 10, 1993, January 3, 1994, and February 1, 1994, respectively, Respondent failed to provide animals kept outdoors with adequate shelter from inclement weather, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.127(b). The APHIS inspection forms, completed by Dr. Dellar after her August 10, 1993, January 3, 1994, and February 1, 1994, inspections, identify Respondent's failure to provide animals kept outdoors with adequate shelter, (CX 12 at 4 item 23, 5; CX 19 at 1 item 23, 2; CX 21 at 1 item 23, unnumbered page between page 1 and page 2).

After her August 10, 1993, inspection of site one on Respondent's premises, Dr. Dellar recorded the following:

> #23 Shelter from elements (3.127b) One llama was housed with the camel but the shelter was only large enough for the camel — shelter space must be adequate for all animals to be afforded shelter. Correct by: 08-10-93 close of business.

CX 12 at 5.

Although the Complaint does not allege any violation by Respondent of the shelter requirements in 9 C.F.R. §§ 2.100(a) and 3.127(b) on September 14, 1993, Dr. Dellar's September 14, 1993, inspection report reveals that the llama and camel were still housed together on September 14, 1993, and had a single shelter that was too small for both animals. (CX 14 at 2.)

After her January 3, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following:

> #23 Shelter (3.127b) In the past, the camel was kept in the large heated barn during the winter. This winter, he is being kept outside with access to a shelter. This shelter has no bedding, and the camel was reluctant to leave it. In an interview with the keeper, I was told that the camel only left the shelter for food and water. The attending vet recommends that the camel be housed in the large barn as well - or that the animal be heavily bedded down. Correct by: 01-10-94.

CX 19 at 2.

Dr. Dellar testified that she recalled a conversation with one of Respondent's employees regarding shelter for the camel, as follows:

[BY MS. DESKINS:]

Q. Okay. Do you happen to remember what you observed outdoors?

[BY DR. DELLAR:]

A. Outdoors, because it was so cold, I remember going out to the enclosure and finding Omar the camel outdoors. And also being concerned that it was such a cold winter where we were having abnormally low temperatures and exceedingly low wind chill factors, that the camel was being housed outdoors. And I was concerned about that, and I brought that up with Mel as well. But his response was that this is the way it's been since I've gotten here, and I'm not going to make any changes. And then he let it rest.

Tr. 68-69.

Dr. Dellar further testified regarding the basis for finding that the camel was not provided with adequate shelter, as follows:

BY MS. ALDEN:

Q. On the third of January 1994 was also the time that you observed the camel outside; isn't that right?

[BY DR. DELLAR:]

A. Yes.

Q. Didn't you also observe the shelter that was outside for the camel?

A. Yes.

Q. And am I to take it then that you didn't consider the shelter to be adequate for the camel?

A. The shelter was cited on line 37 for having loose plywood, loose boards and protruding nails. So it was inadequately protecting him from injury. And under shelter, it was inadequately bedded down, I cited that as well.

Q. So, was it your view that the camel should be brought into the barn or that simply the elimination of the shelter and those conditions that you found to be unacceptable would be sufficient?

A. I discussed two different possibilities. I strongly suggested that they follow their attending veterinarian's recommendation of bringing the animal inside and giving the animal access to the outdoors on a daily basis. If they couldn't do that, I then suggested that they bed the shelter down heavily and remove the nails and the loose boards to make it safe for him to be in there.

Q. Have you ever treated a camel?

A. No.

Q. Have you ever studied camels?

A. No.

Q. Do you know anything about a camel's requirements in extreme hot or cold?

A. Specific camel information?

Q. Specific camel information.

A. No.

Q. Well, are you telling the Court that you cited the facility for this violation because the attending vet suggested that the camel should be put inside?

A. No. What I do is, I look at an individual animal and I can determine by their behavior whether it's normal or not. I've seen this camel on several occasions, and I inspect several camels, so I am familiar

with normal behavior. This animal is in his enclosure and had made tracks in the snow only to the food and water areas, and then back to the shelter.

When I asked him to leave the shelter so that I could look at it for nails and things like that, it was very reluctant and wouldn't leave, whereas that camel normally will be led and is normally a very cooperative animal.

Q. Normally on your inspections in the facility?

A. Correct. Correct. So based on the information that I had that he had never been outside in the winter before, because I hadn't seen him outside before, he was very reluctant to leave because it was so cold. And that the shelter wasn't appropriate for him with the nails and the loose boards and the inadequate bedding. That's how I based my recommendation.

Q. Well, you testified earlier about all the treatises that you studied with respect to elephants and all of the experts that you've consulted with respect to elephant socialization and behavior. Have you ever done anything like that with respect to camels?

A. No.

Q. Is it fair to say that you're not familiar with treatises with respect to camels, or are you?

A. Can you define treatises?

Q. Well, let me ask you specifically about Walker's Mammals of the World. Are you familiar with that?

A. I think that was part of the exhibits, and I think I read over the part that was submitted.

Q. Well, is it your testimony that you are not familiar with the publication Walker's Mammals of the World?

A. I did read over the part that was submitted as part of the case. So that particular section I did read.

Q. All right. That's not my question. Are you telling the Court that you are not familiar with the publication generally, Walker's Mammals of the World?

A. Generally, I am not familiar with that. Correct.

Q. Had you heard about it before you saw it as an exhibit in this case?

A. No.

Q. What information or treatises have you consulted with respect to the care of camels?

A. None.

Q. Well, do you not -- is it not your common understanding that camels live -- can live in extreme heat and extreme cold, and do in their natural habitat?

A. Generally, I understand that. But again, I look at individuals. And this individual may be compromised, he may be old. He may have other underlying medical conditions which would not allow him to withstand the extremes as well as a normal species average.

Q. But you don't know that?

A. No, I do not know that.

Q. Okay. No inspection that you've ever made of the camel has indicated to you that the camel was compromised in any way?

A. Correct.

Q. And the attending vet has not indicated to you that the camel has any medical condition or is compromised in any way?

A. Correct.

Q. You've been inspecting this facility since 1989?

A. Eighty-eight.

Q. Since 1988. And how long has the camel been there?

A. A long time, I don't know the exact years.

Q. So the first time in January of 1994 you determined that the camel needs to be brought inside; is that correct?

A. It's the first time he was housed outdoors during the winter.

Q. To the best of your knowledge?

A. To the best of my knowledge, correct.

Q. Is it your testimony today that you've never seen the camel outside in the winter before?

A. I've seen him on a turnout basis where if it's a nice sunny day, the camel would be turned out, but then brought in at night when the temperatures got too cold.

Q. How do you know that?

A. I was told.

Q. No, you -- didn't you just say you've seen that?

A. Yeah, I saw him outside. On previous inspections he's been outside. But when I've inquired about it, I was told that he was brought in at night and --

Q. So you don't really know whether he's been in or out in previous years; do you?

A. Correct. I'm only going by what I was told.

Q. All right. What you were told by whom?

A. The attending veterinary and the animal caretakers.

Q. And that's the basis for your violation for the first time with respect to the camel in January of 1994?

A. My basis is that this particular animal didn't appear to be able to cope with the cold weather and needed to have something done.

Q. And did you make a suggestion as to what should be done?

A. Bring him indoors and allow him access outside on good days or make his shelter safe and bed him down heavier.

Tr. 180-86.

During her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar again found that the camel did not have sufficient bedding for the winter weather. (CX 21 at unnumbered page between page 1 and page 2.) Again, Dr. Dellar testified that she remembered a conversation with one of Respondent's employees regarding shelter for the camel, as follows:

[BY MS. DESKINS:]

Q. Okay. Do you have any memories regarding a camel?

[BY DR. DELLAR:]

A. Specific memories, I remember that Omar the camel was still outside and had not been brought in.

Q. And is there anything else that you remember about this inspection?

A. Oh, I remember also that in my discussions with the animal caretaker, he felt that not only did he not need to bring in the camel, that he didn't need to bed the facility -- bed the enclosure down any more, that the camel had sufficient bedding and that he just didn't feel that what I was asking was reasonable at all. I --

Q. Okay. Go ahead.

A. I was asking for either heavier bedding so that the animal could get some warmth from additional bedding or be brought into the facility, and on both things he thought both of those requests were unreasonable. So I remember that.

Q. Do you recall anything about the weather at this time?

A. Not specifically. It was winter and it was cold, but I don't remember specifics.

Tr. 89-90.

Mr. King testified that Respondent's camel was a dromedary and that the camel could be exposed to weather extremes. (Tr. 366-67.) Dr. Dellar testified that, while Bactrian camels can deal with extreme temperatures, Respondent's camel was a dromedary and should not be exposed to the winter weather that prevailed during her inspections on January 3 and February 1, 1994, without additional shelter or bedding. (Tr. 283-84.) While Mr. King testified that he had experience with camels and the record reveals that Mr. King is generally knowledgeable regarding the care of camels, I find that, based on her training and experience, Dr. Dellar is more qualified than Mr. King to determine the needs of Respondent's camel with respect to shelter from cold weather. Moreover, Dr. Dellar's January 3, 1994, and February 1, 1994, inspection reports state that Respondent's attending veterinarian had recommended that the camel be housed in the heated barn or given additional bedding. (CX 19 at 2, CX 21 at unnumbered page between page 1 and page 2.)

The record clearly establishes that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.127(b), as alleged in paragraphs VII(C)(3), IX(B)(6), and X(C)(9) of the Complaint.

Paragraphs IX(B)(1) and X(C)(3) of the Complaint allege that on January 3, 1994, and February 1, 1994, respectively, Respondent failed to maintain indoor housing facilities to protect nonhuman primates from temperature extremes and to provide for the health and well-being of nonhuman primates, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.76(a). Paragraphs IX(B)(5) and X(C)(8) of the Complaint allege that on January 3, 1994, and February 1, 1994, respectively, Respondent failed to sufficiently heat indoor housing facilities when necessary to protect animals from cold and to provide for their health and comfort, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.126(a). While the APHIS inspection forms, completed by Dr. Dellar after the January 3, 1994, and February 1, 1994, inspections, identify Respondent's failure to maintain heat in

indoor housing facilities to protect animals from the cold, the record reveals that the drop in temperature in the indoor facility (a large heated barn) may have been very short in duration and may have been caused by the normal use of the door to the facility to bring in equipment and food for the animals, and to take out waste, and an incident in which Respondent's elephant pushed the door off its track. (CX 19 at 1 item 15, 2; CX 21 at 1 item 15, unnumbered page between page 1 and page 2; CX 22A; Tr. 67.) While indoor facilities should be kept heated to protect animals, the evidence of Respondent's violations of 9 C.F.R. §§ 2.100(a), 3.76(a), and 3.126(a), as alleged in paragraphs IX(B)(1), IX(B)(5), X(C)(3), and X(C)(8) of the Complaint, is not quite strong enough to reverse the ALJ.

Paragraphs IX(B)(2) and X(C)(4) of the Complaint allege that on January 3, 1994, and February 1, 1994, respectively, Respondent failed to provide nonhuman primates with food that was wholesome and free from contamination, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.82(a). The APHIS inspection forms, completed by Dr. Dellar after her January 3, 1994, and February 1, 1994, inspections, specifically address Respondent's failure to provide nonhuman primates with food that is wholesome and free from contamination, (CX 19 at 1 item 34, 2; CX 21 at 1 item 34, unnumbered page between page 1 and page 2).

After her January 3, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #34 Feeding (3.82a) 2 cases of rotting bananas were brought in to feed the primates. Several loafs of old bread were found as well as produce marked for disposal. Feed shall be wholesome, nutritious, and palatable — Correct by 01-10-94.

CX 19 at 2.

Dr. Dellar testified that she determined that the bananas were rotting, based upon the appearance of the bananas, as follows:

> [BY MS. ALDEN:]
>
> Q. You also cited the facility for a violation, feeding violation with respect to the bananas and old bread?
>
> [BY DR. DELLAR:]
>
> A. Yes.

Q. Did you make a determination that that food was not wholesome?

A. By observation I could tell that the bananas were rotting.

Q. They were too brown for you to eat?

A. Correct.

Q. And so, that was the basis upon which you determined they were too brown for the animals to eat?

A. Also at that point they're not able to be sold from a grocery store.

Q. How do you know that?

A. Grocery stores get rid of bananas when they're black.

Q. How do you know they weren't brought from a grocery store that day?

A. They could have been.

Q. There were no vermin in the bananas, were there; no pests?

A. None that I documented.

Tr. 186-87.

After her February 1, 1994, inspection of site 2 on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #34 Feeding (3.82a 3.129a) The rotten produce from the last inspection was fed to the elephant. Other old and deteriorating vegetables were still being stored and fed to the animals.

CX 21 at unnumbered page between page 1 and page 2.

During her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar took a photograph of the bananas that were rotting prior to their being fed to the elephant. (Tr. 91; CX 22G.) When shown CX 22G, Mr. King testified, as follows:

[BY MS. DESKINS:]

Q. Okay. Mr. King, I'm going to have to come up there to get some photographs.

Mr. King, I've handed you a document that has been marked as Complainant's Exhibit number 22.

[BY MR. KING:]

A. Uh-huh.

Q. And just to look on the back of it, it's been identified as G?

A. Okay.

Q. Now you would agree, as you've said previously, that the food item showing in that picture should not be stored like that?

A. No, it shouldn't. Could you tell me when this was taken?

Q. Okay. This was taken February 1, 1994.

A. Well, it could be -- it was cooler at that time, so it probably wouldn't be spoiled as fast as it would be if it was the summer, but it doesn't look real good.

Tr. 371-72.

The evidence clearly establishes that on January 3, 1994, Respondent failed to provide nonhuman primates with food that was wholesome and free from contamination, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.82(a), as alleged in paragraph IX(B)(2) of the Complaint. However, it is not clear from this record that Respondent fed or intended to feed the bananas or the vegetables identified in Dr. Dellar's February 1, 1994, inspection report to primates, and I find that the record is not quite strong enough to reverse that ALJ with respect to the violation alleged in paragraph X(C)(4) of the Complaint.

Paragraph IX(B)(3) of the Complaint alleges that on January 3, 1994, Respondent failed to keep primary enclosures for nonhuman primates clean and spot-cleaned daily, in willful violation of 9 C.F.R. §§ 2.100(a), 3.75(c)(3), and 3.84(a). Paragraph X(C)(5) of the Complaint alleges that on February 1, 1994,

Respondent failed to keep primary enclosures for nonhuman primates clean and sanitized, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.84(a), (b). The APHIS inspection forms, completed by Dr. Dellar after her January 3, 1994, and February 1, 1994, inspections, specifically address Respondent's failure to keep primary enclosures for nonhuman primates clean, (CX 19 at 1 item 36, 2; CX 21 at 1 item 36, unnumbered page between page 1 and page 2).

After her January 3, 1994, inspection of site two on Respondent's premises, Dr. Dellar recorded the following on her inspection report:

> #36 Cleaning and Sanitation (3.84b2) The primate enclosures are not being totally cleaned and sanitized at least once every 2 weeks. Correct by: 01-10-94.

CX 19 at 2.

During her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar found a similar violation: failure to clean and sanitize primate enclosures at least once every 2 weeks. (CX 21 at 2.)

Respondent did not rebut the evidence that on January 3, 1994, it failed to keep primary enclosures for nonhuman primates clean and spot-cleaned daily, in violation of 9 C.F.R. §§ 2.100(a), 3.75(c)(3), and 3.84(a), and that on February 1, 1994, it failed to keep primary enclosures for nonhuman primates clean and sanitized, in violation of 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.84(b).

Paragraph X(B) of the Complaint alleges that on February 1, 1994, Respondent handled animals in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort, in willful violation of 9 C.F.R. § 2.131. The APHIS inspection form, completed by Dr. Dellar after her February 1, 1994, inspection, specifically addresses the manner in which Respondent handled its animals, in violation of 9 C.F.R. § 2.131, (CX 21 at 1 item 47, unnumbered page between page 1 and page 2).

During her February 1, 1994, inspection of site two on Respondent's premises, Dr. Dellar found that:

> #47 Handling (2.131a1) One of the leg chains on the elephant was not covered. This elephant has a history of severe injuries to her legs from [illegible] unprotected leg chain. Correct by: 02-08-94.

CX 21 at unnumbered page between page 1 and page 2.

Dr. Dellar testified that she specifically remembered the elephant's leg chain, as follows:

BY MS. DESKINS:

Q. Okay. Can you please tell us what your memories are for that particular inspection. And by "that inspection", I'm referring to the inspection of February 1 of 1994.

[BY DR. DELLAR:]

A. I had two things that I remember distinctly about this. The first one was that when I conducted this inspection the elephant leg chain had been unguarded, meaning that when you normally chain an elephant's legs, you put some type of padding around the chain that actually touches the leg so that it doesn't cause abrasions.

This facility has had in the past a history of having the chains cut the elephant's legs and cause severe lacerations of the elephant's legs. So, I was very concerned that this particular chain wasn't guarded and that the elephant had been agitated and that they had to chain both the front legs and the back legs; that she was poking holes in the barn walls, trying to get at the chimps caged in front of her. She was very agitated and working on the chains constantly trying to escape and break the chains.

MS. ALDEN: Well, Your Honor, I'm going to object to the witness hypothesizing about why the elephant -- what the elephant was thinking at the time that it was moving about.

JUDGE KANE: All right. Thank you, Counsel. Objection overruled. The question seeks the witness's recall; she saw unguarded leg chains.

BY MS. DESKINS:

Q. You can continue, Dr. Dellar.

A. This -- so I was very concerned about the condition of the leg chains going from the previous history of this facility. . . .

Tr. 88-89.

Mr. Stramaglia testified that Respondent did use an "unprotected" chain, but only for a short period of time, as follows:

[BY MS. ALDEN:]

Q. Was there an occasion upon which she had leg chains that were not protected?

[BY MR. STRAMAGLIA:]

A. Yes.

Q. Would you explain how that occurred?

A. Well, what happened was she had -- she was teething, and she was getting ready to drop a tooth and it was bothering her.

Q. And how was that manifested; what did she act like?

A. Well, you know, she wanted to keep rubbing her face and her tusks up against the wall and she was poking at the wall and rubbing her tusks on the ground, and we had contacted Dr. Kispert, and she had given us some medicine to give her. Thought maybe it was worms or something, but it wasn't and we treated her for that and then we took stool samples and so forth, and she came out and took some blood and it wasn't that. What happened was, you know, a while later she had dropped a tooth, and then after she dropped a tooth she started acting a little more normal.

Q. While she was experiencing the teething problem, what kind of action did she take?

A. Did who take?

Q. Twiggy.

A. Well, she was real restless and we had to chain her away from the wall.

Q. Why did you use an unprotected chain?

A. Well, at that point in time, when the caretaker, Mel, had put the chain on her, he did not have any of the covering that we use for the

> chain. So, he had put the chain on her and like a day or so after that, he -- I wasn't there the next day, but the day after that, he came out to the park at the office and I was there and he was looking for some material to cover this chain. We had some stored in another area, so I went out there with him and we cut a few more pieces and went back to the barn and put it around the chain.

Tr. 397-98.

Nonetheless, there is no dispute that a leg chain used on the elephant for some period of time was not covered, and I find that on February 1, 1994, Respondent handled an animal in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort, in willful violation of 9 C.F.R. § 2.131, as alleged in paragraph X(B) of the Complaint.

Paragraph X(C)(1) of the Complaint alleges that on February 1, 1994, Respondent failed to keep housing facilities for nonhuman primates and areas used for storing animal food and bedding free of an accumulation of trash, waste material, junk, weeds, and other discarded materials, in willful violation of 9 C.F.R. §§ 2.100(a) and 3.75(b). The APHIS inspection report, completed by Dr. Dellar after the February 1, 1994, inspection, specifically addresses Respondent's failure to keep facilities and storage areas free of an accumulation of trash, waste material, junk, weeds, and other discarded materials, (CX at 1 item 36, unnumbered page between page 1 and page 2). While the record does contain evidence of a violation of 9 C.F.R. § 3.75(b), it is not clear that the accumulation of items that are the subject of Dr. Dellar's February 1, 1994, inspection report, (CX 21), consists of trash, waste material, junk, weeds, and other discarded materials.

Findings of Fact

1. Respondent, Volpe Vito, Inc., doing business as Four Bears Water Park and Recreation Area, is a corporation whose address is [redacted] Utica, Michigan 48087.

2. Four Bears Water Park and Recreation Area covers approximately 125 acres in Utica, Michigan.

3. Respondent has been in business since 1983 and at all times material to this proceeding exhibited animals.

4. Four Bears Water Park and Recreation Area consists of two separate sites that are regularly inspected by APHIS. Site one is the water park that is open to the public from Memorial Day to Labor Day and is located at [redacted]

Utica, Michigan. Site two is a winter holding area for the animals when the water park is closed and is located at [redacted] Utica, Michigan.

5. Approximately 100,000 people visit Four Bears Water Park and Recreation Area during the summer. While the price of admission ranges from $11.95 to $0 per person, the average price for the admission of one person is $5.

6. At all times material to this proceeding, Respondent was licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations. When Respondent became licensed, and annually thereafter, Respondent received copies of the Animal Welfare Act, the Regulations, and the Standards and agreed in writing to comply with the Animal Welfare Act, the Regulations, and the Standards.

7. From September 19, 1991, through February 1, 1994, Respondent's facility was inspected on nine different occasions by Dr. Lisa Dellar, a veterinarian employed by APHIS.

8. On September 19, 1991, January 2, 1992, January 16, 1992, July 15, 1992, and October 20, 1992, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals.

9. On September 19, 1991, January 2, 1992, January 16, 1992, and August 10, 1993, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

10. On September 19, 1991, July 15, 1992, October 20, 1992, September 14, 1993, and February 1, 1994, surfaces of Respondent's housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted.

11. On September 19, 1991, and January 2, 1992, Respondent failed to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation.

12. On September 19, 1991, Respondent failed to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote the psychological well-being of nonhuman primates.

13. On September 19, 1991, January 16, 1992, August 10, 1993, January 3, 1994, and February 1, 1994, Respondent failed to provide, for animals, facilities that were structurally sound and maintained in good repair so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals.

14. On September 19, 1991, January 2, 1992, July 15, 1992, August 10, 1993, and September 14, 1993, Respondent failed to store supplies of food adequately

to protect them against deterioration, molding, or contamination by vermin, and on February 1, 1994, Respondent failed to store supplies of food adequately to protect them against deterioration, molding, or contamination by vermin, and refrigeration was not provided for supplies of perishable food.

15. On September 19, 1991, and September 14, 1993, Respondent failed to keep water receptacles clean and sanitary.

16. On September 19, 1991, January 2, 1992, and August 10, 1993, Respondent failed to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash, and on February 1, 1994, Respondent failed to keep the premises (buildings and grounds) clean and in good repair.

17. On January 2, 1992, Respondent refused to allow APHIS to inspect its animals, facilities, and records, and on February 1, 1994, Respondent refused to allow APHIS to inspect its records.

18. On January 2, 1992, Respondent failed to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry.

19. On January 2, 1992, and September 14, 1993, Respondent failed to keep the premises, including buildings and surrounding grounds, clean.

20. On July 15, 1992, Respondent failed to provide outdoor housing facilities for nonhuman primates which provide sufficient heat to protect nonhuman primates from temperatures falling below 45 °F.

21. On July 15, 1992, and September 14, 1993, Respondent failed to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities for animals.

22. On October 20, 1992, and February 1, 1994, Respondent failed to provide animals with wholesome and uncontaminated food.

23. On August 10, 1993, January 3, 1994, and February 1, 1994, Respondent failed to provide animals kept outdoors with adequate shelter from inclement weather.

24. On January 3, 1994, Respondent failed to provide nonhuman primates with food that was wholesome and free from contamination.

25. On January 3, 1994, Respondent failed to keep primary enclosures for nonhuman primates clean and spot-cleaned daily.

26. On February 1, 1994, Respondent failed to keep primary enclosures for nonhuman primates clean and sanitized.

27. On February 1, 1994, Respondent handled an animal in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

Conclusions of Law

1. On September 19, 1991, January 2, 1992, January 16, 1992, July 15, 1992, and October 20, 1992, Respondent willfully violated 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1) by failing to maintain complete records showing the acquisition, disposition, and identification of animals.

2. On September 19, 1991, January 2, 1992, January 16, 1992, and August 10, 1993, Respondent willfully violated 9 C.F.R. § 2.40 by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care.

3. On September 19, 1991, July 15, 1992, October 20, 1992, and September 14, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a), 3.75(c)(1), and 3.80(a)(2)(ix) because surfaces of Respondent's housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow the facilities to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted.

4. On February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.75(c)(1) because surfaces of Respondent's housing facilities for nonhuman primates were not constructed in a manner and made of materials that allow the facilities to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted.

5. On September 19, 1991, and January 2, 1992, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.75(e) by failing to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation.

6. On September 19, 1991, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.81 by failing to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote the psychological well-being of nonhuman primates.

7. On September 19, 1991, January 16, 1992, August 10, 1993, January 3, 1994, and February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to provide facilities for animals that were structurally sound and maintained in good repair so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals.

8. On September 19, 1991, January 2, 1992, July 15, 1992, August 10, 1993, and September 14, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.125(c) by failing to store supplies of food adequately to protect them against deterioration, molding, or contamination by vermin, and on February 1, 1994,

or contamination by vermin, and refrigeration was not provided for supplies of perishable foods.

9. On September 19, 1991, and September 14, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.130 by failing to keep water receptacles clean and sanitary.

10. On September 19, 1991, January 2, 1992, and August 10, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.131(c) by failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash.

11. On February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.131(c) by failing to keep the premises (buildings and grounds) clean and in good repair.

12. On January 2, 1992, Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 by refusing to allow APHIS to inspect its animals, facilities, and records, and on February 1, 1994, Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 by refusing to allow APHIS to inspect its records.

13. On January 2, 1992, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.75(f) by failing to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry.

14. On January 2, 1992, and September 14, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.84(c) by failing to keep the premises clean.

15. On July 15, 1992, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.78(b) by failing to provide outdoor housing facilities for nonhuman primates which provide sufficient heat to protect nonhuman primates from temperatures falling below 45 °F.

16. On July 15, 1992, and September 14, 1993, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(c) by failing to provide a suitable method to rapidly eliminate excess water from outdoor housing facilities for animals.

17. On October 20, 1992, and February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.129(a) by failing to provide animals with wholesome and uncontaminated food.

18. On August 10, 1993, January 3, 1994, and February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.127(b) by failing to provide animals kept outdoors with adequate shelter from inclement weather.

19. On January 3, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a) and 3.82(a) by failing to provide nonhuman primates with food that was wholesome and free from contamination.

20. On January 3, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a), 3.75(c)(3), and 3.84(a) by failing to keep primary enclosures for nonhuman primates clean and spot-cleaned daily.

21. On February 1, 1994, Respondent willfully violated 9 C.F.R. §§ 2.100(a), 3.84(a), and 3.84(b) by failing to keep primary enclosures for nonhuman primates clean and sanitized.

22. On February 1, 1994, Respondent willfully violated 9 C.F.R. § 2.131 by handling an animal in a manner that caused trauma, behavioral stress, physical harm, and unnecessary discomfort.

Issues Raised By Respondent on Appeal to the Judicial Officer

Respondent raises nine issues on appeal in Respondent's Appeal to the Secretary (hereinafter Respondent's Appeal) and Respondent's Response. First, Respondent contends that the Complaint should be dismissed in its entirety because:

> . . . [T]he ALJ determined that "Dr. Dellar, as an Inspector, Tr 305) was employed to procure evidence which was memorialized in reports, (Tr 302) prepared in anticipation of litigation, (Tr 153-154) and which were composed with the purpose of putting respondent out of business as an animal exhibitor." (Cx 7, 20; Tr 194). Further, the ALJ determined that Dr. Dellar was encouraged in this activity by her supervisors, (CX 23; Tr 195) and supported in the presentation of her testimony by counseling off-the-record with the government attorneys subsequent to the commencement of cross examination" (Tr. 298-299; Initial Decision and Order, pp 19-20).
>
> Based upon these revelations, the ALJ held that "the evidence," of Dr. Dellar "both verbal, and in the reports of each of the inspections," were "bias" and did "not constitute substantial evidence". (Initial Decision and Order, pp 19-20).

Respondent's Appeal at 3.

Respondent's description of the ALJ's erroneous determination that Dr. Dellar's testimony and inspection reports did not constitute substantial evidence is generally accurate. However, there is no basis in the record for the ALJ's finding that Dr. Dellar's testimony and the inspection reports she completed after each inspection of Respondent's premises did not constitute substantial evidence

of Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards.

The ALJ found that:

> Dr. Dellar, as an inspector, (Tr. 305) was employed to procure evidence which was memorialized in reports, (Tr. 302) prepared in anticipation of litigation, (Tr. 153-154) and which were composed with the purpose of putting respondent out of business as an animal exhibitor. (CX 7, 20; Tr. 194) Dr. Dellar was encouraged in this activity by her supervisors, (CX 23; Tr. 195) and supported in the presentation of her testimony by counseling off-the-record with the Government attorney subsequent to the commencement of cross-examination. (Tr. 298-299) Therefore, the evidence, both verbal, and in the reports of each of the inspections, display a bias which suggests to a reasonable mind that the facts assertedly established by Dr. Dellar's recordings did not exist to the extent or to the degree complaint counsel contend, and hence do not constitute substantial evidence. . . .

Initial Decision and Order at 19-20.

It is the consistent practice of the Judicial Officer to give great weight to the findings by ALJs since they have the opportunity to see and hear witnesses testify.[18] However, in some circumstances, the Judicial Officer has reversed as to the facts where: (1) documentary evidence or inferences to be drawn from the facts are involved, *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*,

[18] *E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *compare In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426-28 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of Complaint on remand where she had originally accepted the testimony of Respondent's wife, Respondent's employee, and Respondent's "real good friend" over that of three disinterested USDA veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); (2) the record is sufficiently strong to compel a reversal as to the facts, *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); or (3) an ALJ's findings of fact are hopelessly incredible, *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986).

Moreover, the Judicial Officer is not bound by the ALJ's credibility determinations, and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[19]

Dr. Dellar testified that she was employed by APHIS with Regulatory Enforcement of Animal Care, that she performs animal welfare inspections, (Tr.

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[19]*See also In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. ___, slip op. at 9-10 (Aug. 19, 1996); *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 5 (July 23, 1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes, supra*, 45 Agric. Dec. at 548; *In re Gerald F. Upton, supra*, 44 Agric. Dec. at 1942 (1985); *In re Dane O. Petty, supra*, 43 Agric. Dec. at 1421; *In re Eldon Stamper, supra*, 42 Agric. Dec. at 30; *In re Aldovin Dairy, Inc., supra*, 42 Agric. Dec. at 1797-98; *In re King Meat Co., supra*, 40 Agric. Dec. at 1500-01. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc., v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiners finding on credibility); *3 Kenneth C. Davis, Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

13), and that she conducts these inspections in her capacity as an inspector for USDA. (Tr. 305.) Dr. Dellar testified that each year she conducts approximately 350 site inspections, (Tr. 22), and that she finds nearly 50 percent of the facilities she inspects to have no violations of the Animal Welfare Act, the Regulations, or the Standards, (Tr. 178). While Dr. Dellar found numerous aspects of Respondent's facilities that were not in compliance with the Animal Welfare Act, the Regulations, and the Standards, a review of her inspection reports, (CX 3, 4, 5, 8, 9, 12, 14, 19, 21), reveals that Dr. Dellar found Respondent's facility to be in compliance with most provisions of Animal Welfare Act, the Regulations, and the Standards during each of her nine inspections of Respondent's premises. Dr. Dellar's inspection reports also reveal that she identified corrections made by Respondent since her previous inspection. (CX 3 at 2, 4; CX 5 at 2, 4; CX 8 at 2, 4; CX 9 at 2, 4; CX 12 at 2; CX 14 at 2, 5; CX 19 at 2; CX 21 at unnumbered page between page 1 and page 2.) Moreover, even when reporting concerns she had regarding the quality of the animal husbandry at Respondent's facility, Dr. Dellar began by stating that, on her January 16, 1992, inspection, she found site two on Respondent's premises "was much cleaner and most of the noncompliant standards were corrected." (CX 7.)

Dr. Dellar did state in a memorandum that she wrote to her supervisor regarding Respondent's facility, on January 7, 1994, that:

> I am extremely concerned about this facility. As you know, we have had a case pending at this facility for nearly 2 years. Now, I feel the agency needs to take an agressive [sic] stance and get these folks out of the animal business. This urgency is prompted by my last inspection of 01-03-94. . . .

CX 20 at 1. While, by January 7, 1994, Dr. Dellar had come to the conclusion that APHIS needed to take an aggressive stance and get Respondent out of the animal business, (CX 20; Tr. 194-95), I find nothing in the record to support the ALJ's determination that Dr. Dellar's testimony and inspection reports "display a bias which suggests to a reasonable mind that the facts assertedly established by Dr. Dellar's recordings did not exist to the extent or to the degree complaint counsel contend, and hence do not constitute substantial evidence." (Initial Decision and Order at 19-20.)

In proceedings conducted under the Administrative Procedure Act, "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence*." (5 U.S.C. § 556(d) (emphasis added).) "Substantial evidence" denotes quantity, *Steadman v.*

SEC, *supra*, 450 U.S. at 98, and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1104 (8th Cir. 1991).

I infer, based upon Dr. Dellar's description of her employment status, (Tr. 12-13), that Dr. Dellar was a salaried USDA employee and that her salary, benefits, and continued employment by USDA were not dependent upon her findings during her inspections of Respondent's premises. Dr. Dellar had no reason to record her findings in other than an impartial fashion or to give false testimony. I find nothing in the record that indicates that Dr. Dellar's testimony or inspection reports are inaccurate or false. The pictures taken by Dr. Dellar, which were introduced into evidence, and the testimony given by Respondent's witnesses support many of the findings that Dr. Dellar included in her inspection reports and testified to at the hearing.

Further, I disagree with the ALJ's finding that the "encouragement" that Dr. Dellar received from her supervisors detracts from the weight to be given Dr. Dellar's testimony or the inspection reports Dr. Dellar completed after each inspection of Respondent's premises.

Further still, the ALJ states and Respondent contends that Dr. Dellar's testimony and inspection reports do not constitute substantial evidence because Dr. Dellar was "supported in the presentation of her testimony by counseling off-the-record with the Government attorney subsequent to the commencement of cross-examination. (Tr. 298-99)" (Initial Decision and Order at 19.)

The record does establish that Ms. Deskins and Dr. Dellar discussed Dr. Dellar's testimony after Dr. Dellar's direct-examination and cross-examination, but prior to Dr. Dellar's redirect-examination and recross-examination, as follows:

RECROSS-EXAMINATION

BY MS. ALDEN:

Q. Now Dr. Dellar, you've -- over the break from last night when you completed your cross-examination, you've discussed your testimony, haven't you?

(No response)

Do you not remember? I've noticed you're hesitating.

[BY DR. DELLAR:]

A. I don't know if I want to say we discussed my testimony. We did meet in the hotel room last night and went over the questions that you asked me.

Q. But you don't call that discussing your testimony; is that what you're telling the Court?

A. I guess we had a discussion of what occurred and it wasn't focused on my testimony, it was a combination of what you had asked as well.

Q. So your discussion was both of my questions and your answers?

A. And her questions as well.

Q. Now, didn't you very specifically yesterday testify that you did not read Dr. Kispert's entire medical report on Washington?

A. Yes, I did say that.

Q. And didn't you specifically testify yesterday that you did not rely on the entirety of that report in coming to your conclusion regarding the cause of death?

A. Yes, I did say that.

Q. And didn't you specifically sit in that witness chair yesterday for several moments and read through the entirety of Dr. Kispert's records regarding Washington?

A. Yes, I did.

Q. And it's only today that you now remember that those answers yesterday were wrong and that you had, in fact, previously read through that record?

A. I had forgotten that I had gone through the record.

Q. Had you forgotten it up until the time you discussed your testimony last evening?

A. Yes. I was reminded that I had gone through the records.

Tr. 298-300.

As an initial matter, I cannot find that any "counseling off-the-record" during the hearing in this proceeding conducted August 16-17, 1994, could possibly have any effect on the reliability or probative value of Dr. Dellar's inspection reports, (CX 3, 4, 5, 8, 9, 12, 14, 19, 21), the last of which Dr. Dellar prepared on February 1, 1994, 6½ months prior to the off-the-record counseling referenced by the ALJ. (Initial Decision and Order at 19.)

Further, off-the-record discussions between counsel and counsel's witnesses are not prohibited by either the Administrative Procedure Act or the Rules of Practice. Moreover, I cannot find any instruction by the ALJ on this record either to Dr. Dellar or to Ms. Deskins that they were not to discuss Dr. Dellar's testimony off-the-record. Moreover, there is nothing on this record to indicate that Ms. Deskins suborned perjury, that the off-the-record discussion between Dr. Dellar and Ms. Deskins resulted in Dr. Dellar's giving perjured testimony, or that Respondent was in any way prejudiced by any off-the-record discussion between Ms. Deskins and Dr. Dellar.

Second, Respondent contends that:

> In Young v USDA, 53 F 3d 728 (CA 5, 1995), the Court dismissed the Complaint on facts strikenly [sic] similar to those now before the Secretary.
>
> The Young court held that the affidavits and summary reports prepared by the Veterinary Medical Officers (MVO) [sic] lacked probative value and reliability where they were prepared in anticipation of administrative proceedings and where the VMO were given instructions regarding how to prepare documents by agency attorneys. Young, 53 F 3d at 730.
>
> Accordingly, as in Young, supra., the complaint against respondent should be dismissed.

Respondent's Appeal at 3-4.

I disagree with Respondent's contention that the facts in *Young v. United States Dep't of Agric.*, 53 F.3d Cir. 728 (5th Cir. 1995) (2-1 decision), are

similar to the facts in the instant proceeding. The documents that the *Young* court found were prepared in anticipation of litigation were affidavits of two veterinary medical officers and a USDA Summary of Alleged Violations form completed after an inspection conducted in accordance with the Horse Protection Act of 1970, as amended (hereinafter Horse Protection Act), (15 U.S.C. §§ 1821-1831). The *Young* court found that the Veterinary Medical Officers' testimony in the case revealed that as a general practice Veterinary Medical Officers prepare USDA Summary of Alleged Violations forms and affidavits only when administrative proceedings are anticipated. The court found even more important the fact that the Veterinary Medical Officers admitted that they only included observations indicating a violation of the Horse Protection Act. Further, the court found relevant the fact that the Veterinary Medical Officers also indicated that they were given instructions regarding how to prepare the documents by USDA attorneys so that the documents would support a USDA complaint under the Horse Protection Act. The *Young* court concluded, based on these factors that, although the authors of the affidavits and the Summary of Alleged Violations forms may have been objective in forming their opinion, the documents themselves admittedly recorded a biased account of the results of the inspection and that their probative value is limited. *Young* at 730-31.

Exhibitors licensed under the Animal Welfare Act are regularly inspected. Unlike the documents that were at issue in *Young*, Animal Welfare Act inspection reports (APHIS Form 7008, Animal Care Inspection Report (previously entitled Inspection of Animal Facilities, Sites or Premises[20])) are prepared after each inspection whether violations of the Animal Welfare Act, the Regulations, and the Standards are found or not found. Each inspection report indicates those aspects of the inspected facility that are found in compliance with the Animal Welfare Act, the Regulations, and the Standards, as well as those aspects of the facility that are found to be in violation of the Animal Welfare Act, the Regulations, and the Standards. Moreover, a correction date is noted on inspection reports for each aspect of a facility that is found in violation of the Animal Welfare Act, the Regulations, and the Standards, and, if a previous violation is found on a subsequent inspection to have been corrected, the correction is noted on that subsequent inspection report. Neither the method by which facilities subject to the Animal Welfare Act are chosen to be inspected nor the manner in which the inspection reports are completed support a conclusion that the inspection reports are prepared in anticipation of litigation. Further, Dr. Dellar's inspection reports identify those aspects of Respondent's facility which complied with, as well as

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[20]See note 5.

those aspects of Respondent's facility which did not comply with, the Animal Welfare Act, the Regulations, and the Standards. (CX 3, 4, 5, 8, 9, 12, 14, 19, 21; Tr. 18-19.)

Moreover, while Dr. Dellar knew of the possibility of the institution of an administrative proceeding against Respondent, (CX 7, 20), Dr. Dellar testified that she did not conduct her inspections of Respondent's premises or complete her inspection reports in the context of developing a case against Respondent, as follows:

BY MS. ALDEN:

Q. Well, my question is didn't you conduct your inspections in the context of a case that was already going on against this facility?

[BY DR. DELLAR:]

A. And I have to say no, I don't do that. But I do collect evidence and send it on to a case that is already pending. But -- so I don't go in with the mental frame that these folks already have a case against them. I go in with, this is a new inspection, whatever happens, happens. But once I collect the evidence, then it's added to a case. That's my mental thinking when I go in.

Q. Well, you certainly thought it was important enough on the 17th day of January 1992 to report it to your supervisor, didn't you?

A. Yes, I did.

Q. So you may not have thought about it when you went into the inspection on January 16th, but you did think about it when you came out of the inspection and wrote the memo on January 17th; didn't you?

. . . .

THE WITNESS: Yes.

BY MS. ALDEN:

Q. Now when you made the further comment to your supervisor, "If you need anything else, let me know." What did you mean?

A. Oh, frequently they'll ask me to go back and get an affidavit, or go back and take a picture, or go back and do this, or go back and do that. So I always put that in as if -- if I didn't do anything or if I left something out that you want, some kind of information, let me know and I'll go back.

Q. Now, did you mean with respect to the case in Vermont or with respect to your inspections?

A. Oh, I -- my inspections. I have nothing to do with Vermont.

Q. And did your supervisor indicate to you that there was anything else that she needed or he needed?

A. No.

Tr. 153-55.

Finally, unlike *Young*, there is nothing in this record to indicate that Dr. Dellar received any instructions from USDA attorneys regarding how to prepare her inspection reports so that they would support a Complaint instituted under the Animal Welfare Act against Respondent. There is no basis for finding that the facts surrounding Dr. Dellar's preparation of inspection reports after inspection of Respondent's premises, (CX 3, 4, 5, 8, 9, 12, 14, 19, 21), are similar to the facts surrounding the preparation of the affidavits and Summary of Alleged Violations form at issue in *Young*.

Third, Respondent contends that the sanction of revocation of Respondent's Animal Welfare Act license is too harsh.

Specifically, Respondent contends that:

Arguendo, it cannot now be asserted respondent willfully or otherwise attempted to falsify records as was the case in Cox v USDA, 925 F 2d 1102 (CA 8, 1991), wherein the Secretary imposed a civil penalty and 90 day suspension deemed appropriate to serve the remedial purpose of the Act. The facts in Cox were more egregious than those presented here, yet the sanctions sought more draconian. Especially where, as here, the ALJ determined that respondent operated a large business without incident from the time it was licensed, had never been convicted of any violation of state

or local regulations involving treatment, care, or handling of animals (Initial Decision and Order, pp 11, 26; Tr 384-385), and that respondent not only attempted to correct violations (Tr 391) but indeed enacted certain measures in order to correct any violations noted by APHIS in order to prevent their reoccurance [sic] in the future (Initial Decision and Order, pp 18, 26; Tr 405).

Respondent's Appeal at 4-5.

I agree with Respondent and the ALJ that Respondent operated a large business under the Animal Welfare Act and that there is no evidence that Respondent has previously been convicted of any violation of state or local regulations involving treatment, care, or handling of animals. (Initial Decision and Order at 26; Respondent's Appeal at 4-5.) I agree with Respondent that Respondent attempted to correct some of the violations identified during APHIS inspections of Respondent's premises, and I find further that Respondent actually did correct some of the violations identified during those inspections. (CX 3 at 2, 4; CX 5 at 2, 4; CX 8 at 2, 4; CX 9 at 2, 4; CX 12 at 2; CX 14 at 2, 5; CX 19 at 2; CX 21 at unnumbered page between page 1 and page 2.) Moreover, the record reveals that Respondent did institute measures to prevent reoccurrence of violations in the future, which Mr. Stramaglia described, as follows:

[BY MS. ALDEN:]

Q. Mr. Stramaglia, would you describe, in a general way, what the response has been from you as the person who runs the park, in an effort to comply with the violations that have been noted by the Department?

[BY MR. STRAMAGLIA:]

A. Yes. Well, what we did is we tried to beef up our staff a little bit, we tried to clean up our record keeping, tried to do a little more clean up as far as the husbandry is concerned at the facility and we try to get a little better qualified people. It's -- sometimes it's hard, but, you know, we've been making an honest effort.

Q. What kind of advertising do you do for help for employees at the park?

A. We advertise in the local papers and trade magazines.

Tr. 405.

Nonetheless, each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations in 9 C.F.R. Part 2 and the Standards in 9 C.F.R. Part 3. (9 C.F.R. § 2.100(a).) This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation. *In re Big Bear Farm, Inc., supra*, 55 Agric. Dec. at 142; *In re Pet Paradise, Inc., supra*, 51 Agric. Dec. at 1070. Moreover, the record reveals that Respondent repeatedly and willfully failed to comply with the Animal Welfare Act, the Regulations, and the Standards. On each of the nine inspections conducted by Dr. Dellar, she found numerous violations of the Regulations and the Standards, (CX 3, 4, 5, 8, 9, 12, 14, 19, 21). I find that the record clearly establishes that Respondent committed 51 violations of the Animal Welfare Act, the Regulations, and the Standards during the period September 19, 1991, through February 1, 1994, many of which were very serious violations and could have affected the health of Respondent's animals.

Fourth, Respondent contends that it cannot now be asserted that Respondent willfully falsified or attempted to falsify records. (Respondent's Appeal at 4.) While anything may be asserted, if Respondent's point is that there is no evidence on this record that Respondent falsified or attempted to falsify records required to be kept under the Animal Welfare Act, I agree with Respondent. Further, the Complaint does not contain an allegation that Respondent falsified or attempted to falsify records required to be kept under the Animal Welfare Act.

Fifth, Respondent contends that:

> . . . [T]he record does not reflect a willful failure or intent on the part of [R]espondent to correct any asserted violation of the [Animal Welfare] Act or willful refusal in bad faith to allow inspections or records or facalities [sic] repeatedly or otherwise[.] . . .

Respondent's Appeal at 5.

I disagree with Respondent's contention that the record does not reflect a willful failure to correct violations of the Animal Welfare Act found during inspection of Respondent's premises. Respondent violated the Animal Welfare Act, the Regulations, and the Standards 51 times during the period September 19, 1991, through February 1, 1994. While Respondent did make some corrections after violations were discovered during APHIS inspections, often the violations

found on one inspection were similar to or identical to violations found on previous inspections.

Further, while I am not certain what Respondent means by a "willful refusal in bad faith," (Respondent's Appeal at 5), to allow inspections, the record does reveal that Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 on two occasions, January 2, 1992, and February 1, 1994, when Respondent refused to allow APHIS to inspect its animals, facilities, and records. (Initial Decision and Order at 27.) On the first occasion, Respondent's manager began using profanities and asked Dr. Dellar to leave, (CX 4 at 2; Tr. 39-40), and on the second occasion, Respondent's employees refused to provide Dr. Dellar access to Respondent's records because Respondent's owner was absent, (CX 21 at unnumbered page between page 1 and page 2). Despite measures taken by Respondent after each incident to ensure that APHIS had access to Respondent's facility, animals, and records, in the future, Respondent's violations of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 were willful.

An action is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. United States Dep't of Agric., supra*, 925 F.2d at 1105; *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Big Bear Farm, Inc., supra*, 55 Agric. Dec. at 138; *In re Julian J. Toney, supra*, 54 Agric. Dec. at 971; *In re Zoological Consortium of Maryland, Inc., supra*, 47 Agric. Dec. at 1284; *In re David Sabo, supra*, 47 Agric. Dec. at 554.[21] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("`Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, `willfully'

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[21]The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondent's violations would still be found willful.

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

Respondent was fully aware of the provisions in the Animal Welfare Act and the Regulations requiring Respondent to provide APHIS with access to Respondent's facilities, animals, and records. Section 16 of the Animal Welfare Act, (7 U.S.C. § 2146), is published in the Statutes at Large and the United States Code, and Respondent is presumed to know the law. See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). Further, section 2.126 of the Regulations, (9 C.F.R. § 2.126), is published in the *Federal Register*, thereby constructively notifying Respondent of that section of the Regulations. See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976). Moreover, Respondent admitted that it received a copy of the Animal Welfare Act, the Regulations, and the Standards when it became licensed, and annually thereafter, and agreed in writing to comply with the Animal Welfare Act, the Regulations, and the Standards. (Answer ¶ I(C).) Further, Mr. Stramaglia testified that Respondent was made aware of the violation of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 on January 2, 1992, and took measures to ensure that a refusal to allow APHIS to inspect its animals, facilities, and records, in violation of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126, would not occur in the future. (Tr. 395.) Despite constructive and actual knowledge of the inspection provisions of Animal Welfare Act and the Regulations and knowledge of the failure to provide access to Respondent's facility, animals, and records in January 1992, Respondent again violated the Animal Welfare Act and the Regulations by refusing to provide APHIS with access to its records on February 1, 1994. These facts clearly support a finding that Respondent's violations of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 were willful.[22]

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[22]I find all of Respondent's violations to be willful (Conclusions of Law, *supra*, pp. 89-92). Respondent did not address willfulness in connection with any violation alleged in the Complaint except the violations of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126 alleged in paragraphs III(C) and X(A) of the Complaint, (Respondent's Appeal at 5; Respondent's Response at 2). Consequently, I have restricted my comments regarding willfulness to Respondent's violations of 7 U.S.C. § 2146 and 9 C.F.R. § 2.126. Section 19(a) of the Animal Welfare Act, (7 U.S.C. § 2149(a)), authorizes the

Sixth, Respondent contends that the revocation of Respondent's Animal Welfare Act license is disproportionate to sanctions imposed in *Cox v. United States Dep't of Agric., supra,* and *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994). (Respondent's Appeal at 4-5.) Respondent violated the Animal Welfare Act, the Regulations, and the Standards 51 times during the period from September 19, 1991, through February 1, 1994. Many of Respondent's violations were serious violations and many of Respondent's violations involved Respondent's failure to provide for the humane care of its animals, which is the principal purpose of the Animal Welfare Act. I find that the facts of this case not only warrant revocation of Respondent's Animal Welfare Act license and a cease and desist order, as would have been imposed by the ALJ had the case not been appealed to me, but also, the circumstances in this case warrant the assessment of a civil penalty. The sanction I am imposing is relatively severe. However, as discussed *infra*, pp. 121-23, the sanction is appropriate under the circumstances in this case and in accordance with the Animal Welfare Act and the Department's sanction policy.

Further, I find Respondent's argument that the sanction imposed on it is disproportionate to the sanctions imposed in *Cox*, in which Petitioners were assessed a civil penalty of $12,000 and a 90-day suspension of their Animal Welfare Act license, and *Lesser*, in which Petitioners were assessed a civil penalty of $9,750 and a 30-day license suspension, without merit. First, the imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *Butz v. Glover Livestock Comm'n Co., supra*, 411 U.S. at 187-88; *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric., supra*, 925 F.2d at 1107; *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970). Second, the facts in *Cox* and *Lesser* are not similar to the facts in the instant proceeding.

Seventh, Respondent contends that:

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

> Respondent recognizes that his failing health does not excuse violations of the [Animal Welfare] Act; however, [R]espondent urges the Secretary to consider this factor in militation [sic] of a less severe sanction . . . .

Respondent's Response at 1.

The record reveals that Respondent's president was in failing health. Dr. Dellar states in a January 7, 1994, memorandum to her supervisor that Mr. Stramaglia's "health has been failing and without his constant presence the employees have no real direction/motivation — that is the reason for the decline of conditions at this facility." (CX 20 at 2.) While I sympathize with Respondent's president, the health of one of the employees of Respondent, even a key employee such as Mr. Stramaglia, is not required to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act, the Regulations, or the Standards, and Mr. Stramaglia's failing health forms no part of the basis for the sanction imposed in this case. The principal purpose of the Animal Welfare Act is the humane care of animals. If the failing health of a person charged with caring for animals renders that person incapable of complying with the Animal Welfare Act, the Regulations, and the Standards, individuals healthy enough to ensure that the facility complies with the Animal Welfare Act, the Regulations, and the Standards should be employed either to assist or to replace those who are not capable of ensuring compliance with the Animal Welfare Act, the Regulations, and the Standards. Mr. Stramaglia's failing health, although unfortunate, cannot be considered, either as a defense to Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards, or as a mitigating factor.

Eighth, Respondent contends that the Initial Decision and Order "IMPOSING THE SANCTION OF LICENSE REVOCATION SHOULD BE SET ASIDE . . . WHERE THE COMPLAINT REQUESTED RELIEF OF SUSPENSION." (Respondent's Response at 1.)

Complainant requests much more than suspension of Respondent's Animal Welfare Act license in the Complaint, as follows:

> The Animal and Plant Health Inspection Service requests:
>
> . . . .
>
> 2. That such order or orders be issued as are authorized by the [Animal Welfare] Act and warranted under the circumstances, including an order:

> (a) Requiring the [R]espondent to cease and desist from violating the [Animal Welfare] Act and the [R]egulations and [S]tandards issued thereunder;
> (b) Assessing civil penalties against the [R]espondent in accordance with section 19 of the [Animal Welfare] Act (7 U.S.C. § 2149); and
> (c) Suspending the [R]espondent's license under the [Animal Welfare] Act.

Complaint at 15-16.

The ALJ's order revoking Respondent's Animal Welfare Act license is an order authorized by section 19(a) of the Animal Welfare Act, (7 U.S.C. § 2149(a)), and revocation is warranted under the circumstances. The ALJ's order clearly falls within the order requested by Complainant in the Complaint. Moreover, Complainant specifically requested that the ALJ revoke Respondent's Animal Welfare Act license in Complainant's Amended Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 45, and requests that the ALJ's revocation of Respondent's Animal Welfare Act license be affirmed in Complainant's Appeal at 28.

Ninth, Respondent contends that Complainant's Appeal is untimely filed and should not be considered. (Respondent's Response at 4.)

Section 1.145(a) of the Rules of Practice provides:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a). The record does not reveal when Complainant was served with the Initial Decision and Order. In any event, the Judicial Officer granted Complainant an extension of time until January 5, 1996, in which to file an appeal and Complainant filed an appeal on that date. Therefore, Respondent's request that I strike Complainant's Appeal is denied.

Issues Raised By Complainant on Appeal to the Judicial Officer

Complainant raises five issues in Complainant's Appeal. First, Complainant contends that the ALJ erroneously dismissed the violations alleged in paragraph II of the Complaint based on the ALJ's finding that the inspection report completed by Dr. Dellar immediately after her September 19, 1991, inspection, (CX 3), is illegible. (Complainant's Appeal at 6-8.)

I agree with Complainant. First, while I found portions of CX 3 difficult to read, I did not find CX 3 illegible. Moreover, during her testimony, Dr. Dellar read much of CX 3 into the record, (Tr. 28-31.)

Second, Complainant contends that: (1) the ALJ's finding that Dr. Dellar is biased, is in error; and (2) the ALJ's findings that Dr. Dellar's testimony and Dr. Dellar's inspection reports, which she completed immediately after each inspection of Respondent's premises, do not constitute substantial evidence of the violations of the Animal Welfare Act, the Regulations, and the Standards alleged in paragraphs II, III(B), III(D)(1)-(7), IV(B), IV(C)(1)-(6), V(B)(1)-(6), VI(B)(1)-(2), VII(A), VII(B), VII(C)(1)-(6), VIII(A)(1)-(7), IX(A), IX(B)(1)-(6), X(B), and X(C)(1)-(11) of the Complaint, are in error. (Complainant's Appeal at 8-22.) I agree with Complainant that the ALJ's finding that Dr. Dellar's testimony and inspection reports do not constitute substantial evidence, is in error. I discussed the reasons for my disagreement with the ALJ regarding the reliability and probative value of Dr. Dellar's testimony and inspection reports *supra*, pp. 93-104, in response to Respondent's contention that the Complaint should be dismissed in its entirety because the ALJ found Dr. Dellar to be biased. Further, I discussed the evidence of Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards *supra*, pp. 18-84. I agree with Complainant that the ALJ dismissed many violations alleged in the Complaint that Complainant has proven by at least a preponderance of the evidence. Specifically, I agree with Complainant that, in addition to the violations found by the ALJ, Complainant has carried its burden of proof by a preponderance of the evidence that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in paragraphs II(A); II(B); II(C)(1)-(6), (8); III(B); III(D)(1)-(2), (4)-(5), (7); IV(B); IV (C)(1); V(B)(1)-(4); VI(B)(1)-(2); VII(B); VII(C)(1)-(4); VIII(A)(1)-(2), (5)-(7); IX(B)(2)-(4), (6); X(B); and X(C)(2), (5)-(7), (9)-(11) of the Complaint.

While the Complainant has a prima facie case with respect to the violations alleged in paragraphs II(C)(7), (9); III(D)(3), (6); IV(C)(2)-(6); V(B)(5)-(6); VII(A); VII(C)(5)-(6); VIII(A)(4); IX(A); IX(B)(1), (5); and X(C)(1), (3)-(4), (8) of the Complaint, I find that the evidence is not as strong as that customarily necessary in these types of cases to support reversal of the ALJ. Further, I find

Can you please tell us when you first began your investigation?

A. The investigation was begun in 1991. It revolved around allegations --

Q. Well, I don't -- we don't want to get anythings that are beyond the date of the complaint, we'll just leave it at that. If the Respondent's want to get into that, that's -- so it first started at that year.

As part of this investigation, did you obtain any documents?

A. I obtained documents from the Agency that had to do with inspections, annual reports by the Respondent, correspondence that was kept in the file by the Agency. I obtained documents from their attending veterinarians concerning the veterinary care of a number of different animals. I've talked to various employees of the Respondent, at times and gotten information from them.

Q. I'm going to hand you documents which have been marked as CX-1 and CX-2 and ask you to identify them.

JUDGE KANE: Ms. Deskins, give me the numbers again.

MS. DESKINS: It's CX-1 and CX-2.

JUDGE KANE: CXID 1 and 2.

BY MS. DESKINS:

Q. Now, you had mentioned that you had gathered some documents. Are these documents that you gathered?

A. Okay. Yes.

Q. And please identify what they are.

A. Okay. CX-1 is official notification and warning of violations of the Federal Regulations, it cites a number specific sections of the CFR that the Respondent had not appropriately responded to as a result of inspections.

CX-2 is an application for license or annual report. This is an annual report for license renewal for 1991 which the Respondent has to fill out every year to renew their license. It provides information on their business, their business location, in the case of an exhibiter, [sic] the number of animals of they have.

MS. DESKINS: I would then like to move for the admission of CX-1 and 2.

MS. ALDEN: Well, Your Honor, with respect to CX-1, these purport to relate to matters outside of the date of this complaint, so I'd object to it on that ground. I have no objection to CX-2.

JUDGE KANE: All right. CX-2 is received.
(CX-2 received into evidence, 10:00 a.m.)

JUDGE KANE: Ms. Deskins, you've seemed to take some pain to establish a relevant period to begin only with the date alleged in the complaint.

MS. DESKINS: Well, the official notification does go to the sanctions. It does show that they were given warnings, that there had been past violations and that --

JUDGE KANE: Does this letter give warning of perceived violations of the allegations asserted in the complaint?

MS. DESKINS: Not in the complaint. This pre-dates it. This was a warning to them which does go to sanctions that they did receive notification that there were violations.

JUDGE KANE: All right. The objection is sustained and CXID-1 will not be received as evidence.
(CX-1 rejected, 10:02 a.m.)

MS. DESKINS: I'm going to have to do an offer of proof in CX-1.

JUDGE KANE: It can accompany the record.

MS. DESKINS: Well, according to the rules of practice I have to do an offer of proof.

JUDGE KANE: I understand.

Tr. 314-17.

The Administrative Procedure Act provides that:

> Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence* — (1) *In general*. . . .
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

While I agree with the ALJ that CX 1 is not relevant to whether Respondent committed the violations alleged in the Complaint, I find that CX 1 is relevant with respect to the sanction to be imposed, and I hereby admit CX 1 into evidence.

Fifth, Complainant requests that a civil penalty of $40,000 be assessed against Respondent, in addition to the revocation of Respondent's Animal Welfare Act license. (Complainant's Appeal at 25-28.) I agree with Complainant that Respondent should be assessed a civil penalty, in addition to the revocation of Respondent's Animal Welfare Act license. However, based upon the factors which I am required to consider under the Animal Welfare Act when determining

the assessment of a civil penalty, (7 U.S.C. § 2149(b)), the Department's sanction policy, and the facts in this case, I am not assessing Respondent the full amount of the civil penalty requested by Complainant.

Complainant did not appeal the ALJ's decision not to disqualify Respondent from being licensed under the Animal Welfare Act and the Regulations for a period of 10 years, which Complainant had requested in a proposed order filed with the ALJ prior to the issuance of the ALJ's Initial Decision and Order. (Complainant's Amended Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 45.) Consequently, I have not considered the imposition of a disqualification period.

Sanction

As to the appropriate sanction, the Animal Welfare Act provides:

§ 2149. Violations by licensees

> (a) If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.
>
> (b) Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

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

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

The annual gross revenue of Respondent is approximately $500,000 per year, (Tr. 425); the facility covers 125 acres, (Tr. 425); and by February 1994, Respondent owned approximately 14 animals, (CX 20 at 3). The ALJ determined that Respondent operates a large business, (Initial Decision and Order at 26), and Respondent contends that it is a large business, (Respondent's Appeal at 4). Thus, I conclude that Respondent operated a large facility and the civil penalty requested by Complainant would be appropriate.

There is no evidence that Respondent deliberately harmed its animals. However, Respondent repeatedly and willfully violated the Animal Welfare Act, the Regulations, and the Standards. Many of the violations are serious and constitute a failure to humanely treat its animals.

Complainant could have sought $2,500 for each violation.[23] In light of the amount that Complainant could have requested and the number of violations and serious nature of many of the violations, the requested sanction of a civil penalty of $40,000, and revocation of Respondent's Animal Welfare Act license, is appropriate.

Nonetheless, considering the statutory criteria, the Department's sanction policy, the record regarding Respondent's correction of some violations and attempts to correct other violations, the number of violations alleged, which I do not find Complainant has proven by a preponderance of the evidence, and Complainant's recommendation regarding sanction, I believe a civil penalty of $26,000 and a revocation of Respondent's Animal Welfare Act license is appropriate. Finally, I believe that Respondent should be ordered to cease and

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[23]I found that Complainant proved its case by a preponderance of the evidence with respect to 51 violations alleged in the Complaint. Complainant could have sought and had assessed a maximum civil penalty of $2,500 for each of these 51 violations, for a total civil penalty of $127,500.

desist from further violations of the Animal Welfare Act, the Regulations, and the Standards.

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

Order

Paragraph I

Respondent, Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area, is assessed a civil penalty of $26,000. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 60 days after service of this Order on Respondent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order should indicate that payment is in reference to AWA Docket No. 94-08.

Paragraph II

Respondent's license under the Animal Welfare Act is hereby revoked, effective on the 30th day after service of this Order on Respondent.

Paragraph III

Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

1. Failing to maintain complete records showing the acquisition, disposition, and identification of animals;

2. Failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

3. Failing to provide veterinary care to animals in need of care;

4. Failing to construct housing facilities for nonhuman primates in a manner and of materials that allow the housing facilities to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted;

5. Failing to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation;

6. Failing to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote the psychological well-being of nonhuman primates;

7. Failing to provide facilities for animals that are structurally sound and maintained in good repair so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals;

8. Failing to store supplies of food adequately to protect them against deterioration, molding, or contamination by vermin;

9. Failing to keep water receptacles clean and sanitary;

10. Failing to provide refrigeration for supplies of perishable food;

11. Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash;

12. Refusing to allow APHIS to inspect its animals, facilities, and records;

13. Failing to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry;

14. Failing to provide outdoor housing facilities for nonhuman primates which provide sufficient heat to protect nonhuman primates from temperatures falling below 45 °F.;

15. Failing to provide a suitable method to eliminate excess water from outdoor housing facilities for animals rapidly;

16. Failing to provide animals with wholesome and uncontaminated food;

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

18. Failing to provide nonhuman primates with food that is wholesome and free from contamination;

19. Failing to keep primary enclosures for nonhuman primates clean and spot-cleaned daily;

20. Failing to keep primary enclosures for nonhuman primates clean and sanitized; and

21. Handling any animal in a manner that causes trauma, behavioral stress, physical harm, and unnecessary discomfort.

Paragraph III of this Order shall become effective on the day after service of this Order on Respondent.

In re: VOLPE VITO, INC., d/b/a FOUR BEARS WATER PARK AND RECREATION AREA.
AWA Docket No. 94-0008.
Order Denying Petition for Reconsideration filed April 16, 1997.

Sanction — Consideration of the whole record.

The Judicial Officer denied Respondent's Petition for Reconsideration. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Animal Welfare Act and the Department's sanction policy. Respondent's argument that the sanction imposed is disproportionate to sanctions imposed in previous disciplinary proceedings under the Animal Welfare Act is without merit because Respondent is not entitled to a sanction no more severe than that applied to others. The Decision and Order in the proceeding is based upon a consideration of the whole record in accordance with 5 U.S.C. § 556(d).

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Initial decision issued by Paul Kane, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant), instituted this disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under the Animal Welfare Act (9 C.F.R. §§ 4.1-.11) (hereinafter the Rules of Practice), by filing a Complaint on March 1, 1994.[1] The Complaint alleges that Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area (hereinafter Respondent), willfully violated the Animal Welfare Act, the Regulations, and the Standards. On March 22, 1994, Respondent filed an Answer denying the material allegations of the Complaint.

The ALJ presided over a hearing on August 16-17, 1994, in Detroit, Michigan.

On September 15, 1995, the ALJ issued an Initial Decision and Order revoking Respondent's Animal Welfare Act license and directing Respondent to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards.

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[1]On June 23, 1994, Complainant filed a Motion to Correct Errors in the Complaint, which was not opposed by Respondent. On June 24, 1994, Administrative Law Judge Paul Kane (hereinafter ALJ) issued an Order to Correct Typographical Errors in the Complaint.

Complainant and Respondent each appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35),[2] and on March 15, 1996, the case was referred to the Judicial Officer for decision.

On January 13, 1997, I issued a Decision and Order in which I: (1) found that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in paragraphs II(A); II(B); II(C)(1)-(6), (8); III(A); III(B); III(C); III(D)(1)-(2), (4)-(5), (7); IV(A); IV(B); IV(C)(1); V(A); V(B)(1)-(4); VI(A); VI(B)(1)-(2); VII(B); VII(C)(1)-(4); VIII(A)(1)-(2), (5)-(7); IX(B)(2)-(4), (6); X(A); X(B); and X(C)(2), (5)-(7), (9)-(11) of the Complaint; (2) assessed a civil penalty of $26,000 against Respondent; (3) revoked Respondent's Animal Welfare Act license; and (4) ordered Respondent to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards. *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op at 3-5, 123-26 (Jan. 13, 1997). On February 18, 1997, Respondent filed Respondent's Petition for Reconsideration, and on March 20, 1997, Complainant filed Complainant's Opposition to the Respondent's Petition for Reconsideration and Complainant's Brief in Support of its Opposition to the Respondent's Petition for Reconsideration. On March 24, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent contends that the sanction imposed is too severe. I disagree with Respondent.

Section 19(a) and (b) of the Animal Welfare Act provides:

§ 2149. Violations by licensees

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

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to

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

exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

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

7 U.S.C. § 2149(a), (b).

The record reveals that on each of nine inspections of Respondent's premises, an Animal and Plant Health Inspection Service (hereinafter APHIS) veterinarian found numerous violations, many of which were serious and could have affected the health of Respondent's animals (CX 3, 4, 5, 8, 9, 12, 14, 19, 21). During the period September 19, 1991, through February 1, 1994, Respondent willfully violated the Animal Welfare Act, the Regulations, and the Standards 51 times.

Respondent could have been assessed a maximum civil penalty of $2,500 for each of the 51 violations, for a total civil penalty of $127,500. Moreover, Respondent's license under the Animal Welfare Act could be revoked for a single willful violation of the Animal Welfare Act, the Regulations, or the Standards.

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

> [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 Acting Administrator of APHIS, United States Department of Agriculture, an administrative official charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act, recommended the revocation of Respondent's Animal Welfare Act license and the assessment of a civil penalty of $40,000 against Respondent.

I considered each of the factors required to be considered under section 19 of the Animal Welfare Act, and the sanction imposed is in accordance with the Animal Welfare Act and the Department's sanction policy.

Respondent contends that several factors, including the size of its business, the lack of prior convictions for violations of state or local regulations regarding the care and handling of animals, efforts to correct violations, efforts to comply with the Animal Welfare Act, Respondent's admission of some of the violations alleged in the Complaint, and circumstances surrounding some of the violations, militate against revocation of Respondent's Animal Welfare Act license and the assessment of a civil penalty of $26,000 (Respondent's Petition for Reconsideration at 2-5).

I agree with Respondent that Respondent operates a large business and that there is no evidence that Respondent has previously been convicted of any violation of state or local regulations involving treatment, care, or handling of animals. Further, I agree with Respondent that the record reveals that Respondent attempted to correct some of the violations identified during APHIS inspections and actually did correct some of the violations identified during those inspections (CX 3 at 2, 4; CX 5 at 2, 4; CX 8 at 2, 4; CX 9 at 2, 4; CX 12 at 2; CX 14 at 2, 5; CX 19 at 2; CX 21 at unnumbered page between pages 1 and 2).[3] Moreover, the record reveals that Respondent did institute measures to prevent reoccurrence of violations in the future (Tr. 405).

Nonetheless, each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations and the Standards (9 C.F.R. § 2.100(a)). This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account

[3]The record also reveals that often the violations found on one inspection were similar to or identical to violations found on previous inspections..

when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.[4]

I considered circumstances which I found to be mitigating circumstances, and the sanction imposed reflects those circumstances which I found to be mitigating circumstances. *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 105-10, 121-23 (Jan. 13, 1997).

Respondent contends that the revocation of its Animal Welfare Act license is punitive and not remedial and will not further the purposes of the Animal Welfare Act (Respondent's Petition for Reconsideration at 6). I disagree with Respondent. If the remedial purpose of the Animal Welfare Act is to be achieved, the sanction imposed must be adequate to deter Respondent and others from violating the Animal Welfare Act, the Regulations, and the Standards. In my judgment, the sanction recommended by the administrative officials charged with responsibility for achieving the congressional purpose of the Animal Welfare Act is appropriate. Nonetheless, considering the statutory criteria, the Department's sanction policy, the record regarding Respondent's correction of some violations and attempts to correct other violations, the number of violations alleged that I do not find Complainant has proven by a preponderance of the evidence, and Complainant's recommendation regarding sanction, I believe a civil penalty of $26,000 and a revocation of Respondent's Animal Welfare Act license is appropriate. Finally, I believe that Respondent should be ordered to cease and desist from further violations of the Animal Welfare Act, the Regulations, and the Standards.

Respondent contends that the sanction imposed in the instant proceeding is more severe than several previous cases in which the violations were more egregious than Respondent's violations (Respondent's Petition for Reconsideration at 7-10).

The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.[5] Moreover, while the sanction imposed in this proceeding

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[4]*In re John Walker*, 56 Agric. Dec. ___, slip op. at 21 (Mar. 21, 1997); *In re Mary Meyers*, 56 Agric. Dec. ___, slip op. at 31 (Mar. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995)(not to be cited per 7th Circuit Rule 53(b)(2)).

[5]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v.*

is relatively severe, it is appropriate under the circumstances in this case and is consistent with the Animal Welfare Act, the Department's sanction policy, and sanctions imposed in other cases for violations of the Animal Welfare Act, the Regulations, and the Standards.[6]

Second, Respondent contends that the Decision and Order issued in this proceeding is not based on a consideration of the entire record and that I only considered evidence that supports a finding that Respondent violated the Animal Welfare Act, the Regulations, and the Standards (Respondent's Petition for Reconsideration at 10-13). I disagree with Respondent.

The Administrative Procedure Act provides:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

SEC, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970).

[6]*See, e.g., In re John Walker*, 56 Agric. Dec. ___ (Mar. 21, 1997) ($5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Mary Meyers*, 56 Agric. Dec. ___ (Mar. 13, 1997) ($26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) ($10,000 civil penalty and 60-day license suspension for 13 violations of the Regulations and the Standards); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) ($2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) ($6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Julian J. Toney*, 54 Agric. Dec. 923 (1995) ($200,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act, the Regulations, and the Standards), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (1996); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) ($5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) ($2,000 civil penalty and 60-day license suspension for numerous violations on four different dates over a 13-month period); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) ($15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) ($1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

> (d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d).

I considered the whole record prior to issuing the Decision and Order in this proceeding, including evidence which supports Respondent's theory of the case and evidence of mitigating circumstances. *In re Volpe Vito Inc.*, 56 Agric. Dec. ___, slip op. at 18-123 (Jan. 13, 1997). Based on my examination of the whole record, I found, *inter alia*, that there was not sufficient evidence to prove the violations alleged in paragraphs II(C)(7), (9); III(D)(3), (6); IV(C)(2)-(6); V(B)(5)-(6); VII(A); VII(C)(5)-(6); VIII(A)(3)-(4); IX(A); IX(B)(1), (5); and X(C)(1), (3)-(4), (8) of the Complaint, and that Respondent had introduced evidence of mitigating circumstances that warranted the assessment of a civil penalty that is $14,000 less than that recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 13, 1997, *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ (Jan. 13, 1997), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[7] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on January 13, 1997. Therefore, since Respondent's Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed January 13, 1997, is reinstated, with allowance for time passed, as follows:

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[7] *In re City of Orange*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 25, 1997) (Order Granting Request to Withdraw Petition for Reconsideration); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___, slip op. at 6 (Mar. 19, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Petition for Reconsideration).

Order

Paragraph I

Respondent, Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area, is assessed a civil penalty of $26,000. The penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 60 days after service of this Order on Respondent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order should indicate that payment is in reference to AWA Docket No. 94-0008.

Paragraph II

Respondent's license under the Animal Welfare Act is hereby revoked, effective on the 30th day after service of this Order on Respondent.

Paragraph III

Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

1. Failing to maintain complete records showing the acquisition, disposition, and identification of animals;
2. Failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;
3. Failing to provide veterinary care to animals in need of care;
4. Failing to construct housing facilities for nonhuman primates in a manner and of materials that allow the housing facilities to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted;

5. Failing to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation;

6. Failing to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote the psychological well-being of nonhuman primates;

7. Failing to provide facilities for animals that are structurally sound and maintained in good repair so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals;

8. Failing to store supplies of food adequately to protect against deterioration, molding, or contamination by vermin;

9. Failing to keep water receptacles clean and sanitary;

10. Failing to provide refrigeration for supplies of perishable food;

11. Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash;

12. Refusing to allow APHIS to inspect Respondent's animals, facilities, and records;

13. Failing to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry;

14. Failing to provide outdoor housing facilities for nonhuman primates which provide sufficient heat to protect nonhuman primates from temperatures falling below 45 °F.;

15. Failing to provide a suitable method to eliminate excess water rapidly from outdoor housing facilities for animals;

16. Failing to provide animals with wholesome and uncontaminated food;

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

18. Failing to provide nonhuman primates with food that is wholesome and free from contamination;

19. Failing to keep primary enclosures for nonhuman primates clean and spot-cleaned daily;

20. Failing to keep primary enclosures for nonhuman primates clean and sanitized; and

21. Handling any animal in a manner that causes trauma, behavioral stress, physical harm, and unnecessary discomfort.

Paragraph III of this Order shall become effective on the day after service of this Order on Respondent.

In re: VOLPE VITO, INC., d/b/a FOUR BEARS WATER PARK AND RECREATION AREA.
AWA Docket No. 94-0008.
Stay Order filed May 19, 1997.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1997, the Judicial Officer issued a Decision and Order in which: (1) Respondent was found to have violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159)(hereinafter the Animal Welfare Act), and the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); (2) Respondent was assessed a civil penalty of $26,000; (3) Respondent's Animal Welfare Act license was revoked; and (4) Respondent was ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ (Jan. 13, 1997). On February 18, 1997, Respondent filed a Petition for Reconsideration, and on April 16, 1997, the Judicial Officer issued an Order Denying Petition for Reconsideration. *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ (Apr. 16, 1997).

On May 13, 1997, Respondent filed a Motion to Stay Execution of Decision and Order Filed January 13, 1997 (hereinafter Respondent's Motion for Stay), pending completion of proceedings for judicial review, and on May 16, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Motion for Stay. On May 19, 1997, Sharlene A. Deskins, attorney for Complainant in this proceeding, informed the Office of the Judicial Officer by telephone that Complainant does not oppose Respondent's Motion for Stay.

Respondent's Motion for Stay is granted. The Order issued in this proceeding on January 13, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: JACK D. STOWERS, DOING BUSINESS AS SUGAR CREEK KENNELS.
AWA Docket No. 94-0014.
Decision and Order filed December 23, 1996.

Post-hearing motion to amend Complaint to include additional allegations denied - Denial of inspection - Recordkeeping - Identification - Holding period - Structural strength and maintenance of primary and transport enclosures - Health certificates - Veterinary care - Willfulness - Cease and desist order - Civil penalty - License revocation.

Chief Administrative Law Judge Victor W. Palmer imposed a civil penalty of $15,000.00, issued a cease and desist order, and revoked Respondent's license after finding that Respondent: failed to allow department officials to inspect his facility; failed to maintain complete and accurate records of the acquisition, disposition, and identification of dogs; failed to properly identify dogs; failed to hold dogs for the required period of time; offered dogs for transportation in enclosures that did not conform to structural strength and space requirements; failed to construct and maintain primary enclosures for dogs that protect the dogs from injury; failed to deliver health certificates for dogs transported interstate; failed to provide adequate veterinary care; and obtained random source dogs from individuals who had not bred and raised the dogs on their own premises. Several allegations were dismissed, including unsubstantiated recordkeeping allegations and several allegations relating to inspections made during hours other than those specified on the Hours of Inspection Forms completed by Respondent. Additionally, Complainant's post-hearing motion to amend the Complaint to include additional allegations discussed at the hearing was denied because Complainant failed to show good cause as to why an Amended Complaint was not filed prior to the hearing. The sanction imposed was based on the size of Respondent's business, the seriousness and frequency of the violations, and the lack of good faith as evidenced by Respondent's threats against government officials and continuous refusal to cooperate.

Colleen A. Carroll, for Complainant.
C. David Little, Frankfort, Indiana, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*) (hereinafter the Act), instituted by a Complaint filed on June 16, 1994, by Lonnie J. King, Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. The Complaint was amended on October 28, 1994.

The Amended Complaint alleges that Jack D. Stowers, doing business as Sugar Creek Kennels, willfully violated the Act, and the regulations and standards issued pursuant thereto (9 C.F.R. § 1.1 *et seq.*). The Complainant requests a cease and desist order, assessment of civil penalties, and revocation of Respondent's license.

Procedural Background

The Acting Administrator of APHIS filed a Complaint on June 16, 1994, which was subsequently amended on October 28, 1994. The Respondent filed an Answer to the Complaint, and an appearance was made by his attorney David Little, on July 12, 1994. Mr. Little successfully moved to withdraw his appearance on November 1, 1994. The Respondent filed an Answer to the Amended Complaint on his own behalf on November 29, 1994. On March 7, 1995, the Respondent requested and was granted additional time to comply with prehearing obligations, in order to obtain counsel.

The hearing was initially scheduled for December 5 and 6, 1995, in Indianapolis, Indiana. On November 17, 1995, a teleconference was held in which it was determined that Respondent had not complied with the order to provide a list of his proposed exhibits and witnesses. On November 21, 1995, Complainant moved to exclude Respondent's witnesses and exhibits, and requested a telephone hearing. Respondent was given until December 1, 1995, to respond, which he did not do. On December 1, 1995, Complainant's motion was granted and a telephone hearing was scheduled for December 15, 1995. On December 5, 1995, Respondent submitted a witness list, and during a teleconference on December 14, 1995, it was decided that a live hearing should be scheduled for February 7 and 8, 1996, in Indianapolis, Indiana. On February 5, 1996, the hearing was rescheduled as the Respondent had again retained David Little as counsel, and Mr. Little needed additional time to prepare. On February 27, 1996, the hearing was again rescheduled to accommodate two of Complainant's witnesses. The hearing was held in Indianapolis on May 2 and 3, 1996.

Complainant obtained three extensions of the briefing schedule and ultimately filed the Complainant's Proposed Findings of Fact and Brief in Support Thereof on August 12, 1996. Respondent then sought and obtained three extensions for the filing of his brief, and thereafter filed it on November 4, 1996. Complainant filed its reply brief on November 22, 1996.

Complainant's brief contained motions to amend the Complaint in order to conform to the proof presented at the hearing by including additional instances of noncompliance.[1] A complaint may only be amended upon a showing of good cause. The Complainant did not cite any cause to amend, with the possible

[1]Complainant seeks to include allegations of recordkeeping, health certificate and structure violations noted during inspections on June 30, 1994, October 12, 1994, March 14, 1995, May 18, 1995, and March 30, 1993; as well as failed inspection attempts on January 10, 1995, January 17, 1995, January 31, 1995, May 19, 1995, August 31, 1995, and October 26, 1995.

exception of "conforming to the proof." With one exception, all of the additional violations occurred after those included in the Amended Complaint filed October 28, 1994; therefore, there may have been good cause to file an amended complaint prior to the hearing. Amending a complaint post-hearing, however, raises due process concerns. The Respondent must be given notice of the allegations against him and an opportunity to contest those allegations. On the other hand, the same formalities as found in court pleadings are not required in administrative proceedings, and errors in the complaint are generally considered to be harmless. Due process requirements are met in an administrative proceeding if the respondent has some opportunity to know and meet the claims against him. *In re: Edwards*, 52 Agric. Dec. 1365, 1367-1368 (Aug. 24, 1993). Nevertheless, the relaxed standard does not allow the government to ambush the respondent with new claims at the hearing. *In re: Carolina Biological Supply Company*, 53 Agric. Dec. 96 (Mar. 30, 1994), rejected a post-hearing amendment where the violations to be added occurred at the same time as the violations previously alleged in the complaint, and the respondent was given no notice of the claims prior to the hearing. Under those circumstances there was a failure to show good cause, and the Respondent did not have adequate notice of the allegations. *Id.*, at 101.

In accordance with the legal precedents set forth in *Carolina Biological*, the Complainant's motion to amend the Complaint to include the failure to have health certificates available on March 30, 1993, should be denied as the violation was known to Complainant at the time the complaint was filed. It is less clear whether the subsequent violations should be allowed. They are not completely new allegations as was the case in *Carolina Biological*. They are instead merely additional instances of previously alleged violations. Also, there is no indication that the subsequent inspection reports were not provided to the Respondent during the prehearing exchange of exhibits. Furthermore, the claims were addressed at the hearing. However, since the Complainant has not adequately explained why the amendments were not made prior to the hearing, the motion is denied. The additional instances will, however, be noted and considered as evidence of Respondent's chronic noncompliance and lack of good faith.

Applicable Statute, Regulations and Standards

The Complaint alleges numerous violations which occurred over a five year period. The regulations and standards[2] have been amended over the course of those five years. With one exception, however, all of the relevant provisions have remained the same between the year of the violation and the present. Therefore, all citations to the Code of Federal Regulations (C.F.R.) can be found in the 1996 version, except the standard dealing with primary enclosures for transportation, which is cited below from the 1991 version.[3]

Paragraph I of the Complaint incorrectly cites 9 C.F.R. § 3.12 as the standard violated by Respondent's failure to construct and maintain primary enclosures for dogs so that they protect the dogs from injury and contain them securely. The relevant provision is actually § 3.6. Also the Complaint erroneously cites 9 C.F.R. § 2.50, and fails to cite 9 C.F.R. § 2.53 in reference to the identification violations. However, these mistakes constitute harmless error, inasmuch as the Complaint describes the violations sufficiently to make the Respondent aware of the issues. *See In re: Edwards,* 52 Agric. Dec. 1365, 1367-69 (Aug. 24, 1993); *In re: SSG Boswell II,* 49 Agric. Dec. 210, 212-14 (Feb. 6, 1990).

Records

7 U.S.C. § 2140

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.

9 C.F.R. § 2.75

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or

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[2] The pertinent regulations are 9 C.F.R. §§ 2.40, 2.53, 2.75, 2.78, 2.126, 2.100, 2.101, 2.132. The pertinent standards are 9 C.F.R. §§ 3.6, 3.12.

[3] A comparable provision is found in the 1996 version at 7 C.F.R. § 3.14.

exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom a dog or cat was purchased or otherwise acquired whether or not the person is required to be licensed or registered under the Act;
(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
(iii) The vehicle license number and state, and the driver's license number and state of the person if he or she is not licensed or registered under the Act;
(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;
(v) The date a dog or cat was acquired or disposed of, including by euthanasia;
(vi) The official USDA tag number or tattoo assigned to a dog or cat under §§ 2.50 and 2.54;
(vii) A description of each dog or cat which shall include:
  (A) The species and breed or type;
  (B) The sex;
  (C) The date of birth or approximate age; and
  (D) The color and any distinctive markings;
(viii) The method of transportation including the name of the initial carrier or intermediate handler or, if a privately owned vehicle is used to transport a dog or cat, the name of the owner of the privately owned vehicle.
(ix) The date and method of disposition of a dog or cat, e.g. sale, death, euthanasia, or donation.

Inspection

7 U.S.C. § 2146

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer . . . 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 . . . . The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies

or deviation from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of the chapter or any regulation or standard issued thereunder if . . . such animal is held by a dealer . . . .

9 C.F.R. § 2.126

(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 another means, conditions and areas of noncompliance.

Identification

7 U.S.C. § 2141

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

9 C.F.R. § 2.53

Official tags obtained by a dealer . . . shall be applied to dogs or cats in the manner set forth in § 2.50 and in as close to consecutive numerical order as possible. No tag number shall used to identify more than one animal. No tag number shall be repeated within a 5-year period.

Holding Period

7 U.S.C. § 2135

No dealer or exhibitor shall sell or otherwise dispose of any dog or cat within a period of five business days after the acquisition of such animal or within such other period as may be specified by the Secretary[.]

9 C.F.R. §2.101

(a) Any live dog or cat acquired by a dealer . . . shall be held by him or her, under his or her supervision and control, for a period of not less than 5 full days, not including the day of acquisition, after acquiring the animal, excluding time in transit: *Provided, however:*

(1) That any live dog or cat acquired by a dealer or exhibitor from any private or contract animal pound or shelter shall be held by that dealer or exhibitor under his or her supervision and control for a period of not less than 10 full days, not including the day of acquisition, after acquiring the animal, excluding time in transit.

Transportation

7 C.F.R. § 2.100

(a) Each dealer . . . shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care and treatment, housing and transportation of animals.
(b) Each carrier shall comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter setting forth the conditions and requirements for the humane transportation of animals in commerce and their handling care, and treatment in connection therewith.

9 C.F.R. § 3.12 (1-1-91 ed.)

No dealer . . . shall offer for transportation or transport, in commerce any live dog or cat in a primary enclosure which does not conform to the following requirements:

(a) Primary enclosures, such as compartments, transport cages, cartons, or crates used to transport live dogs and cats shall be constructed in such a manner that:

(1) The structural strength of the enclosure shall be sufficient to contain the live dogs and cats and to withstand the normal rigors of transportation;

. . . .

(c) Primary enclosures used to transport live dogs and cats shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely in a standing position using normal body movements, to stand and sit erect, and to lie in a natural position.

(d) A maximum of one live dog or cat, 6 months or more of age . . . shall be transported in a primary enclosure.

Random source dogs

9 C.F.R. § 2.132

(a) A class "B" dealer may obtain random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

(b) A class "B" dealer shall not obtain live random source dogs and cats from individuals who have not bred and raised the dogs and cats on their own premises.

(c) Live nonrandom source dogs may be obtained from persons who have bred and raised the dogs and cats on their own premises, such as hobby breeders.

Veterinary care

9 C.F.R. § 2.40

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

Health certificates

9 C.F.R. § 2.78

(a) No dealer . . . shall transport in commerce any dog . . . unless . . . the dog . . . is accompanied by a health certificate executed and issued by a licensed veterinarian. The health certificate shall state that:

(1) the licensed veterinarian inspected the dog . . . on a specified date which shall not be more than 10 days prior to the delivery of the dog . . . for transportation; and

(2) when so inspected, the dog . . . appeared to the licensed veterinarian to be free of any infectious disease or physical abnormality which would endanger the animal(s) or other animals or endanger public health.

Primary enclosures

9 C.F.R. § 2.100

(a) Each dealer . . . shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing and transportation of animals.

9 C.F.R. § 3.6

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General Requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

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

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

(iii) Contain the dogs and cats securely;

(iv) Keep other animals from entering the enclosure;

(v) Enable the dogs and cats to remain dry and clean;

. . . .

Findings of Fact

1. Respondent Jack D. Stowers is an individual doing business as Sugar Creek Kennels, and whose address is [redacted] Frankfort, Indiana 46041. (Response 18).

2. At all times material herein, Respondent Jack D. Stowers was licensed and operating as a dealer as defined in the Act and the regulations. (Response 18).

3. Dr. Peter R. Kirsten is a veterinary medical officer for the U. S. Department of Agriculture, APHIS, Regulatory Enforcement and Animal Care (REAC), and has been assigned to inspect Sugar Creek Kennels since 1990. (Tr. 225-26).

4. Dr. Kirsten conducted full or partial inspections of the Respondent's facilities on February 20, 1990, June 27, 1990, January 3, 1991, June 10, 1991, March 30, 1993, June 28, 1994, June 29, 1994, June 30, 1994, October 12, 1994, March 14, 1995, and May 18, 1995.

5. On June 17, 1994, Kent Permentier, Senior Investigator for APHIS, REAC in Indiana, delivered a 21 day suspension notice to Mr. Stowers. Mr. Stowers refused to allow an inspection at that time and threatened to harm Dr. Kirsten if he returned to conduct an inspection on a later date. (CX 201).

6. Mr. Stowers purchases dogs for approximately $25 to $40 each. He sells dogs to research facilities for approximately $120 to $130 each. He has handled

approximately 10,000 dogs since becoming licensed in 1988. (Tr. 460, 468-69, 485).

Findings on Denial of Inspection

7. Between February 9, 1990 and May 16, 1994, Respondent completed and signed 10 forms indicating various hours when he or an agent would be present for an inspection. At various times Chester Stowers and Cynthia Alexander Stowers were designated as agents. (CX 2, CX 316).

8. On 2 occasions prior to receiving an Hours of Inspection Form from Respondent, Dr. Kirsten attempted to inspect Respondent's facility during normal business hours, but could not because neither the Respondent nor a designated agent was available. (CX 3, CX 4).

9. On 16 occasions between May 1, 1991 and October 26, 1995, Dr. Kirsten attempted to inspect Respondent's facility either during times listed on the Hours of Inspection Forms or by appointment, but could not because neither Respondent nor an agent was available. (CX 8, CX 20, CX 70-72, CX 190-191, CX 193, CX 194, CX 197, CX 199, CX 206, CX 301, CX 305-307).

10. On 11 occasions between February 13, 1990 and May 19, 1995, Dr. Kirsten attempted to inspect Respondent's facility during regular business but not at times indicated on the Hours of Inspection Form, but could not because neither Respondent nor an agent was available. (CX 5-9, CX 12, CX 22, CX 203, CX 299, CX 300, CX 304).

Findings on Recordkeeping and Identification of Animals

11. On February 20, 1990, Respondent failed to have records available for inspection. (CX 311).

12. On June 27, 1990, Respondent failed to have records of disposition available for inspection. (CX 11).

13. On January 3, 1991, Respondent failed to have records of acquisition available for inspection. Some records of disposition were available; however, the records incorrectly identified a female dog as a male hound. (CX 13).

14. On June 10, 1991 Dr. Kirsten conducted a records inspection and found the following discrepancies and omissions (CX 23):

(a) 9 animals appeared twice with different dates of acquisition.

(b) There were discrepancies in the sale dates of 4 animals on the Records of Animals on Hand and the Record of Disposition of Dogs or Cats.

(c) An animal was listed on the Record of Animals on Hand as an alley cat, but on the Record of Disposition of Dogs or Cats as a hound.

(d) 5 tag numbers were used to identify more than one animal, without identifying the date of acquisition for one of them.

(e) 7 animals were listed on the Record of Animals on Hand as having lost their tags, but were also listed as being sold on the disposition records.

(f) 4 animals were listed as having been shot on the Record of Animals on Hand, but as sold on the disposition records.

(g) 1 dog was listed as having been donated to Cindy Alexander on December 18, 1990, but also as having been sold to a research facility on December 19, 1990.

(h) There was no record of acquisition for 11 animals, and no record of disposition for 5 animals.

(i) Tags were used more than once within a five year period.

(j) Tag numbers were not recorded in as consecutive numerical order as possible.

15. On March 30, 1993, Dr. Kirsten conducted a records inspection by appointment and noted the following discrepancies and omissions (CX 192):

(a) 12 tag numbers were used twice, without any record of the acquisition of 5 of the dogs.

(b) 15 animals were listed in the Record of Animals on Hand as having been lost or having lost their tags, and then listed as being sold on the disposition records.

(c) 15 animals were listed as having been sold or rejected for sale, but there were no descriptions, dates of acquisition or records of acquisition for them.

(d) 3 animals were listed as having been sold that had no record of acquisition.

16. On June 28, 1994, Respondent failed to have records available for inspection. (CX 240).

17. On June 30, 1994, Dr. Kirsten conducted a records inspection by appointment. The following discrepancies and omissions were noted (CX 315):

(a) Of the approximately 1,490 animals listed in the records as having been obtained since May 8, 1993, approximately 1,317 had incomplete acquisition information. There were both incomplete addresses and no driver's license number or vehicle license number for the persons from whom 1,162 of the animals were obtained. There were incomplete addresses with respect to 36 animals. There were no driver's license or vehicle license numbers with respect to 119 animals.

(b) There was no record of disposition for 59 animals.

(c) There was no record of acquisition for 4 animals.

(d) 5 animals were listed as having been shot, then later as having been sold.
(e) 8 animals were listed as having been rejected by research facilities, with no record of their future disposition.
(f) 3 animals had incorrect descriptions.
(g) 1 tag number was reissued within a five year period.
(h) Tag numbers were not recorded in as consecutive numerical order as possible.
(h) No pound certificates were available on dogs obtained from pounds.
(i) 15 animals were listed as having lost their tags or as not having a tag, but then 13 of them were listed as sold, 1 was confiscated and 1 was returned to the seller.
(k) 15 tag numbers were assigned to more than 1 animal.
(l) 5 animals were listed as having been sold twice.

18. On October 12, 1994, some recordkeeping violations were corrected. They contained complete addresses and driver's license and vehicle license numbers. However, with respect to 8 dogs there was no record of acquisition. No medical records or pound certificates were available. (CX 298).

19. On March 14, 1995, Respondent's records contained a discrepancy in the acquisition information for 1 dog; and pound certificates that were available did not accompany dogs to the research facilities, and lacked some required information. (CX 302).

20. On May 18, 1995, Respondent failed to have records available for inspection. (CX 240).

Findings on Holding Periods

21. On January 3, 1991, compliance with holding periods could not be verified due to the unavailability of records. (CX 13).

22. On June 10, 1991, a records inspection revealed that Respondent failed to hold 3 animals for the required 5-day holding period. (CX 23).

23. On March 30, 1993, a records inspection revealed that Respondent failed to hold 13 animals for the required 5 or 10-day holding period. (CX 192).

24. On June 28, 1994, compliance with holding periods could not be verified due to the unavailability of records. (CX 240).

Findings on Structural Standards

25. On January 3, 1991, Dr. Kirsten inspected the transportation facilities and found that a dividing wall between two enclosures was broken and several enclosures contained more than one dog. There was not adequate space for the dogs to lift their heads. (CX 13).

26. On June 28, 1994, there was a hole in the floor of one shelter box, and a broken door on another. (CX 240).

27. On October 12, 1994, the interiors of the shelter were not impervious to moisture; the shelter had not been sanitized for 6 weeks; 2 shelter boxes had holes in them; and a bag of dog food was open and stored near a gasoline can. (CX 298).

28. On March 14, 1995, one of the holes in the shelter boxes was repaired, but the other was not. The interior surfaces on the west side of the shelter were sealed, but the east side was still not impervious to moisture. (CX 302).

29. On May 18, 1995, 1 shelter box on the east side had a rotten wall; 1 shelter box was heavily chewed around the door; 1 shelter box had a nail protruding in the doorway; 1 shelter box had a hole chewed in the back with only a board and cement block placed over it. (CX 303).

Findings on Health Certificates for Dogs Transported Interstate

30. On March 30, 1993, Respondent failed to have health certificates available on dogs transported interstate. (CX 192).

31. On June 28, 1994, Respondent failed to have health certificates available for dogs transported interstate. (CX 240).

32. On June 30, 1994, Respondent failed to have health certificates available for dogs transported interstate. (CX 315).

33. On March 14, 1995, Respondent failed to have health certificates available for dogs transported interstate. (CX 302).

34. On October 12, 1994 Respondent failed to have health certificates available for dogs transported interstate. (CX 298).

Findings on Veterinary Care

35. On June 28, 1994, Dr. Kirsten inspected Respondent's facility pursuant to an administrative warrant and found that animals were in need of immediate veterinary care. 4 dogs had purulent ocular and/or nasal discharge. 3 dogs had a cough. 1 dog had cherry eye. 3 dogs were excessively thin. 2 dogs had loose and bloody stools. Mr. Stowers was instructed, in writing and orally through his agent

Cindy Stowers, to obtain veterinary diagnosis and treatment for the sick animals within 24 hours. (CX 240).

36. On June 29, 1994 Dr. Kirsten and Mr. Permentier returned and found that the dogs had not been provided with veterinary care. All of the dogs were either sick or had been exposed to contagious disease. All 29 dogs present were confiscated. (CX 244).

37. On October 10, 1994, 2 dogs present were in need of veterinary care. 1 dog had a cough and a gag and the other had a mucous discharge.

Findings on Random Source Dogs

38. Mr. Stowers buys random source dogs from unlicensed individuals who do not breed and raise them on their own premises. (Tr. 462, 509-10).

Conclusions

1. On January 24, 1990, January 31, 1990, May 30, 1990, May 1, 1991, February 18, 1992, February 20, 1992, February 27, 1992, August 6, 1992, September 24, 1992, September 20, 1993, September 30, 1993, March 2, 1994, May 25, 1994, and June 22, 1994, Respondent failed to allow department officials to inspect his facility, in violation of 7 U.S.C. § 2146 and 9 C.F.R § 2.126.

2. On June 27, 1990, January 3, 1991, June 10, 1991, March 30, 1993, and June 28, 1994, APHIS inspected the Respondent's facility and records, and found that he had failed to maintain complete and accurate records of the acquisition, disposition, and identification of dogs, in violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75.

3. On January 3, 1991, June 10, 1991, March 30, 1993, and June 28, 1994, APHIS inspected the Respondent's facility and found that he had failed to identify dogs as required, in violation of 7 U.S.C. § 2141, and 9 C.F.R. §§ 2.50 and 2.53.

4. On January 3, 1991, June 10, 1991, March 30, 1993, and June 28, 1994, APHIS inspected the Respondent's facility and found that he had failed to hold dogs for the required period of time, in violation of 7 U.S.C. § 2135 and 9 C.F.R. § 2.101.

5. On January 3, 1994, APHIS inspected the Respondent's facility and found that he had offered dogs for transportation in enclosures that did not conform to structural strength and space requirements, in violation of 9 C.F.R §§ 2.100 and 3.12 (1991 ed.).

6. On June 28, 1994, APHIS inspected the Respondent's facility and found that he had failed to construct and maintain primary enclosures for dogs so that they

protect the dogs from injury and contain them securely, in violation of 9 C.F.R. §§ 2.100 and 3.6.

7. On June 30, 1994, APHIS inspected the Respondent's facility and found that he had failed to deliver health certificates for dogs transported interstate, in violation of 9 C.F.R. § 2.78(a).

8. On June 28 and 29, 1994, APHIS inspected the Respondent's facility and found that he had failed to provided adequate veterinary care to dogs, in violation of 9 C.F.R. § 2.40.

9. Respondent obtained random source dogs from individuals who had not bred and raised the dogs on their own premises, in violation of 9 C.F.R § 2.132(b).

Discussion

Respondent, for the most part, does not deny Complainant's allegations but rather attempts to excuse the violations by arguing that he is being persecuted for being a class B dealer, that the violations were only slight and that the regulations are too difficult to understand. For example, he cites Dr. Kirsten's repeated inspection attempts as evidence of a "personal vendetta" against him. He complains that Dr. Kirsten was "painstakingly accurate" and would cite the most minor violations. He claims that the regulations are too difficult to understand with only an eighth grade education, and blames the government for not training him. Such excuses do not justify Respondent's noncompliance with the Act and the regulations.

Respondent admits that he failed to keep accurate records of the acquisition and disposition of dogs; improperly identified the animals; did not have health certificates in his possession; and was not present and did not have a representative present for random inspections of his facility. (Respondent's Response Brief 18). He claims, however, that these violations were mere errors and omissions and not willful violations of the Act.

A willful act is one which is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See In re: Big Bear Farm,* 55 Agric. Dec. 107, 137 (Mar. 15, 1996); *In re: Lesser*, 52 Agric. Dec. 155, 167 (Apr. 28, 1993); *In re: Pet Paradise*, 51 Agric. Dec. 1047, 1067-70 (Sept. 16, 1992). Respondent's acts were willful. He repeatedly committed violations over a five year period. Such chronic non-compliance at a minimum qualifies as careless disregard of the regulations, and more likely evidences intentional refusal to comply with the regulations.

In any case, willfulness is not required for cease and desist orders or for monetary fines and it is only required for license revocation if the agency has not given the Respondent written notice of the violations and an opportunity to come

into compliance with the regulations. 5 U.S.C. § 558(c). *See also Big Bear Farm*, 55 Agric. Dec., at 140; *In re: Delta Airlines*, 53 Agric. Dec. 1076, 1084 (Nov. 9, 1994); *Pet Paradise*, 51 Agric. Dec., at 1067. Mr. Stowers was given a copy of each inspection report which listed the violations and the dates by which the non-compliant standards were to be corrected. He had every opportunity to come into compliance. A showing of willfulness is, therefore, not required.

Respondent repeatedly thwarted efforts by APHIS to inspect his facility. There was consistently no one available at the kennel to facilitate inspections during the times indicated on the Hours of Inspection Forms. Respondent argued that Dr. Kirsten could have inspected the premises without being accompanied. Inspectors, however, cannot enter the property without a warrant unless they are accompanied by the licensee or his agent. Respondent further argues that it is almost impossible for a Class B dealer to have someone present at the facility every day. It may not be possible for Mr. Stowers to personally be on the premises every day, but that is why the regulations allow for the designation of an agent.

Respondent's records consistently lacked information, contained inaccuracies, or were unavailable for inspection. Respondent, having admitted that there were many errors in the records, argues that the regulations are too difficult to understand, particularly in light of his eighth grade education and claimed illiteracy. He believes the government should have offered seminars or other assistance or encouragement. The government, however, is not responsible for training class B dealers, it is responsible for regulating them. Mr. Stowers was provided with copies of the Act and regulations and standards. Inspection reports clearly described the violations and noted the section numbers of the provisions that were violated. Furthermore, each inspection ended with an exit interview where Dr. Kirsten orally informed Mr. Stowers or his agent of what needed to be corrected.

In addition to having inaccurate or incomplete information about the dogs in the records, Respondent also frequently used tag numbers for more than one dog, did not record the tag numbers consecutively, and used tag numbers more than once within five years. Respondent admits that animals were improperly identified but claims that he is still learning the rules. It is very important to properly identify dogs so that APHIS inspectors can adequately trace and prevent the sale of stolen animals. Mr. Stowers has had adequate time to learn the rules in that he has been a dealer since 1988.

Respondent admits that he did not always have health certificates available for dogs transported interstate; but he claims that five violations out of the thousands of dogs that he has handled as a dealer is so minimal that it ought to be overlooked. It is not the case, however, that only 5 dogs out of thousands did not have health

certificates available. Rather, during 5 out of 11 inspections Respondent failed to have health certificates available for some or all of the dogs which had been transported interstate.

Respondent does deny failing to provide adequate veterinary care. Although he admits several dogs were sick at the time of the June 28, 1994, inspection, he claims he had treated the dogs by giving them a "modified live virus vaccine." Dr. Kirsten testified that he found a number of dogs in need of immediate veterinary attention; and there was no indication that the attending veterinarian ever saw the animals as the regulations require. Respondent argues that it is unclear what he should have done to appease the government, although Dr. Kirsten told him exactly what to do. The June 28, 1994, inspection report given to Mr. Stowers listed the problems with each dog and instructed Mr. Stowers to "seek veterinary diagnosis and treatment for all of the above by 24 hours or 12:00 noon on 6-29-94." (CX 240). The instructions were clear and Mr. Stowers failed to follow them in violation of the Act and regulations.

Respondent also argues that the government failed to prove that he purchased random source dogs from individuals who did not breed and raise them on their own premises. Respondent, however, testified that: "Some of them guys will raise them on their premises, but a lot of them trade for them." (Tr. 462). He further testified that he suspected that sixty percent of the dogs he buys are not home bred. (Tr. 509-10).

With regard to structural standards Respondent claims that all violations were promptly corrected when brought to his attention. The violations noted on June 28, 1994, were corrected by the next inspection. Violations noted on October 12, 1994 were not completely corrected by the next inspection which was four months after the specified date for compliance. On May 15, 1995, the prior violations had all been corrected, but there were new violations as well. *In re: Pet Paradise*, 51 Agric. Dec. 1047 (Sept. 16, 1992), dealt with a similar situation of chronic non-compliance and held that the Respondent's willingness to correct was not relevant, and that subsequent correction did not negate the violations. *Id.*, at 1069-1070. See also *Big Bear Farm*, 55 Agric. Dec. 107, 142 (Mar. 15, 1996).

With respect to holding period violations, Respondent claims that they are merely recordkeeping errors. Even if this claim were accepted as true, it would be meaningless because it merely exchanges one violation for another. Respondent also claims that the 18 violations noted during the June 30, 1994, records inspection are erroneous because the dogs were confiscated by Dr. Kirsten on June 29, 1994, so he did not have the opportunity to hold them for the required time. Although the June 30, 1994, inspection report does not list the tag numbers for the dogs in question, it is unlikely that they were the confiscated dogs. The dogs that were confiscated on June 29, 1994, must have been held for at least 10 days as

Respondent had been suspended since June 17, 1994. It is inconsequential in any case because the complaint does not refer to the June 30, 1994, violations.

Respondent contends that the transportation standards that he violated were very technical in nature, and were probably corrected. The Respondent's violations were not minor. The enclosures were overcrowded and the dogs did not have room to lift their heads. These violations directly affected the well-being of the animals. Whether or not the necessary corrections were promptly made is impossible to determine from the record. Dr. Kirsten noted the violations on January 3, 1991 and instructed Mr. Stowers to correct them that same day. The next time the transport enclosures appear to have been inspected by Dr. Kirsten they were in compliance, but that was more than four years later, on March 14, 1995. Furthermore, as previously stated, subsequent corrections do not negate prior violations.

Dismissed allegations

Three of the records violations are dismissed as unsubstantiated. There was no evidence admitted pertaining to the June 3, 1993, and June 21, 1994, allegations. The November 1, 1993, allegation stems from the traceback project in which APHIS investigators attempted to verify the accuracy of Respondent's records by locating the individuals listed as having sold him dogs. The investigators were unable to locate numerous individuals and those whom they found generally denied selling the dogs as shown by Mr. Stowers' records. Although the records may have contained some inaccurate information, the Complainant failed to prove that any of these inaccuracies were the fault of Respondent. Complainant's evidence was unreliable as it consisted primarily of out of court statements, many of which were made by persons who might have reason to provide false information.

On February 13, 1990, February 28, 1990, May 11, 1990, May 16, 1990, May 25, 1990, December 7, 1990, May 29, 1991, and June 21, 1994, Dr. Kirsten attempted to inspect Respondent's facility during hours that Respondent had not indicated that he or an agent would be available. Although the Act and regulations allow inspections at any time during regular business hours, as a courtesy APHIS allows licensees to choose the four hours each day which are most convenient. The form states that a failure to allow inspection during those hours is a violation. A failure to be available for inspection during hours not indicated should, therefore, not be considered a violation.

Sanctions

APHIS has recommended the issuance of a cease and desist order, a $20,000 civil penalty, and the revocation of Mr. Stowers' license. After considering the size of Respondent's business, the seriousness and frequency of the violations, as well as his lack of good faith as evidenced by threats against government officials and his continuous refusal to cooperate, I have determined that the government's recommended sanctions, with an adjustment to the civil penalty, are appropriate. The Act provides that sanctions shall be imposed as follows:

> If the Secretary has reason to believe that any person licensed as a dealer . . . has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, . . . and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.
>
> . . .
>
> Any dealer . . . that violates any provision of this chapter, or any rule, regulation or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith and the history of previous violations.

7 U.S.C. § 2149.

Respondent, by his own testimony, has a fairly large business. He testified that he has handled 10,000 dogs since 1988, or an average of 1,250 dogs per year. (Tr. 485). He pays between $25 and $40 for each dog (Tr. 468-69), and sells them to research facilities for $120 to $130 per dog, (Tr. 460) for a gross profit of $80 to $105 per dog, or $100,000 to $131,000 per year. This refutes his testimony that he earns only $20,000 to $25,000 per year. (Tr. 492).

The government could have requested $2,500 for each violation and in that I have found that Respondent committed 33 violations, a fine of as much as $82,000 could have been assessed. Furthermore, Mr. Stowers has proven himself unwilling to submit to statutorily required government regulation. His claims of showing good faith are negated by his admitted threats against APHIS inspectors and his

routine refusal to allow the inspection of his facility. Considering the extent of Respondent's noncompliance, the $20,000 penalty requested by Complainant is not inappropriate. However, since I have dismissed a number of the allegations, the amount of the fine shall be reduced to $15,000. Further, the revocation of Respondent's license, and the issuance of a cease and desist order as requested by Complainant are appropriate and shall be ordered.

Order

1. Respondent Jack Stowers, doing business as Sugar Creek Kennels, is assessed a civil penalty of $15,000, to be paid within 120 days of service of this order to the Treasurer of the United States, and forwarded to Colleen A. Carroll, United States Department of Agriculture, Office of General Counsel, Room 2014, South Building, Washington, D.C. 20250-1400.

2. License Number 32-B-97, issued to Jack Stowers, doing business as Sugar Creek Kennels, under the Animal Welfare Act, is hereby revoked.

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

(a) interfering with or refusing APHIS inspection of their facilities;

(b) failing to maintain their facilities and records in accordance with the regulations and standards;

(c) failing to provide adequate veterinary care for animals.

Pursuant to the Rules of Practice governing proceedings under this Act, this Decision and Order shall become final and effective without further procedure thirty-five (35) days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service, as provided in sections 1.130, 1.142, and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.130, 1.142, 1.145).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final February 6, 1997.--Editor]

In re: JACK D. STOWERS, d/b/a SUGAR CREEK KENNELS.
AWA Docket No. 94-0014.
Order Modifying Order filed May 30, 1997.

Colleen A. Carroll, for Complainant.
David Little, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 23, 1996, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued a Decision and Order in this proceeding[1] in which he assessed Jack D. Stowers, d/b/a Sugar Creek Kennels (hereinafter Respondent), a civil penalty of $15,000; revoked Respondent's license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter Animal Welfare Act); and ordered Respondent to cease and desist from violating the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142). The Chief ALJ's Decision and Order provides that the Decision and Order shall become final and effective without further procedure 35 days after service upon the parties unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service. *In re Jack D. Stowers, supra*, slip op. at 26.

On January 30, 1997, Respondent requested an extension of time within which to appeal the Chief ALJ's December 23, 1996, Decision and Order. The Judicial Officer granted Respondent an extension to April 1, 1997, within which to file an appeal petition. On March 28, 1997, Respondent requested a second extension of time to appeal the Chief ALJ's December 23, 1996, Decision and Order. The Judicial Officer granted Respondent an extension to April 8, 1997, within which to file an appeal petition.

Respondent failed to file an appeal petition by April 8, 1997, and the Chief ALJ's Decision and Order became final and effective. On May 27, 1997, the Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) and Respondent filed a Joint Request to Modify Order requesting the modification of paragraph 2 of the Order in the Chief ALJ's December 23, 1996, Decision and Order. On May 29, 1997, the case was referred to the Judicial Officer for a ruling on the Joint Request to Modify Order.

Paragraph 2 of the Order in the Chief ALJ's December 23, 1996, Decision and Order provides:

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[1]*In re Jack D. Stowers*, 56 Agric. Dec. ___ (Dec. 23, 1996).

> 2. License Number [redacted] issued to Jack Stowers, doing business as Sugar Creek Kennels, under the Animal Welfare Act, is hereby revoked.

In re Jack D. Stowers, supra, slip op. at 26.

Complainant and Respondent jointly move that paragraph 2 of the Order in the Chief ALJ's December 23, 1996, Decision and Order be modified to read as follows:

> 2. License Number [redacted], issued to Jack Stowers, doing business as Sugar Creek Kennels, under the Animal Welfare Act, is hereby revoked, effective May 19, 1997.

Joint Request to Modify Order.

The Joint Request to Modify Order is granted. This Order Modifying Order is issued *nunc pro tunc* and is effective May 19, 1997.

In re: DORA HAMPTON, d/b/a HAMPTON KENNELS.
AWA Docket No. 96-0050.
Decision and Order filed January 15, 1997.

Default — Failure to file timely answer — Intention to dispose of regulated animals not a defense — Age of Respondent not a defense — Civil penalty — License suspension — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Victor W. Palmer (ALJ) assessing a civil penalty of $10,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license for 60 days, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Neither Respondent's inability to comply with the Act and the Regulations and Standards issued under the Act due to her age nor Respondent's intention to dispose of all animals within the jurisdiction of the Secretary under the Act operates as a defense.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the Regulations and Standards issued under the Animal Welfare Act, (9 C.F.R. §§ 1.1-3.142)(hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on May 8, 1996.

The Complaint alleges that: (1) on August 2, 1994, Dora Hampton, d/b/a Hampton Kennels (hereinafter Respondent) violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and sections 3.1(a), 3.1(c)(3), 3.6(c)(1)(iii), and 3.11(c) of the Standards, (9 C.F.R. §§ 3.1(a), 3.1(c)(3), 3.6(c)(1)(iii), and 3.11(c)), (Complaint at 2, ¶ II); (2) on January 31, 1995, Respondent violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and sections 3.1(f) and 3.6(c)(1)(iii) of the Standards, (9 C.F.R. §§ 3.1(f) and 3.6(c)(1)(iii)), (Complaint at 2-3, ¶ III); (3) on August 15, 1995, Respondent violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and sections 3.1(a), 3.4(c), 3.11(a), and 3.11(c) of the Standards, (9 C.F.R. §§ 3.1(a), 3.4(c), 3.11(a), and 3.11(c)), (Complaint at 3-4, ¶ IV); (4) on September 26, 1995, Respondent violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and sections 3.4(c) and 3.11(c) of the Standards, (9 C.F.R. §§ 3.4(c) and 3.11(c)), (Complaint at 4, ¶ V); and (5) on November 7, 1995, Respondent violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and section 3.6(c)(1)(iii) of the Standards, (9 C.F.R. § 3.6(c)(1)(iii)), (Complaint at 4, ¶ VI).

Respondent was served with the Complaint on May 14, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), and on October 9, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Administrative Law Judge Victor W. Palmer (hereinafter ALJ) issued a Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Default Decision) in which the ALJ found that Respondent violated the Regulations and Standards, as alleged in the Complaint, issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, assessed a civil penalty of $10,000 against Respondent, and suspended Respondent's license under the Animal Welfare Act for 60 days and continuing thereafter until Respondent demonstrates that she is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and pays the assessed civil penalty. (Default Decision at 5.)

On October 16, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] On December 3, 1996, Complainant filed Complainant's Opposition to Motion by Respondent Dora Hampton to Set Aside Default (hereinafter Complainant's Response). On January 6, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

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

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture[.] . . .

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as

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

a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

7 U.S.C. § 2132(b), (f).

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title; *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.] . . .

7 U.S.C. § 2133.

. . . .

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

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

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

(2) The standards described in paragraph (1) shall include minimum requirements—

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary. . . .

7 U.S.C. § 2143(a)(1), (a)(2).

. . . .

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and an opportunity for a hearing with respect to the alleged violation[.] . . .

7 U.S.C. § 2149(a), (b).

. . . .

9 C.F.R.:

SUBCHAPTER A — ANIMAL WELFARE

PART 1 — DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

9 C.F.R. § 1.1.

PART 2 — REGULATIONS

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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

. . . .

(c) *Surfaces*—. . . .

. . . .

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

. . . .

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes,

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

9 C.F.R. § 3.1(a), (c)(3), (f).

. . . .

§ 3.4 Outdoor housing facilities.

. . . .

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

9 C.F.R. § 3.4(c).

. . . .

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

. . . .

(c) *Additional requirements for dogs*—(1) *Space*. . . .

. . . .

(iii) The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position[.] . . .

9 C.F.R. § 3.6(c)(1)(iii).

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

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

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

. . . .

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate

breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

9 C.F.R. § 3.11(a), (c).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

A copy of the Complaint and [a copy of] the Rules of Practice, 7 C.F.R. §§ 1.130-.151, were served on Respondent Dora Hampton on May 14, 1996. Respondent was informed in the letter of service[, which was served on Respondent with the copy of the Complaint and the copy of the Rules of Practice,] that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent Dora Hampton has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are [deemed] admitted . . . by Respondent's failure to file an Answer, are adopted and set forth [in this Decision and Order] as Findings of Fact and Conclusions of Law.

. . . .

Findings of Fact and Conclusions of Law

. . . .

1. Dora Hampton, hereinafter referred to as Respondent, is an individual doing business as Hampton Kennels, whose address is [redacted] Arkansas [redacted]

2. Respondent, at all times material herein, was operating as a dealer as defined in the [Animal Welfare] Act and the Regulations.

3. On August 2, 1994, Respondent willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and the . . . Standards [identified in paragraph 3(A)-(D) of these Findings of Fact and Conclusions of Law]:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering, (9 C.F.R. § 3.1(a));

B. Surfaces of housing facilities were not cleaned and sanitized, as required, (9 C.F.R. § 3.1(c)(3));

C. Primary enclosures for dogs were not constructed so that they provide sufficient space, as required, (9 C.F.R. § 3.6(c)(1)(iii)); and

D. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled, in order to protect the animals from injury [and] facilitate the required husbandry practices, (9 C.F.R. § 3.11(c)).

4. On January 31, 1995, Respondent willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and the . . . Standards [identified in paragraph 4(A)-(B) of these Findings of Fact and Conclusions of Law]:

A. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks, (9 C.F.R. § 3.1(f)); and

B. Primary enclosures for dogs were not constructed so that they provide sufficient space, as required, (9 C.F.R. § 3.6(c)(1)(iii)).

5. On August 15, 1995, Respondent willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and the . . . Standards [identified in paragraph 5(A)-(D) of these Findings of Fact and Conclusions of Law]:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering, (9 C.F.R. § 3.1(a));

B. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled, in order to protect the animals from injury [and] facilitate the required husbandry practices, (9 C.F.R. § 3.11(c));

C. Excreta were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors, (9 C.F.R. § 3.11(a)); and

D. The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture, (9 C.F.R. § 3.4(c)).

[6]. On September 26, 1995, Respondent willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and the . . . Standards [identified in paragraph 6(A)-(B) of these Findings of Fact and Conclusions of Law]:

A. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled, in order to protect the animals from injury [and] facilitate the required husbandry practices, (9 C.F.R. § 3.11(c)); and

B. The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture, (9 C.F.R. § 3.4(c)).

[7]. On November 7, 1995, Respondent willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), and the . . . Standard [identified in paragraph 7(A) of these Findings of Fact and Conclusions of Law]:

A. Primary enclosures for dogs were not constructed so that they provide sufficient space, as required, (9 C.F.R. § 3.6(c)(1)(iii)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The . . . Order [issued in this Decision and Order] is authorized by the [Animal Welfare] Act and warranted under the circumstances.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's October 16, 1996, filing (hereinafter Respondent's Appeal Petition) appears to be and is treated in this Decision and Order as Respondent's appeal of the Default Decision.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) [,(7 C.F.R. § 1.136(a)),] shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[, (7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for hearing.

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

7 C.F.R. § 1.141(a).

A copy of the Complaint, a copy of the Rules of Practice, and a letter dated May 9, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on May 14, 1996.[2] The Complaint states:

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[2]The record reveals that a copy of the Complaint, a copy of the Rules of Practice, and a letter dated May 9, 1996, were mailed on May 9, 1996, by the Office of the Hearing Clerk by certified mail, return receipt requested, to Respondent at [redacted] The certified mail return receipt applicable to this mailing is numbered [redacted]. Respondent signed certified mail return receipt number [redacted] but the date of delivery to Respondent is not indicated on the return receipt. However, the record establishes that the United States Postal Service sent certified mail return receipt number [redacted], signed by Respondent, from the Fayetteville, Arkansas, post office to the Office of the Hearing Clerk on May 14, 1996, and that certified mail return receipt number [redacted] was received by the Office of the Hearing Clerk on May 21, 1996. Therefore, I find that Respondent was served with a copy of the Complaint, a copy of the Rules of Practice, and the May 9, 1996, letter from the Office of the Hearing Clerk on May 14, 1996.

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

Complaint at 5.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying May 9, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> May 9, 1996
>
> Ms. Dora Hampton, d/b/a
> Hampton Kennels
>
> Ms. Hampton:
>
> **Subject: In re: Dora Hampton, dba Hampton Kennels, - Respondent AWA Docket No. 96-50**
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and five copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain

> each allegation of the complaint. Your answer may include a request for oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

May 9, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Dora Hampton, d/b/a Hampton Kennels, at 1. (Emphasis in the original.)

Respondent's Answer was due no later than June 3, 1996. Respondent's first and only filing in this proceeding is Respondent's Appeal Petition which Respondent filed on October 16, 1996, 155 days after the Complaint was served on Respondent and 135 days after Respondent's Answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)).

On September 6, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). A copy of the Complainant's Motion for Proposed Default Decision, a copy of the Complainant's Proposed Default Decision, and a letter dated September 9, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on September 13, 1996.[3] The September 9, 1996, letter from the Office of the Hearing Clerk, which accompanied a copy of Complainant's Motion for Proposed Default Decision and a copy of Complainant's Proposed Default Decision states, as follows:

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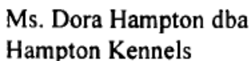
[3]The record reveals that a copy of Complainant's Motion for a Proposed Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated September 9, 1996, were mailed on September 9, 1996, by the Office of the Hearing Clerk by certified mail, return receipt requested, to Respondent at [redacted] The certified mail return receipt applicable to this mailing is numbered [redacted]. Respondent signed certified mail return receipt number [redacted] but the date of delivery to Respondent is not indicated on the return receipt. However, the record establishes that the United States Postal Service sent certified mail return receipt number [redacted] signed by Respondent, from the Fayetteville, Arkansas, post office to the Office of the Hearing Clerk on September 13, 1996, and that certified mail return receipt number [redacted] was received by the Office of the Hearing Clerk on September 19, 1996. Therefore, I find that Respondent was served with a copy of Complainant's Motion for a Proposed Default Decision, a copy of Complainant's Proposed Default Decision, and the September 9, 1996, letter from the Office of the Hearing Clerk on September 13, 1996.

CERTIFIED RECEIPT REQUESTED September 9, 1996

Ms. Dora Hampton dba
Hampton Kennels



Dear Ms. Hampton:

Subject: **<u>In re: Dora Hampton dba Hampton Kennels, Respondent</u> - AWA Docket No. 96-0050**

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

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

September 9, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Dora Hampton.

Respondent failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on October 9, 1996, the ALJ filed the Default Decision, which was served on Respondent. On October 16, 1996, Respondent filed Respondent's Appeal Petition, which states, as follows:

I Dont [sic] know what all of this is about - Some of thes [sic] charged [sic] are not so-
I am a 80 year old lady - and not able to do all that
I sold part of the dog in August-
Going to sell the other ore [sic] give them away

Dora Hampton

Respondent's Appeal Petition.

Respondent's denial of the material allegations of the Complaint comes too late. Although on rare occasions default decisions have been set aside for good cause

shown or where Complainant did not object,[4] Respondent has shown no basis for setting aside the Default Decision here.[5] The Rules of

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[4]*In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. ___ (Nov. 21, 1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[5]*See In re Gerald Funches*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 94 days after the Complaint was served on Respondent); *In re City of Orange*, 55 Agric. Dec. ___ (Sept. 12, 1996) (default decision proper where Respondent's first and only filing in the proceeding was filed 70 days after Respondent's Answer was due); *In re Bibi Uddin*, 55 Agric. Dec. ___ (Aug. 23, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (default order proper where Respondent was given an extension of time to file an Answer, but the Answer was not filed until 69 days after the extended date for filing the Answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper

Practice, a copy of which was served on Respondent on May 14, 1996, with a copy of the Complaint, clearly provide that an Answer must be filed within 20 days after the service of the Complaint. (7 C.F.R. § 1.136(a).) Respondent's first and only filing in this proceeding, Respondent's Appeal Petition, was filed October 16, 1996, 155 days after Respondent was served with the Complaint and 135 days after Respondent's Answer was due.

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where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

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

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[6] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer. (7 C.F.R. §§ 1.139, .141(a).) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).)

Respondent asserts that she is an "80 year old lady - and not able to do all that." Further, Respondent asserts that she has sold some of her dogs and intends to dispose of the remainder of the dogs. (Respondent's Appeal Petition.) While I sympathize with Respondent's inability to comply with the Animal Welfare Act, the Regulations, and the Standards because of her age, inability to comply due to age is not a defense to the failure to comply with the Animal Welfare Act, the Regulations, or the Standards. The principal purpose of the Animal Welfare Act is the humane care of animals. If the age of an individual charged with caring for

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

animals renders that person incapable of complying with the Animal Welfare Act, the Regulations, and the Standards, individuals able to ensure compliance with the Animal Welfare Act, the Regulations, and the Standards should be employed either to assist or to replace those who are not capable of ensuring compliance with the Animal Welfare Act, the Regulations, and the Standards. Respondent's age cannot be considered either as a defense to Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards or as a mitigating factor. (*Cf. In re Volpe Vito Inc.*, 56 Agric. Dec. ___, slip op. at 112-13 (Jan. 13, 1997) (failing health is not a defense to violations of the Animal Welfare Act, the Regulations, and the Standards and is not considered as a mitigating factor.))

I infer from Respondent's Appeal Petition that Respondent intends to dispose of all animals in her possession that are under the Secretary's jurisdiction under the Animal Welfare Act. However, Respondent's intention to dispose of these animals is not a defense to Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards. Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations, (9 C.F.R. part 2), and the Standards, (9 C.F.R. part 3). (9 C.F.R. § 2.100(a).) This duty exists regardless of the fact that a Respondent intends to dispose of or actually disposes of all animals under the Secretary's jurisdiction under the Animal Welfare Act immediately after the violation.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

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

Order

1. Respondent is assessed a civil penalty of $10,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States, and forwarded to: Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 60 days after the date of service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 96-0050.

2. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the

Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. Failing to provide housing facilities for dogs that are structurally sound and maintained in good repair so as to protect dogs from injury, contain dogs securely, and restrict other animals from entering;

b. Failing to clean and sanitize surfaces of housing facilities for dogs;

c. Failing to construct primary enclosures for dogs so that they provide sufficient space for dogs;

d. Failing to keep the premises, including buildings and surrounding grounds, in good repair, clean, and free of trash, junk, waste, and discarded matter;

e. Failing to control weeds, grasses, and bushes in order to protect dogs from injury and facilitate the required husbandry practices;

f. Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;

g. Failing to remove excreta from primary enclosures daily, to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors; and

h. Failing to provide building surfaces in contact with the animals in outdoor housing facilities for dogs that are impervious to moisture.

3. Respondent's Animal Welfare Act license is suspended for a period of 60 days and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that she is in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied these conditions, a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license.

The suspension of Respondent's license shall become effective beginning on the 30th day after service of this Order on Respondent. The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

In re: MARY MEYERS.
AWA Docket No. 96-0062.
Decision and Order filed March 13, 1997.

Default — Failure to file timely answer — Disposal of regulated animals not a defense — Intention to give up license not a defense — Correction of violations not a defense — Civil penalty — Disqualification period — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of $26,000 against Respondent, disqualifying Respondent from obtaining an Animal Welfare Act (Act) license for 10 years, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's correction of violations identified by APHIS inspectors, Respondent's disposal of all animals within the jurisdiction of the Secretary under the Act, and Respondent's intention to give up her Animal Welfare Act license do not operate as defenses.

Robert A. Ertman, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on September 9, 1996.

The Complaint alleges that: (1) on September 12, 1994, Mary Meyers (hereinafter Respondent) violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .100(a)) and sections 3.8, 3.11(c), and 3.11(d) of the Standards (9 C.F.R. §§ 3.8, .11(c), (d)) (Complaint ¶ II); (2) on June 14, 1995, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.4(b), 3.4(c), 3.6(a)(2)(xi), 3.11(a), and 3.11(c) of the Standards (9 C.F.R. §§ 3.4(b), (c), .6(a)(2)(xi), .11(a), (c)) (Complaint ¶ III); (3) on July 26, 1995, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.1(b), 3.1(f), 3.4(c), 3.11(c), and 3.11(d) of the Standards (9 C.F.R. §§ 3.1(b), (f), .4(c), .11(c), (d)) (Complaint ¶ IV); and (4) on October 4, 1995,

Respondent violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141), sections 2.40, 2.50, and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .50, .100(a)), and sections 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.2(b), 3.4(a)(1)(iii), 3.4(b), 3.4(c), 3.6(a)(1), 3.6(a)(2)(i)-(ii), 3.6(c)(1), 3.9(a), 3.9(b), 3.10, 3.11(a), 3.11(c), and 3.11(d) of the Standards, (9 C.F.R. §§ 3.1(a), (b), (e), (f), .2(b), .4(a)(1)(iii), .4(b), (c), .6(a)(1), .6(a)(2)(i)-(ii), .6(c)(1), .9(a), (b), .10, .11(a), (c), (d)) (Complaint ¶ V).

Respondent was served with the Complaint on September 14, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on January 21, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt (hereinafter ALJ) issued a Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Default Decision) in which the ALJ: (1) found that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (3) assessed a civil penalty of $26,000 against Respondent; and (4) disqualified Respondent from becoming licensed under the Animal Welfare Act for 10 years and continuing after the 10-year disqualification period until Respondent demonstrates to the Animal and Plant Health Inspection Service (hereinafter APHIS) that she is in full compliance with the Animal Welfare Act, the Regulations, and the Standards, and pays the assessed civil penalty (Default Decision at 8-9).

On January 29, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On February 26, 1997, Respondent filed an addendum to her appeal, and on February 28, 1997, the case was referred to the Judicial Officer for decision. On March 7, 1997, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by

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

dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

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

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture[.] . . .

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

7 U.S.C. § 2132(b), (f).

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon

payment of such fee established pursuant to 2153 of this title; *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.] . . .

7 U.S.C. § 2133.

§ 2141. Marking and identification of animals

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

7 U.S.C. § 2141.

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

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

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

(2) The standards described in paragraph (1) shall include minimum requirements—

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary . . . .

7 U.S.C. § 2143(a)(1), (2).

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation[.] . . .

7 U.S.C. § 2149(a), (b).

9 C.F.R.:

SUBCHAPTER A — ANIMAL WELFARE

PART 1 — DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in

this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

9 C.F.R. § 1.1.

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(I) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

9 C.F.R. § 2.50(a), (b)(1)-(3) (footnotes omitted).

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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

(b) *Conditions and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be

stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

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

9 C.F.R. § 3.1(a), (b), (e), (f) (footnote omitted).

§ 3.2 Indoor housing facilities.

. . . .

(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as

fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

9 C.F.R. § 3.2(b).

§ 3.4 Outdoor housing facilities.

(a) *Restrictions.* (1) The following categories of dogs or cats must not be kept in outdoor facilities, unless that practice is specifically approved by the attending veterinarian:

. . . .

(iii) Sick, infirm, aged or young dogs or cats.

. . . .

(b) *Shelter from the elements.* Outdoor facilities for dogs and cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cars, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing

facilities—includinghouses, dens etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

9 C.F.R. § 3.4(a)(1)(iii), (b), (c).

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be in good repair.

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

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

. . . .

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

. . . .

(c) *Additional requirements for dogs*—(1) *Space.* (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

(ii) Each bitch with nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics, and in accordance with generally accepted husbandry practices as determined by the attending veterinarian. If the additional amount of floor space for each nursing puppy is less than 5 percent of the minimum requirement for the bitch, such housing must be approved by the attending veterinarian in the case of a research facility, and, in the case of dealers and exhibitors, such housing must be approved by the Administrator.

(iii) The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position[.] . . .

9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii), (xi), (c)(1).

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.8 Exercise for dogs.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise. In addition, the plan must be approved by the attending veterinarian. The plan must include written standard procedures to be followed in providing the opportunity for exercise. The plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding Federal agency. . . .

9 C.F.R. § 3.8.

§ 3.9 Feeding.

(a) Dogs and cats must be fed at least once each day, except as otherwise might be required to provide adequate veterinary care. The food must be uncontaminated, wholesome, palatable, and of sufficient quantity and nutritive value to maintain the normal condition and weight of the animal. The diet must be appropriate for the individual animal's age and condition.

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Sanitization is achieved by using one of the methods described in § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be

clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken to ensure that there is no molding, deterioration, and caking of feed.

9 C.F.R. § 3.9.

§ 3.10 Watering.

If potable water is not continually available to the dogs and cats, it must be offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian. Water receptacles must be kept clean and sanitized in accordance with § 3.11(b) of this subpart, and before being used to water a different dog or cat or social grouping of dogs or cats.

9 C.F.R. § 3.10.

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

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

. . . .

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the

husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

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

9 C.F.R. § 3.11(a), (c), (d).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

A copy of the Complaint and [a copy of] the Rules of Practice . . . w[ere] duly served on Respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service[, which was served on Respondent with the copy of the Complaint and the copy of the Rules of Practice,] that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are [deemed] admitted . . . by Respondent's failure to file an Answer, are adopted and set forth [in this Decision and Order] as Findings of Fact and Conclusions of Law.

. . . .

Findings of Fact and Conclusions of Law

1. . . . Respondent is an individual with a mailing address of

2. Respondent, at all times material hereto, was licensed and operating as a dealer as defined in the [Animal Welfare] Act and the Regulations.

3. When Respondent became licensed and annually thereafter, she received copies of the [Animal Welfare] Act, the Regulations, and Standards . . . and agreed in writing to comply with them.

4. On September 12, 1994, APHIS inspected Respondent's premises and found that Respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

5. On September 12, 1994, APHIS inspected Respondent's facility and found . . . willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards [identified in paragraph 5(A)-(C) of these Findings of Fact and Conclusions of Law]:

A. An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R § 3.11(d));

B. Weeds, grasses, and bushes were not controlled (9 C.F.R § 3.11(c)); and

C. Respondent failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise (9 C.F.R. § 3.8).

6. On June 14, 1995, APHIS inspected Respondent's facility and found . . . willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards [identified in paragraph 6(A)-(E) of these Findings of Fact and Conclusions of Law]:

A. Outdoor housing facilities for dogs did not provide areas of shade large enough to contain all the animals at one time and protect them from the direct rays of the sun (9 C.F.R. § 3.4(b));

B. The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c));

C. Primary enclosures for dogs were not constructed so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (9 C.F.R. § 3.6(a)(2)(xi));

D. Primary enclosures for dogs were not kept clean (9 C.F.R. § 3.11(a)); and

E. The premises, including buildings and surrounding grounds, were not kept clean and free of waste and discarded matter, and weeds, grasses, and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)).

7. On July 26, 1995, APHIS inspected Respondent's facility and found . . . willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards [identified in paragraph 7(A)-(E) of these Findings of Fact and Conclusions of Law]:

A. Animal areas inside of housing facilities were not kept neat and free of clutter, including equipment, furniture, and stored material (9 C.F.R. § 3.1(b));

B. Provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f));

C. An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R § 3.11(d));

D. The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c)); and

E. Weeds, grasses, and bushes were not controlled (9 C.F.R § 3.11(c)).

8. On October 4, 1995, APHIS inspected Respondent's premises and found that Respondent had failed to provide veterinary care to an animal in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

9. On October 4, 1995, APHIS inspected Respondent's premises and records and found that Respondent had failed to individually identify dogs, in willful violation of section 11 of the [Animal Welfare] Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).

10. On October 4, 1995, APHIS inspected Respondent's facility and found . . . willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards [identified in paragraph 10(A)-(P) of these Findings of Fact and Conclusions of Law]:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Supplies of food were not stored in a manner that protects them from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e));

C. Indoor housing facilities for dogs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (9 C.F.R. § 3.2(b));

D. Young dogs were kept in outdoor facilities without specific approval by the attending veterinarian (9 C.F.R. § 3.4(a)(1)(iii));

E. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));

F. Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii));

G. Dogs were not provided sufficient space, as required (9 C.F.R. § 3.6(c)(1));

H. Food receptacles for dogs were not kept clean and sanitized; disposable food receptacles were not discarded after one use (9 C.F.R. § 3.9(b));

I. Dogs were not provided with food of sufficient quantity and nutritive value to maintain the normal condition and weight of the animals (9 C.F.R. § 3.9(a));

J. Watering receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.10);

K. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a));

L. The premises, including buildings and surrounding grounds, were not kept clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c));

M. Animal areas inside of housing facilities were not kept neat and free of clutter, including equipment, furniture, and stored material (9 C.F.R. § 3.1(b));

N. Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f));

O. An effective program for the control of pests was not established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas (9 C.F.R § 3.11(d)); and

P. The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The . . . Order [issued in this Decision and Order] is authorized by the [Animal Welfare] Act and warranted under the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's January 29, 1997, and February 26, 1997, filings are treated in this Decision and Order as Respondent's appeal of the Default Decision.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) [(7 C.F.R. § 1.136(a))] shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138 [(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for hearing.

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

7 C.F.R. § 1.141(a).

A copy of the Complaint, a copy of the Rules of Practice, and a letter dated September 9, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on September 14, 1996. The Complaint states:

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

Complaint at 6.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying September 9, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> September 9, 1996
>
> Ms. Mary Meyers
>
>
>
> Dear Ms. Meyers:
>
> **Subject: In re: Mary Meyers - Respondent**
> **AWA Docket No. 96-0062**
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file

> with the Hearing Clerk an original and five copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

September 9, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Mary Meyers at 1 (emphasis in original).

Respondent's Answer was due no later than October 4, 1996. Respondent's first filing in this proceeding was filed on January 29, 1997, 137 days after the Complaint was served on Respondent and 117 days after Respondent's Answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)) and a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On December 18, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). A copy of Complainant's Motion for Proposed Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated December 19, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on December 27, 1996. The December 19, 1996, letter from the Office of the Hearing Clerk states, as follows:

> CERTIFIED RECEIPT REQUESTED December 19, 1996
>
> Ms. Mary Meyers
>
>
>
> Dear Ms. Meyers:
>
> **Subject:** **<u>In re: Mary Meyers, Respondent</u>**
> **AWA Docket No. 96-0062**
>
> Enclosed is a copy of Complainant's Motion For Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and

Order Upon Admission of Fact by Reason of Default, which have been filed with this office in the above-captioned proceeding.

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

December 19, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Mary Meyers.

Respondent failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on January 21, 1997, the ALJ filed the Default Decision. Respondent's filings include what appears to be Respondent's denial of some of the allegations in the Complaint, as follows:

> So that I would be able to clean my kennel I put lights in the trees that surrounded the area. Then I cleaned the pens and fed the dogs after daylight hours. My pens were cleaned and fed within a twenty-four hour period. They weren't cleaned and fed at the same time every day. My work schedule simply would not allow for it. (The kind of feed fed plays apart).
>
> If I ran short of time and didn't get the fecal carried away that morning I would be written up that night. They would be sitting in my yard. In order to keep from extending their day any more than necessary they would go through the kennel the first time that evening. I checked my kennels morning and night.
>
> I had one pen my inspectors couldn't agree on the shade. I would try to guess which one was coming first. The two shades for the pen left me trying [to] guess which inspector would show up next. If my guess was wrong I was wrote up.
>
> Another example was the lack of knowledge. Because of limited space for whelping I would bred [sic] just so many at one time. So to vary the dog schedule you can vary the heat cycle by backing off on their feed. When you are ready to bred [sic] you supply the female with a high protein ration with lots of vitamins and minerals. In just a matter of time you have a dog in cycle.

> We were also able to pick up used siding to put on our barn. We stacked it in 3 stacks back of the house yet away from the kennel. They didn't like that either.
>
> My 4-H children had a pen in the shade with their animals in them for at least 15 years. All at once they couldn't use it anymore. Kind of slow don't you think!
>
> I, also, was told I had to take a dog to the vet to be checked. I did and the vet could not find any problem with her. I relayed the findings to the inspector. The response was they sometimes say that when they don't know what the problem is. I complied to their request.
>
> I painted all the dog houses and sealed the insides to make it impervious to moisture. The inspector noticed and commented saying he supposed I coated the inside too. I responded saying I had. The comment back we'll see if you did with water the next time. Totally uncalled for! (There is so much on them paint won't stick.)
>
> At no time were any of my dogs uncared for or in danger anywhere or at any time. My dogs were vaccinated and free of disease.
>
> . . . .
>
> At no time were any of my dogs in danger or ill health. And at no time did I _not_ do what I was ask to do. It just wasn't enough for those who think they know more than I.

Respondent's January 29, 1997, filing (emphasis in original).

Respondent continues in her second filing, as follows:

> My animals were never in danger or uncared for. They were disease free and vaccinated and wormed regularly. The small dogs were dipped regularly and the large dogs were soaked.
>
> My place is not a show place by any means but that doesn't mean my kennel dogs were not cared for.

Respondent's February 26, 1997, filing.

Respondent's denial of the material allegations of the Complaint comes too late. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[2] Respondent has shown no basis for setting aside the Default Decision here.[3] The Rules of

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[2]*In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. ___ (Nov. 21, 1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3]*See In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 135 days after Respondent's Answer was due); *In re Gerald Funches*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 94 days after the Complaint was served on Respondent); *In re City of Orange*, 55 Agric. Dec. ___ (Sept. 12, 1996) (default decision proper where Respondent's first and only filing in the proceeding was filed 70 days after Respondent's Answer was due); *In re Bibi Uddin*, 55 Agric. Dec. ___ (Aug. 23, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (default order proper where Respondent was given an extension of time to file an Answer, but the Answer was not filed until 69 days after the extended date for filing the Answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948

Practice, a copy of which was served on Respondent on September 14, 1996, with a copy of the Complaint, clearly provide that an Answer must be filed within 20

(1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

days after the service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed January 29, 1997, 137 days after Respondent was served with the Complaint and 117 days after Respondent's Answer was due.

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

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[4] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)).

Respondent asserts in her January 29, 1997, filing that she corrected the violations that were identified by inspectors, as follows:

> Whether you realize it or not I made changes. I corrected what I was written up for. I did it within my financial means.

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

Respondent's January 29, 1997, filing.

Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Animal Welfare Act, the Regulations, and the Standards. This duty exists regardless of any "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violations.[5]

I infer from Respondent's February 26, 1997, filing that she no longer owns any animals that are under the Secretary of Agriculture's jurisdiction under the Animal Welfare Act and that Respondent has decided to "give up" her Animal Welfare Act license. However, neither Respondent's disposal of all her animals under the Secretary of Agriculture's jurisdiction under the Animal Welfare Act nor Respondent's intention to "give up" her Animal Welfare Act license is a defense to Respondent's violations of the Animal Welfare Act, the Regulations, and the Standards. Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Animal Welfare Act, the Regulations, and the Standards. This duty exists regardless of the fact that a Respondent disposes of all animals under the Secretary of Agriculture's jurisdiction under the Animal Welfare Act and intends to "give up" the Animal Welfare Act license immediately after the violation.[6]

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

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

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[5]*In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ slip op. at 106 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995)(not to be cited per 7th Circuit Rule 53(b)(2)).

[6]*In re Dora Hampton, supra*, slip op. at 23 (Respondent's intention to dispose of animals under the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act is not a defense to a violation of the Animal Welfare Act or the Regulations and the Standards issued under the Animal Welfare Act.)

Order

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

(a) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;

(b) Failing to provide animals with adequate shelter from the elements;

(c) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals;

(d) Failing to keep food and water receptacles clean and sanitized;

(e) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(f) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter;

(g) Failing to control weeds, grasses, and bushes;

(h) Failing to establish and maintain an effective program for the control of pests;

(i) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(j) Failing to individually identify animals, as required;

(k) Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;

(l) Failing to provide sufficient space for animals in primary enclosures;

(m) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(n) Failing to store supplies of food and bedding so as to adequately protect them against contamination.

2. Respondent is assessed a civil penalty of $26,000 which shall be paid by a certified check or money order made payable to the Treasurer of United States and forwarded to Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 96-0062.

3. Respondent is disqualified from becoming licensed under the Animal Welfare Act for a period of 10 years and until she demonstrates to APHIS that she in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to APHIS that she has satisfied the conditions in the disqualification provisions of this Order, a supplemental order will be issued in this proceeding, upon motion of Complainant, terminating the disqualification of Respondent from becoming licensed under the Animal Welfare Act.

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

In re: JOHN WALKER, d/b/a WALKER BROTHER'S CIRCUS.
AWA Docket No. 96-0085.
Decision and Order filed March 21, 1997.

Default — Failure to file timely answer — Sanction — Correction of violations not a defense — Civil penalty — License suspension — Cease and desist order.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of $5,000 against Respondent, suspending Respondent's Animal Welfare Act (Act) license for 30 days, and directing Respondent to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. Respondent's correction of violations identified by APHIS inspectors does not operate as a defense. The sanction imposed is appropriate under the circumstances in the case and is in accordance with the Act.

James D. Holt, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the regulations and standards issued under the Animal

Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on September 23, 1996.

The Complaint alleges that: (1) from on or about August 3, 1994, and continuing to March 1996, John Walker, d/b/a Walker Brother's Circus (hereinafter Respondent) operated as an exhibitor as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) (Complaint ¶ II); (2) on August 3, 1994, March 29, 1995, and August 14, 1995, Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) (Complaint ¶¶ III(A), IV(A), V(A)); (3) on August 3, 1994, March 29, 1995, and August 14, 1995, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40) (Complaint ¶¶ III(B), IV(B), V(B)); (4) on August 3, 1994, Respondent willfully violated sections 2.100(a), 2.131(b)(1), and 2.131(c)(3) of the Regulations (9 C.F.R. §§ 2.100(a), .131(b)(1), (c)(3)) (Complaint ¶ III(C)); and (5) on August 14, 1995, Respondent willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.137 of the Standards (9 C.F.R. § 3.137) (Complaint ¶ V(C)).

Respondent was served with the Complaint on September 30, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on January 3, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued a Decision and Order (hereinafter Default Decision) in which the Chief ALJ: (1) found that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (3) assessed a civil penalty of $5,000 against Respondent; and (4) suspended Respondent's Animal Welfare Act license for 30 days and continuing after the 30-day suspension until Respondent demonstrates to the Animal and Plant Health Inspection Service (hereinafter APHIS) that Respondent is in full compliance with the Animal Welfare Act, the Regulations, and the Standards and pays the assessed civil penalty (Default Decision at 2-5).

On February 3, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] Complainant filed Complainant's Response to Respondent's Appeal on March 10, 1997, and on March 11, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

Applicable Statutory Provisions, Regulations, and Standard

7 U.S.C.:

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

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture[.]

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term

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

includes, carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

7 U.S.C. § 2132(b), (h).

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title[.] . . .

7 U.S.C. § 2133.

§ 2134. Valid license for dealers and exhibitors required

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

7 U.S.C. § 2134.

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

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

available at all reasonable times for inspection and copying by the Secretary.

7 U.S.C. § 2140.

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

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

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

(2) The standards described in paragraph (1) shall include minimum requirements—

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals[.] . . .

7 U.S.C. § 2143(a)(1), (2)(A).

§ 2149. *Violations by licensees*

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

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

(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for

failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation[.] . . .

7 U.S.C. § 2149(a), (b).

9 C.F.R.:

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events,

purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

9 C.F.R. § 1.1.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale . . . must have a valid license. . . .

9 C.F.R. § 2.1(a)(1).

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

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

(I) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);
(vi) The species of the animal(s); and
(vii) The number of animals in the shipment.

9 C.F.R. § 2.75(b)(1).

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of Animals.

. . . .

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

(c)(1) . . . .

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

9 C.F.R. § 2.131(b)(1), (c)(3).

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

. . . .

TRANSPORTATION STANDARDS

. . . .

§ 3.137 Primary enclosures used to transport live animals.

No dealer, research facility, exhibitor, or operator of an auction sale shall offer for transportation or transport, in commerce, any live animal in a primary enclosure which does not conform to the following requirements:

(a) Primary enclosures, such as compartments, transport cages, cartons, or crates, used to transport live animals shall be constructed in such a manner that (1) the structural strength of the enclosure shall be sufficient to contain the live animals and to withstand the normal rigors of transportation; (2) the interior of the enclosure shall be free from any protrusions that could be injurious to the live animals contained therein[.] . . .

9 C.F.R. § 3.137(a)(1)-(2).

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Findings of Fact

1. John Walker, doing business as Walker Brother's Circus, is an individual whose address is [redacted] Florida [redacted]

2. Respondent, at all times material hereto, was operating as an exhibitor as defined in the [Animal Welfare] Act and the Regulations.

3. From [on or about] August 3, 1994, and continuing to March 1996, Respondent willfully operated as an exhibitor as defined in the [Animal Welfare] Act and the Regulations, without being licensed.

4. On August 3, 1994, Respondent willfully failed to maintain complete records showing the acquisition, disposition, and identification of animals.

5. On August 3, 1994, Respondent . . . willfully failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

6. On August 3, 1994, Respondent, during public exhibition of animals, willfully failed to provide a sufficient distance or barrier between animals and the general viewing public so as to assure the safety of the animals [and the public].

7. On August 3, 1994, Respondent, during public exhibition of dangerous animals, willfully failed to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler.

8. On March 29, 1995, Respondent willfully failed to maintain complete records showing the acquisition, disposition, and identification of animals.

9. On March 29, 1995, Respondent willfully failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

10. On August 14, 1995, Respondent willfully failed to maintain complete records showing the acquisition, disposition, and identification of animals.

11. On August 14, 1995, Respondent willfully failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

12. On August 14, 1995, Respondent's primary enclosures used to transport animals were not structurally sound and maintained in good repair so as to protect the animals from injury.

Conclusion [of Law]

By reason of the facts contained in the Findings of Fact, Respondent has violated [sections 4 and 10 of] the [Animal Welfare] Act [(7 U.S.C. §§ 2134, 2140), sections 2.1, 2.40, 2.75(b)(1), 2.100(a), 2.131(b)(1), and 2.131(c)(3) of] the Regulations (9 C.F.R. §§ 2.1, .40, .75(b)(1), .100(a), .131(b)(1), (c)(3)), [and section 3.137 of the Standards (9 C.F.R. §] 3.137).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's only filing in this proceeding dated January 24, 1997, entitled *RESPONSE TO ALLEGATIONS* (hereinafter Respondent's Appeal Petition), which was filed February 3, 1997, appears to be and is treated in this Decision and Order as Respondent's appeal of the Default Decision.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) [(7 C.F.R. § 1.136(a))] shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138 [(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for hearing.

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

7 C.F.R. § 1.141(a).

A copy of the Complaint, a copy of the Rules of Practice, and a letter dated September 24, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on September 30, 1996. The Complaint states:

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

Complaint at 4.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying September 24, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> September 24, 1996
>
> Mr. John Walker dba
> Walker Brother's Circus
>
> Dear Mr. Walker:
>
> **Subject: In re: John Walker dba Walker Brother's Circus, Respondent**
> **AWA Docket No. 96-0085**
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

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

September 24, 1996, letter from Joyce A. Dawson, Hearing Clerk, to John Walker at 1 (emphasis in original).

Respondent's Answer was due no later than October 21, 1996. Respondent's first and only filing in this proceeding was filed on February 3, 1997, 126 days after the Complaint was served on Respondent and 105 days after Respondent's Answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)) and a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On October 30, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Decision and Order (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). A copy of Complainant's Motion for Proposed Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated October 30, 1996, from the Office of the Hearing Clerk were served on Respondent by certified mail on November 5, 1996. The October 30, 1996, letter from the Office of the Hearing Clerk states, as follows:

> CERTIFIED RECEIPT REQUESTED October 30, 1996
>
> Mr. John Walker dba
> Walker Brother's Circus
>
> Dear Mr. Walker:

> **Subject: In re: John Walker dba Walker Brother's Circus, Respondent**
> **AWA Docket No. 96-0085**
>
> Enclosed is a copy of Complainant's Motion For Adoption of Proposed Decision and Order, together with a copy of the Decision and Order, which have been filed with this office in the above-captioned proceeding.
>
> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

October 30, 1996, letter from Joyce A. Dawson, Hearing Clerk, to John Walker.

Respondent failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on January 3, 1997, the Chief ALJ filed the Default Decision.

Respondent denies violating the Animal Welfare Act, the Regulations, and the Standards (Respondent's Appeal Petition). Respondent's denial of the material allegations of the Complaint comes too late. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[2] Respondent has shown no basis for setting aside the Default Decision here.[3]

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[2]*In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. ___ (Nov. 21, 1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3]*See In re Mary Meyers*, 56 Agric. Dec. ___ (March 13, 1997) (default decision was proper where Respondent's first filing was filed 117 days after her answer was due); *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 135 days after Respondent's Answer was due); *In re Gerald Funches*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 94 days after the Complaint was served on Respondent);

In re City of Orange, 55 Agric. Dec. ___ (Sept. 12, 1996) (default decision proper where Respondent's first and only filing in the proceeding was filed 70 days after Respondent's Answer was due); *In re Bibi Uddin*, 55 Agric. Dec. ___ (Aug. 23, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (default order proper where Respondent was given an extension of time to file an Answer, but the Answer was not filed until 69 days after the extended date for filing the Answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys);

The Rules of Practice, a copy of which was served on Respondent on September 30, 1996, with a copy of the Complaint, clearly provide that an Answer must be filed within 20 days after the service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's only filing in this proceeding was filed February 3, 1997, 126 days after Respondent was served with the Complaint and 105 days after Respondent's Answer was due.

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

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[4] If Respondent were

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In re Carl D. Cuttone, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[4]*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for

permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived his right to a hearing by failing to file a timely Answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)).

Respondent requests that his Animal Welfare Act license not be suspended and that the civil penalty assessed be reduced to $1,600, based upon Respondent's demonstration to APHIS that he is currently in compliance with the Animal Welfare Act, the Regulations, and the Standards (Respondent's Appeal Petition).

Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Animal Welfare Act, the Regulations, and the Standards. This duty exists regardless of any "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violations.[5]

Respondent's Animal Welfare Act license could have been revoked based upon his numerous willful violations of the Animal Welfare Act, the Regulations, and the Standards which took place over an extended period of time, August 3, 1994, to March 1996. Further, Respondent could have been assessed a civil penalty of

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inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

[5]*In re Mary Meyers, supra*, slip op. at 31; *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___ slip op. at 106 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995)(not to be cited per 7th Circuit Rule 53(b)(2)).

$2,500 for each violation and each day during which each violation continued.[6] Moreover, an examination of other cases brought by APHIS for similar violations reveals that civil penalties and suspension periods similar to those sought by Complainant in this case have been assessed in the past.[7]

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

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

Order

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

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[6]Respondent is deemed to have admitted that he violated the Animal Welfare Act, the Regulations, and the Standards 10 times, and one of these violations occurred continuously from on or about August 3, 1994, to March 1996. Complainant could have sought and had assessed the maximum civil penalty of $2,500 for each violation and each day during which the violations continued (7 U.S.C. § 2149(b)). Thus, Respondent could have been assessed a civil penalty over $1,400,000.

[7]*See, e.g., In re Mary Meyers, supra* ($26,000 civil penalty and a 10-year disqualification from becoming licensed under the Animal Welfare Act for 32 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Dora Hampton, supra* ($10,000 civil penalty and 60-day license suspension for 13 violations of the Regulations and the Standards); *In re Volpe Vito, Inc., supra* ($26,000 civil penalty and license revocation for 51 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) ($2,500 civil penalty and a 1-year disqualification from becoming licensed under the Animal Welfare Act for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc., supra* ($6,750 civil penalty and 45-day suspension of a license for 36 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) ($5,000 civil penalty and 30-day suspension of a license for 21 violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) ($2,000 civil penalty and 60-day suspension of a license for numerous violations on four different dates over a 13-month period).

(a) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

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

(c) Failing, during public exhibition of dangerous animals, to have the animals under the direct control and supervision of a knowledgeable and experienced animal handler;

(d) Failing, during public exhibition of animals, to provide a sufficient distance or barrier or both between the animals and the general viewing public so as to assure the safety of the animals and the public;

(e) Failing to use structurally sound primary enclosures to transport animals and to maintain primary enclosures in good repair so as to protect animals from injury; and

(f) Engaging in any activity for which a license is required under the Animal Welfare Act and Regulations without being licensed.

2. Respondent is assessed a civil penalty of $5,000 which shall be paid within 60 days after service of this Order on Respondent by a certified check or money order made payable to the Treasurer of United States, and forwarded to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 96-0085.

3. Respondent's Animal Welfare Act license is suspended for a period of 30 days and until Respondent demonstrates to APHIS that he is in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to APHIS that he has satisfied these conditions, a supplemental order will be issued in this proceeding upon motion of Complainant, terminating the suspension of Respondent's Animal Welfare Act license.

The license suspension provisions of this Order shall become effective on the 30th day after service of this Order on Respondent and the cease and desist

provisions of this Order shall become effective on the day after service of this Order on Respondent.

In re: CITY OF ORANGE, CALIFORNIA, COMMUNITY SERVICES DEPARTMENT, d/b/a EISENHOWER PARK.
AWA Docket No. 96-0044.
Order Granting Request to Withdraw Petition for Reconsideration and Motion for Stay of Monetary Sanctions and Modified Order filed March 25, 1997.

Petition for reconsideration — Motion for stay — Modification of order.

Colleen A. Carroll, for Complainant.
Wayne W. Winthers, Orange, California, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the Regulations and Standards promulgated under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter the Regulations and Standards); the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151); and the Rules of Practice Governing Proceedings Under the Animal Welfare Act (9 C.F.R. §§ 4.1-.11) (hereinafter the Rules of Practice), by filing a Complaint on April 22, 1996

The Complaint, which alleges that the City of Orange, California, Community Services Department, doing business as Eisenhower Park (hereinafter Respondent), willfully violated the Regulations and Standards, was served on Respondent on May 7, 1996. Section 1.136(a) of the Rules of Practice provides that Respondent may file an Answer to the Complaint within 20 days after service of the Complaint on Respondent (7 C.F.R. § 1.136(a)). Administrative Law Judge James W. Hunt (hereinafter ALJ) extended the time for Respondent to file its Answer from May 28, 1996, to June 3, 1996 (Order Extending Time to Answer Complaint).

Respondent failed to answer by June 3, 1996, and on July 26, 1996, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued a Proposed Decision and Order Upon Admission of Facts By Reason of Default (hereinafter Default Decision) in which the ALJ: (1) found that Respondent violated the Regulations and Standards; (2) assessed a civil penalty of

$5,000 against Respondent; and (3) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

On August 12, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On August 22, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order, and on August 26, 1996, the case was referred to the Judicial Officer for decision.

A Decision and Order was filed in this proceeding on September 12, 1996, in which Respondent was: (1) found to have violated the Regulations and Standards; (2) assessed a civil penalty of $5,000; and (3) ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re City of Orange*, 55 Agric. Dec. ___ (Sept. 12, 1996). On September 24, 1996, Respondent filed a Petition for Reconsideration and a Motion for Stay of Monetary Sanctions. On October 31, 1996, the case was referred to the Judicial Officer for reconsideration.

On March 18, 1997, Respondent filed a Request to Withdraw Motion for Stay of Monetary Sanctions and a Request to Withdraw Petition for Reconsideration, and on March 21, 1997, Complainant and Respondent filed Joint Request to Modify Order issued September 12, 1996.

Section 1.146(b) of the Rules of Practice provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[2] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order in this proceeding filed on September 12, 1997. Respondent's Motion for Stay of Monetary Sanction was mere surplusage and Respondent's Request to Withdraw Motion for Stay of Monetary Sanctions is granted.

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

[2]*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___, slip op. at 6 (Mar. 19, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 1 (Oct. 29, 1996) (Order Denying Petition for Reconsideration).

Withdrawal of a petition for reconsideration is not a matter of right.[3] Based upon a careful consideration of the record in this proceeding, I find no reason not to grant Respondent's Request to Withdraw Petition for Reconsideration, and Respondent's Request to Withdraw Petition for Reconsideration is therefore granted.

Complainant's and Respondent's Joint Request to Modify Order is granted, and in accordance with the Joint Request to Modify Order, paragraph 1 of the Order in the Decision and Order issued in this proceeding on September 12, 1996, is modified to read, as follows:

> 1. Respondent City of Orange, California, Community Services Department, d/b/a Eisenhower Park, is assessed a civil penalty of $5,000, as follows:
>
> a. $1,000 shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 30 days after service of this Order on Respondent to:
>
> Colleen A. Carroll
> United States Department of Agriculture
> Office of the General Counsel
> Room 2014 South Building
> Washington, D.C. 20250-1417

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[3] *See generally, Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw petition rests in the sound discretion of the court to be exercised in light of the circumstances of the particular case); *American Automobile Mfrs. Ass'n v. Commissioner, Massachusetts Dep't of Environmental Protection*, 31 F.3d 18, 22 (1st Cir. 1994) (court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) (an appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have discretionary authority not to dismiss the case in appropriate circumstances); *In re Vermont Meat Packers, Inc.*, 48 Agric. Dec. 158 (1989) (withdrawal of an appeal is not a matter of right); *In re Smith Waller*, 34 Agric. Dec. 373, 374 (1975) (the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 297 (1975) (the rules of practice do not permit a party to withdraw an appeal as a matter of right; in considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

b. $4,000 shall be suspended for 1 year from this Order, so long as Respondent remains in compliance with the Animal Welfare Act and the Regulations and the Standards issued under the Animal Welfare Act.

c. Respondent shall not be required to pay $4,000 of this $5,000 civil penalty if Respondent does not violate the Animal Welfare Act or the Regulations or Standards issued under the Animal Welfare Act within one year from the effective date of this Order.

This Order shall become effective upon service of this Order on Respondent.

In re: GAIL DAVIS, d/b/a PERSONALITY PLUS POODLES.
AWA Docket No. 97-0001.
Order Denying Late Appeal filed April 18, 1997.

Late appeal — Failure to file answer — Default.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based upon Respondent's failure to file a timely Answer which, under the Rules of Practice (7 C.F.R. § 1.136(c)), constitutes an admission of the allegations in the Complaint.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on October 2, 1996.

The Complaint alleges that: (1) on September 14, 1995, Gail Davis, d/b/a Personality Plus Poodles (hereinafter Respondent), violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.75(a)(1) and 2.100(a) of the Regulations (9 C.F.R. §§ 2.75(a)(1), .100(a)), and sections 3.1(c)(1)(i), 3.1(f),

3.6(a)(2)(i), 3.6(a)(2)(x), 3.11(a), and 3.11(c) of the Standards (9 C.F.R. §§ 3.1(c)(1)(i), .1(f), .6(a)(2)(i), .6(a)(2)(x), .11(a), .11(c)) (Complaint ¶ II); and (2) on October 26, 1995, Respondent violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141), sections 2.40, 2.50, and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .50, .100(a)), and sections 3.1(c)(1)(i), 3.1(f), 3.6(a)(2)(i), 3.11(a), and 3.11(c) of the Standards (9 C.F.R. §§ 3.1(c)(1)(i), .1(f), .6(a)(2)(i), .11(a), .11(c)) (Complaint ¶ III).

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

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

. . . .

§ 2132. Definitions

When used in this chapter—

. . . .

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture[.]

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

7 U.S.C. § 2132(b), (f).

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

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

7 U.S.C. § 2140.

§ 2141. Marking and identification of animals

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

7 U.S.C. § 2141.

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

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

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

(2) The standards described in paragraph (1) shall include minimum requirements—

(A) for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; and

(B) for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary. . . .

7 U.S.C. § 2143(a)(1), (2).

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation[.] . . . Any such civil penalty may be compromised by the Secretary. . . .

7 U.S.C. § 2149(a), (b).

9 C.F.R.:

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

9 C.F.R. § 1.1.

PART 2—REGULATIONS

. . . .

Subpart D—Attending Veterinarian and Adequate Veterinary Care

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

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for

delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(I) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

9 C.F.R. § 2.50(a), (b)(1)-(3) (footnotes omitted).

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

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

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

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

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

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

(A) The species and breed or type;

(B) The sex;

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

(D) The color and any distinctive markings;

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

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

9 C.F.R. § 2.75(a)(1).

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(c) *Surfaces*—(1) *General requirements.* The surfaces of the housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface[.]

. . . .

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

9 C.F.R. § 3.1(c)(1)(i), (f).

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

. . . .

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

(i) Have no sharp points or edges that could injure the dogs and cats;

. . . .

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor. If the floor of the primary enclosure is constructed of wire, a solid resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably must be provided[.]

9 C.F.R. § 3.6(a)(2)(i), (x).

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

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

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

. . . .

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

9 C.F.R. § 3.11(a), (c).

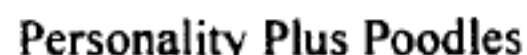
Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on October 7, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on February 13, 1997, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) filed a Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Default Decision) in which the ALJ: (1) found that Respondent violated the Animal Welfare Act, the Regulations, and the Standards, as alleged in the Complaint; (2) issued a cease and desist order directing that Respondent cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (3) assessed a civil penalty of $5,000 against Respondent; and (4) disqualified Respondent from becoming licensed under the Animal Welfare Act and the Regulations for 120 days (Default Decision at 2-6).

The Default Decision was served on Respondent on February 25, 1997, and on Complainant on February 21, 1997. The Default Decision provides:

> The provisions of this order shall become effective on the first day after this decision becomes final.
>
> Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Default Decision at 6.

A letter from the Office of the Hearing Clerk accompanying the Default Decision states:

> CERTIFIED RECEIPT REQUESTED
> February 13, 1997
> Ms. Gail Davis d/b/a
> Personality Plus Poodles
>
> 
>
> Dear Ms. Davis:
>
> **Subject: <u>In re: Gail Davis d/b/a Personality Plus Poodles-Respondent</u>**
> **AWA Docket No. 97-0001**

Enclosed is a copy of the Decision and Order Upon Admission of Facts by Reason of Default issued in this proceeding by Administrative Law Judge Baker on February 13, 1997.

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

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

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Letter from Joyce A. Dawson, Hearing Clerk, to Gail Davis, d/b/a Personality Plus Poodles.

The Rules of Practice provide that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time, and on March 26, 1997, the Office of the Hearing Clerk issued a Notice of Effective Date of Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Notice of Effective Date of Default Decision), which was served on Respondent on April 3, 1997.

Mr. Frank Martin, Jr., attorney for Complainant, received from Respondent an envelope post-marked March 28, 1997, containing a letter dated March 18, 1997, and a 2-page attachment. Complainant's attorney filed the letter and the attachment on behalf of Respondent on April 7, 1997 (Notice of Filing, Apr. 7, 1997), and

filed the envelope on behalf of Respondent on April 15, 1997 (Notice of Filing, Apr. 15, 1997). On April 10, 1997, the case was referred for decision to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] I infer that Respondent's letter dated March 18, 1997, and filed April 7, 1997 (hereinafter Respondent's Appeal Petition) is Respondent's Appeal Petition and that Complainant's April 7, 1997, Notice of Filing and April 15, 1997, Notice of Filing constitute Complainant's response to Respondent's Appeal Petition.

Respondent's Appeal Petition states:

> March 18, 1997
>
> Dear Sir;
>
> Hopefully I am responding to the correct department with my request for additional evaluation of my case. I received a letter saying I had twenty days to respond. I finally am assuming the fine against me at this point is for failure to respond within the given time first time, therefore waiving a request for a hearing. As I have written earlier, at that time I was under a great amount of medical problems. I was in great pain and also was very medicated, so I really was not fully aware of the time passing. I would be able to provide doctor bills[,] emergency room services, and pharmacy bills to further prove the condition I was in.
>
> I again am sending copies of the letter explaining my answers to the charges against me, in hopes they would be considered. Please advise me as to what further action will be taken, as I am at a loss. Also please let me know if the $5000.00 fine is indeed levied, am I allowed to make payments, as I certainly could not pay it in full.
>
> Thank you for your consideration.
>
> Gail Davis

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

Respondent's Appeal Petition.

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

Respondent's Appeal Petition, filed April 7, 1997, was not filed within 35 days after service of the Default Decision on Respondent, which occurred on February 25, 1997. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, *viz.*, on March 31, 1997, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's appeal. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final.[2]

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[2]*In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (Respondent's appeal, filed 8 days after the Initial Decision and Order became effective, dismissed); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (Respondent's appeal, filed 35 days after the Initial Decision and Order became effective, dismissed); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (Respondents' appeal, filed 2 days after the Initial Decision and Order became final, dismissed); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (Respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective, dismissed); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (Respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective, dismissed); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (Respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective, dismissed); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final and effective, dismissed); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (Respondent's appeal, filed after the Initial Decision and Order became final, dismissed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (Respondent's appeal, filed with the Hearing Clerk on the day the Initial Decision and Order had become final and effective, dismissed); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (Respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective, dismissed); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (Respondent's appeal, filed 1 day after Default Decision and Order became final, denied); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (Judicial Officer has no jurisdiction to consider Respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (since Respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider Respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (failure to file an appeal before the effective date of the Initial Decision is

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.—**
>
> (1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

> We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .

Accord Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P.

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jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule).

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after the Initial Decision and Order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Rule 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after the Initial Decision and Order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after the Initial Decision becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.

Accord Jem Broadcasting Co. v. FCC, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*,

881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

Accordingly, Respondent's appeal must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. § 1.142(c)(4).)

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

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> (b) *Contents.* The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

7 C.F.R. § 1.136(a)-(c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for Hearing.

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

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on October 7, 1997, states:
The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint at 4-5.

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

CERTIFIED RECEIPT REQUESTED

October 3, 1996

Ms. Gail Davis dba
Personalty Plus Poodles

Dear Ms. Davis:

Subject: <u>In re: Gail Davis dba Personality Plus Poodles - Respondent</u>
AWA Docket No. 97-0001

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

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

Letter from Joyce A. Dawson to Gail Davis, dba Personality Plus Poodles, at 1 (emphasis in original).

Respondent's Answer was due October 28, 1996. Respondent filed an Answer on December 9, 1996, dated November 20, 1996, and Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)). Accordingly, the Default Decision was properly issued in this case. On rare occasions default decisions have been set

aside for good cause shown or where Complainant did not object.[3] Respondent contends that she did not file a timely Answer because she had "a great amount of medical problems[,] was in great pain," was "very medicated[,]" and consequently "was not fully aware of the time passing." (Respondent's Appeal Petition.) While I sympathize with Respondent, Respondent's medical condition does not provide a basis for setting aside a properly issued Default Decision.[4]

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[3]*In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4]*See generally In re John Walker*, 56 Agric. Dec. ___ (Mar. 21, 1997) (default decision was proper where Respondent's first filing was filed 105 days after Respondent's Answer was due); *In re Mary Meyers*, 56 Agric. Dec. ___ (Mar. 13, 1997) (default decision was proper where Respondent's first filing was filed 117 days after her Answer was due); *In re Dora Hampton*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 135 days after Respondent's Answer was due); *In re Gerald Funcnes*, 56 Agric. Dec. ___ (Jan. 15, 1997) (default decision was proper where Respondent's first and only filing in the proceeding was filed 94 days after the Complaint was served on Respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (default decision proper where Respondent's first and only filing in the proceeding was filed 70 days after Respondent's Answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (default order proper where Respondent was given an extension of time to file an Answer, but the Answer was not filed until 69

days after the extended date for filing the Answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of

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

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

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

Order

Respondent's Appeal Petition filed April 7, 1997, is denied. The Decision and Order Upon Admission of Facts by Reason of Default filed by the ALJ on February 13, 1997, is the final Decision and Order in this proceeding.

Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

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

In re: BERT ALLEN WAHL, JR., and WILDLIFE RESCUE, INC.
AWA Docket No. 95-0023.
Decision and Order filed May 1, 1997.

Jurisdiction - Credibility - Recordkeeping - Inspections - Shelter from inclement weather - Structural soundness - Space requirements - Housekeeping - Food storage - Perimeter fence - Cease and desist order - Civil penalty.

Administrative Law Judge Edwin S. Bernstein found that Respondents violated the Animal Welfare Act (Act) and the regulations and standards enacted pursuant thereto by: failing to maintain complete records showing the acquisition, disposition, and identification of animals; failing to provide APHIS inspectors access to the facility for inspection during regular business hours; failing to provide deer with adequate shelter from inclement weather; failing to maintain facilities in good repair so as to protect the animals from injury; and failing to provide primary enclosures with sufficient space for the animals to turn around. Judge Bernstein also dismissed a number of allegations relating to housekeeping requirements; food storage; perimeter fence requirements; structural soundness; shelter from inclement weather; and space requirements. As a preliminary matter Judge Bernstein determined that the operations of Bert Wahl and Wildlife Rescue were inseparable, and therefore, both were properly named as Respondents. In addition, he determined that all animals in Respondents' possession were subject to USDA regulation. In determining the sanction, Judge Bernstein found that Respondents operated a small non-profit organization; showed good faith; did not have a history of noncompliance; and committed only minor violations. On the basis of those findings Judge Bernstein imposed a $1,000 civil penalty and issued a cease and desist order.

Robert A. Ertman, for Complainant.
Respondents, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Animal Welfare Act, as amended, (7 U.S.C. § 2131 *et seq.*) (hereinafter the Act), instituted by a Complaint filed on March 31, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture.

The Complaint alleges that Respondents, Bert Allen Wahl, Jr., and Wildlife Rescue, Inc., wilfully violated the Act, and the regulations and standards issued pursuant thereto (9 C.F.R. § 1.1 *et seq.*). Complainant requested a cease and desist order, assessment of a $100,000 civil penalty, and suspension of Respondents' license. Respondents filed a timely Answer on May 16, 1995, denying all of the material allegations in the Complaint. A hearing was held in Tampa, Florida, on January 8-11, 1997. Complainant filed proposed findings of fact, proposed conclusions of law, and a brief on March 11, 1997. Respondents did not file any post-hearing written submissions.

At the hearing, Complainant agreed to a dismissal of all allegations in the Complaint relating to perimeter fence requirements and these allegations were dismissed (Tr. 476-78). In its brief, however, Complainant attempts to modify the scope of the dismissal, stating:

> The inspection report noted, and the complaint originally alleged, that the facility was not in compliance because it lacked a perimeter fence at least eight feet in height for the safe enclosure of the panthers and other dangerous animals. At the hearing complainant stated that it was not contended that the absence of such a fence was a *per se* violation. However, such a fence may serve more than one purpose. The deer were 'confined' in a backyard area enclosed by a fence three to four feet in height (TR-I 66, TR-IV 730). This enclosure was not adequate either to confine the deer (TR-II 329-330) nor to keep other animals, such as large dogs, out.

(Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof, at 4). Based on Complainant's agreement at the hearing, Respondents did not present any evidence with respect to those allegations. Therefore, I do not accept Complainant's characterization of the stipulation; and I will not consider the allegations relating to the perimeter fence.

All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. Complainant's exhibits are referred to as "Gx." Respondents' exhibits are referred to as "Rx." The hearing transcript is referred to as "Tr."

Pertinent Statutes, Regulations and Standards

Recordkeeping

7 U.S.C. § 2140

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

9 C.F.R. § 2.75(b)(1)

> Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or

which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

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

Access for inspection

7 U.S.C. § 2146

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any . . . exhibitor . . . 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 . . . exhibitor . . . .

9 C.F.R. § 2.126(a)

(a) Each dealer and, 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.

Facilities, outdoor

9 C.F.R. § 3.127

(a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.
(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

Space requirements

9 U.S.C. § 3.128

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

Facilities, general

9 U.S.C. § 3.125

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

. . . .

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

Housekeeping

9 U.S.C. § 3.131(c)

Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

Findings of Fact

1. Respondent, Bert Allen Wahl, Jr., is an individual whose business mailing address is [redacted] Florida [redacted] Respondent, Wildlife Rescue, Inc., is a corporation and has its principal place of business at the same mailing address.

2. Respondent, Wildlife Rescue, Inc., is a not-for-profit organization dedicated to the preservation of wildlife, and education of the public with respect to endangered species. Respondent, Bert Allen Wahl, Jr., is the founder and president of Wildlife Rescue. The corporation has a 10-member board of directors which makes decisions as to overall policy; however, Mr. Wahl is personally responsible for the day-to-day management of the organization.

3. Respondents, at all times material herein, were licensed and operating as an exhibitor as defined in the Act and the regulations. Respondents' licenses were applied for under the name Bert Allen Wahl, Jr., as president, with no mention of Wildlife Rescue, Inc. From 1992 until 1994, and in 1996, the licenses were issued under the name "Wildlife Rescue, Inc." In 1995 the license was issued to "Bert A. Wahl, Jr. dba: Wildlife Rescue, Inc."

4. When Respondents became licensed, and annually thereafter, they received copies of the Act and the regulations and standards issued thereunder, and agreed in writing to comply with them.

5. Charmain Zordan, an APHIS, REAC inspector, inspected Respondents' facility on March 24, 1992, and June 23, 1992.

6. Elizabeth Kelpis, an APHIS, REAC inspector, inspected Respondents' facility on January 26, 1993, April 13, 1993, June 23, 1993, June 30, 1993, September 17, 1993, February 22, 1994, and June 29, 1994.

7. On March 24, 1992, APHIS inspected Respondents' facility and noted the following conditions (Gx. 1):

a. A bag of deer feed was stored in a can which did not have a tight fitting lid.

b. The refrigerator where meat was thawed was lined with bloody newspaper and emitted an odor.

c. The food storage area was cluttered with animal waste bags, old equipment, and furniture.

d. Deer were enclosed in the backyard which was cluttered with rusty wire fencing and lumber with protruding nails. The wire and lumber prevented the deer from using the roof overhang for shelter. The only other shelter available was two trees.

e. The panther enclosure was standing on its side, preventing access by the panthers.

f. There was deteriorating plywood resting on the roof of the panther and bobcat enclosure.

g. The bear cage had a broken floor board with nails exposed.

h. A deer, panther cub, and bobcat were contained in transport enclosures.

i. A river otter, panther cub, and small deer were kept in a cluttered, carpeted room at night.

j. Acquisition records for bears cubs were unavailable for inspection.

8. On June 23, 1992, APHIS inspected Respondents' facility and noted the following conditions (Gx. 3):

a. Animal feed bags were stored in containers which did not have tight fitting lids. One of the containers was rusted through the bottom.

b. The refrigerator used for thawing meat was lined with bloody newspaper.

c. The food storage area was cluttered with animal feed bags and old furniture and equipment.

d. There was deteriorating plywood resting on the roof of the panther and bobcat enclosure.

e. A screw was exposed in the bear cage.

9. On January 26, 1993, APHIS inspected Respondents' facility and noted the following conditions (Gx. 4):

a. The acquisition records pertaining to two panthers were incomplete.

b. Two panthers were kept in transport enclosures at night.

c. The food storage area was cluttered with old furniture and equipment.

d. The refrigerator/freezer had blood and insects in it.

e. There was deteriorating plywood resting on top of the bear cage.

f. The food preparation area had a rusty surface and was cluttered with equipment, dishes, and cleaning products. The wood shelf below the table was deteriorating.

10. On April, 13, 1993, APHIS inspected Respondents' facility and noted the following conditions (Gx. 5):

a. There was deteriorating plywood resting on the roof of the panther enclosure.

b. The food preparation area had a rusty surface and had deteriorating wood on the shelving below. Cleaning products were stored beneath the table.

c. Records pertaining to an otter, a bear, and two panthers were incomplete.

11. On June 23, 1993, Elizabeth Kelpis arrived at Respondents' facility at 10:30 a.m., in order to conduct an unannounced inspection. A woman who was present at the facility informed Ms. Kelpis that neither the Respondent, Bert Wahl, nor Judy Watson, were present at that time; and as a result Ms. Kelpis was unable to perform her inspection (Gx. 7).

12. On June 30, 1993, Elizabeth Kelpis arrived at Respondents' facility at 10 a.m., in order to conduct an unannounced inspection. A woman who was present at the facility informed Ms. Kelpis that neither Bert Wahl, nor Judy Watson, were present at that time; and as a result Ms. Kelpis was unable to perform her inspection (Gx. 8).

13. On September 17, 1993, APHIS inspected Respondents' facility and noted the following conditions (Gx. 9):

a. There was deteriorating plywood resting on top of the panther cage.

b. The food preparation area had a rusty surface with deteriorating wood beneath it. Cleaning products were stored beneath the table.

14. On February 22, 1994, Elizabeth Kelpis arrived at Respondents' facility at 10 a.m., in order to conduct an unannounced inspection. She spoke with Jonathan McKinney, the animal caretaker, who informed her that neither Bert Wahl, nor Judy Watson, were present; and as a result Ms. Kelpis was unable to perform her inspection (Gx. 11).

15. On June 29, 1994, APHIS inspected Respondents' facility and noted the following conditions (Gx. 12):

a. The metal ventilation wires on the den houses in the panther enclosures had rust on them.

b. There were two female panthers in an enclosure that was approximately five by four feet in size.

c. The animal enclosures had deteriorating wood resting on top of them.

d. The food preparation area was rusted and cleaning products were stored underneath the table.

e. The panther enclosure was placed next to a vacuum cleaner and a lamp. There were recycling boxes and bags next to the refrigerator where the cats' food was stored.

f. When Ms. Kelpis attempted to inspect two bobcats and a leopard that were on the property, Respondent, Bert Wahl, told her that she could not inspect those animals because they were not subject to USDA regulations.

Conclusions of Law

1. Respondents violated the Act and the regulations and standards as follows:

a. On March 24, 1992, January 26, 1993, and April 13, 1993, Respondents failed to maintain complete records showing the acquisition, disposition, and identification of animals, in wilful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(b) of the regulations (9 C.F.R. §2.75(b)).

b. On June 23, 1993, June 30, 1993, February 29, 1994, and June 29, 1994, APHIS attempted to inspect Respondents' facility, but was denied access in wilful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

c. On March 24, 1992, Respondents failed to provide deer with adequate shelter from inclement weather in wilful violation of 9 C.F.R. § 3.127(b).

d. On March 24, 1992, Respondents failed to maintain facilities for animals in good repair so as to protect the animals from injury, in wilful violation of 9 C.F.R. § 3.125(a).

e. On March 24, 1992, and January 26, 1993, Respondents provided primary enclosures for animals at Respondents' facility that were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement, in wilful violation of 9 C.F.R. § 3.128.

2. Respondents did not violate the Act and regulations and standards as follows:

a. On March 24, 1992, June 23, 1992, January 26, 1993, April 13, 1993, September 17, 1993, and June 29, 1994, Respondents did not fail to keep to keep their premises clean and in good repair and free of accumulations of trash in violation of 9 C.F.R. § 3.131(c).

b. On March 24, 1992, June 23, 1992, January 26, 1993, Respondents did not fail to store food supplies so as to adequately protect them against deterioration, molding, or contamination by vermin in violation of 9 C.F.R. § 3.125(c).

c. On March 24, 1992, June 23, 1992, January 26, 1992, April 13, 1992, September 17, 1993, and June 29, 1994, Respondents did not fail to maintain the facilities in good repair so as to protect the animals from injury in violation of 9 C.F.R. § 3.125(a), due to deteriorating wood placed on top of animal enclosures.

d. On June 23, 1992, Respondents did not fail to maintain the facilities in good repair so as to protect the animals from injury in violation of 9 C.F.R. § 3.125(a), due to a screw exposed in the bear cage.

e. On June 29, 1994, Respondents did not fail to maintain the facilities in good repair so as to protect the animals from injury in violation of 9 C.F.R. § 3.125(a), due to rust on the metal ventilation wires on the animal enclosures.

f. On March 24, 1992, June 23, 1992, January 26, 1993, April, 13, 1993, September 17, 1993, and June 29, 1994, Respondents did not fail to maintain the facilities in good repair so as to protect the animals from injury in violation of 9 C.F.R. § 3.125(a), by failing to maintain a perimeter fence which was eight feet in height.

g. On April 13, 1993, September 17, 1993, and June 29, 1994, Respondents did not fail to provide the animals with adequate shelter from inclement weather in violation of 9 C.F.R. § 3.127(b).

h. On June 29, 1994, Respondents did not fail to provide the animals with sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement in violation of 9 C.F.R. § 3.128.

Discussion

Jurisdiction:

As a preliminary matter it is necessary to determine whether Wildlife Rescue, Inc., is an appropriate respondent in this proceeding. Mr. Wahl argues that Wildlife Rescue is a separate entity which does not engage in commercial exhibition of animals, is not licensed under the Act and regulations, and is not subject to regulation by APHIS. Complainant maintains that Wildlife Rescue is a separate entity that does act as an exhibitor, is licensed under the Act, and is subject to regulation by APHIS.

Although it does appear that Mr. Wahl made some attempt to separate himself from Wildlife Rescue, as a practical matter their operations were inseparable. The license renewal forms submitted to APHIS by Mr. Wahl do not bear the name of Wildlife Rescue, however, they do identify Mr. Wahl as "president," indicating his

position with respect to Wildlife Rescue (Rx. 8). When licenses were issued in the name of Wildlife Rescue, Judy Watson, in her capacity as assistant director of Wildlife Rescue, twice wrote to APHIS requesting that the licenses be changed. Her letters seemed to indicate, however, that the problem was not that Wildlife Rescue was listed as the licensee, but rather that Mr. Wahl was not listed as well. The 1993 letter states:

> Our license application listed Mr. Bert Allen Wahl as the applicant but the license was issued *only* showing Wildlife Rescue, inc. as the licensee.

Rx. 4 (emphasis added). The 1994 letter states:

> If possible we would like this license, 58-C-463, issued in the name of Bert Allen Wahl, Jr. as in 1992, instead of, *or in addition to*, Wildlife Rescue, Inc.

Rx. 13 (emphasis added). The 1995 license identifies the licensee as Bert Allen Wahl, Jr., doing business as Wildlife Rescue, and the 1996 license identifies only Wildlife Rescue. Mr. Wahl did not ask that either of these licenses be changed.

More importantly, the day-to-day operations of the facility do not indicate any distinction between the two. Jonathan McKinney is the only caretaker at the facility. He is employed by Wildlife Rescue, but it appears that he cares for all of the animals. Ms. Watson, an employee of Wildlife Rescue, testified that she purchases food for both Bert Wahl and Wildlife Rescue together as one order (Tr. 633). Mr. Wahl testified that when he exhibits his animals he asks that donations be made to Wildlife Rescue (Tr. 662). He further testified that Wildlife Rescue is not permitted to possess animals; therefore, he maintains the animals for Wildlife Rescue under his permit (Tr. 665). Since Mr. Wahl's operation and that of Wildlife Rescue are so interrelated, it is appropriate for Wildlife Rescue to be named as a respondent in this proceeding. Secondly, Respondents claim that some of the animals were personal pets of Bert Wahl, which were not subject to regulation because they were not exhibited commercially. The term "animal" is defined for purposes of the Act as follows:

> [A]ny live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for . . . exhibition purposes, or as a pet[.]

7 U.S.C. § 2132(g). The animals in question are, therefore, subject to regulation under this broad definition, either if Respondents ever intended to exhibit them, or if they were to remain pets.

Based on the foregoing, I conclude that the Secretary has proper jurisdiction as to both Respondents and as to all of the allegations in the Complaint.

Credibility:

Respondent, Bert Allen Wahl, Jr., has impressed me as an admirable member of the community, devoted to the care of animals at no financial gain to himself. His testimony appeared to be nothing other than forthright and honest. His assistant Judy Watson showed great integrity and honesty in her testimony, giving answers which she believed to be true whether or not they were helpful to Respondents' position.

The inspectors, on the other hand, appeared to be defensive and, at times, prone to exaggeration. While I do not believe that they deliberately have falsely cited violations, they did seem to have been overly exacting in their inspections and their interpretations of the regulations, considering conditions to be serious violations when it was questionable that there were violations at all. For example, on a scale of "1 to 10" for seriousness, Charmain Zordan testified that storing furniture in the same room that food was stored in ranked as a "10." She stated that the furniture made it more difficult to keep the premises clean as required by section 3.131(c), yet she cited no evidence that the premises were not kept clean, despite the added encumbrances. Since the regulations only require that the premises be kept clean, Respondents were, in fact, in compliance with regulations where Ms. Zordan considered the condition to be a violation of the greatest severity possible.

Recordkeeping:

Respondents failed to have complete records available for inspection on March 24, 1992, January 26, 1993, and April 13, 1993. Ms. Watson admitted that records pertaining to the animals were not always available for inspection, but stated that they would always be made available at a later date (Tr. 555).

In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476 (Feb. 8, 1991), stressed the importance of having records available for unannounced inspections:

> The importance of all records, particularly those showing the source of all animals and their disposition, being made immediately available at the time of an unannounced inspection, cannot be overstated. To allow a dealer to

furnish records at a later date is to permit an opportunity for records to be changed to conceal activities in violation of the Act.

Id. at 489. The importance is somewhat reduced in the case of an exhibitor as concerns of dealing in stolen animals are not present in the case at hand. Nevertheless, the regulations require that records be available for unannounced inspections, and allowing records to be produced at a later time would frustrate the intent of this provision.

Ms. Watson further testified that records were unavailable for certain animals because they did not own them, but merely possessed them under rehabilitation permit from the Florida Game and Fresh Water Commission (Tr. 574-76). The regulations, however, require that records be kept for animals that are "purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control." 9 C.F.R. § 2.75(b)(1). Therefore, none of the animals in Respondents' possession are exempt from the recordkeeping requirements.

Access for inspection:

On three occasions, June 23, 1993, June 30, 1993, and February 22, 1994, APHIS inspector, Elizabeth Kelpis, attempted to inspect Respondents' facility but was unable to because neither Mr. Wahl nor Ms. Watson were present. The regulations require that the exhibitor allow APHIS officials to inspect during regular business hours, defined as between 7 a.m. and 7 p.m., Monday through Friday. 9 C.F.R. § 1.1.

Respondents argue that at the dates and times indicated by Ms. Kelpis there was no responsible agent present to refuse an inspection. Following that argument, however, it must also be the case that there was no responsible agent present to allow an inspection. There is some question as to who Ms. Kelpis spoke to on two occasions, and it is troubling that she did not make any effort to find out. However, there were a number of people who volunteered at the facility; presumably it was such a volunteer who turned Ms. Kelpis away. On a third occasion the animal caretaker, Jonathan McKinney, was present when Ms. Kelpis arrived. He testified that she only asked whether Mr. Wahl or Ms. Watson were present, and did not ask to inspect. However, as is also the case with the volunteers, if Ms. Kelpis did not recognize Mr. McKinney as a designated agent for Respondents, then it was reasonable for her to determine that she was unable to inspect at that time.

On June 29, 1994, Ms. Kelpis inspected Respondents' facilities, but was denied access to two bobcats and a leopard. Mr. Wahl does not deny telling Ms. Kelpis that she could not inspect the animals because they were not under USDA

jurisdiction. Rather, he argues that Ms. Kelpis could have moved past him to inspect the animals despite his statements. In addition, he maintains that since the cages are chain link, she could have seen all of the animals from her position at the end of the row of cages (Tr. 767-74). Ms. Kelpis is, however, entitled to approach the animals. She cannot be expected to perform an adequate inspection by peering through a row of cages. Also, she is not required to attempt to inspect after a refusal by the licensee.

Shelter from inclement weather:

On March 24, 1992, Complainant alleges a lack of shelter for deer enclosed in the back yard. The roof overhang was inaccessible due to piles of lumber and wire fencing (Gx. 2B). The only shelter available from rain or sun was two trees located in the back yard. The regulations allow for natural forms of shelter. It appears from the photograph marked as government's exhibit 2G, that the trees in question provide ample shade from sunlight, however, it is not apparent that the trees alone provide sufficient shelter from rain or other inclement weather. Respondents, consequently, violated the standards at that time.

On April 13, 1993, Complainant again alleges that the deer in the back yard were not provided with adequate shelter. At that time, however, the lumber and fence had been removed from the area, allowing the deer access to the roof overhang. In addition, the deer had two kennels which they could enter (Tr. 580). Accordingly, there was sufficient shelter on that date.

On March 24, 1994, Complainant cited as a violation a panther enclosure that was tipped on its side preventing access by the animals (Gx. 1). Ms. Watson, however, explained that the kennels in question had just been cleaned and were draining. The kennels were turned upright after they dried (Tr. 490-93). Since it is necessary to clean the enclosures, and they were not overturned for an unreasonable amount of time, this was not a violation of the Act or regulations.

On March 24, 1992, April 13, 1993, September 17, 1993, and June 29, 1994, Complainant alleges that the panthers kept outdoors did not have sufficient shelter from inclement weather. Mr. Wahl testified that, throughout the period covered in the Complaint, the panthers had sufficient shelter consisting of shelves, kennel cages, plywood and/or metal sheets on the roof, as well as trees in the back yard. In fact, if anything, he was concerned about the animals having too much shade and possibly developing fungal problems. There was no testimony from Complainant's witnesses elaborating on the March 24, 1992, and April 13, 1993, allegations. Ms. Kelpis testified with respect to the September 17, 1993, and June 29, 1994, allegations, but merely read from the report without any explanation

(Tr. 142, 145). Furthermore, there are no photographs documenting these alleged conditions (Tr. 702). The allegations with respect to adequate shelter for the panthers are, therefore, unsubstantiated.

Structural Soundness:

On March 24, 1992, Respondents' bear cage had a hole in the floor from which nails were protruding (Gx. 1). Respondents do not dispute this, but explain that the bears made the hole. Mr. Wahl testified that, bears tear things apart as part of their natural foraging habits (Tr. 682-83). This being the case, however, it would be more suitable to give the bears something to tear apart without exposing any dangerous surfaces, instead of allowing them to destroy their enclosure. In addition, Respondents point out that the nails were below the frame of the cage and not on the walking surface. However, since it was the bears that made the hole it is not unlikely that they would stick their paws into the hole and injure themselves on the nails. Thus, the condition was a violation of the standards.

During the next inspection it was noted that the nails were no longer exposed in the bear cage, but a screw was exposed. There were no photographs of this condition; and there was no testimony as to whether the exposed portion of the screw had as a sharp edge, thereby posing as a threat to the animals. Furthermore, the condition was corrected during the inspection. That allegation was, therefore, unsubstantiated.

Also, on March 24, 1992, the deer enclosure was cluttered with piles of lumber and rusty wire. Respondents maintain that deer are accustomed to living in environments filled with obstacles, and that these conditions did not, in fact, injure the deer. Actual injury to animals is not required for a violation to be found. The Act and regulations and standards were issued to prevent injury to animals, not merely to punish licensees after injury occurs. While deer may be adapted to natural obstacles such as briar patches as Respondents maintain, such obstacles do not equate to rusty wire fencing and piles of lumber with exposed nails. Such conditions can be said to pose a threat to the safety of the animals and are, therefore, violations of the standards.

Throughout the period of the Complaint, the inspection reports repeatedly allege a violation of structural soundness based on deteriorating plywood resting on top of the animal cages. The wood was not attached to the cage, and had it not been there at all, it would not have been cited as a violation. Since wood resting on top of a structurally sound cage is not a threat to the safety of the animals those allegations do not constitute a violation.

Complainant alleges that on June 29, 1994, metal ventilation wires on the den houses in the panther enclosures were rusted. Ms. Kelpis testified that when wire breaks down an abrasive surface can form and splinters can develop which could harm the animals (Tr. 275-76). Conceivably, a fairly large amount of rust would have to be present before these dangerous conditions would exist. Ms. Kelpis could not recall the level of rust on the cage surfaces, but she testified that she would have cited even the most minor amount (Tr. 275). Ms. Watson testified that there was rust beginning to show on some clips on the cage, but she tested them to ensure that they were secure (Tr. 619). As there is no evidence that there was anything more than minor rusting on the cage, that allegation does not constitute a violation.

Space requirements:

On March 24, 1992, and January 26, 1993, Respondents kept animals in transport enclosures at night which did not provide sufficient space for adequate freedom of movement. Ms. Zordan reported that animals were kept in the night enclosures from approximately 5 p.m. until 7 a.m. (Tr. 52). She stated that she measured a deer to be 36 inches and its cage to be 30 inches. She noted that the bobcat's enclosure was filled almost halfway with its water dishes (Tr. 52). Ms. Watson and Mr. Wahl both testified that the animals were only kept inside temporarily while they were young or ill, and that they were allowed to move around the office as much as possible (Tr. 496-98, 709). Respondents did not indicate a specific amount of time that the animals spent in the transport enclosures. If Complainant's statement regarding the number of hours is correct, it would mean that the animals were kept in the transport enclosures more often than not. The enclosures in question are shown in photographs marked as Gx. 2O, 2M, and 2Q. Although it appears that the animals have adequate room to stand up and sit down, it is not evident that they had sufficient room to turn around in a comfortable manner. To that end, the condition violates the standards.

Complainant also asserts that the animals were kept in the night time enclosures during the day based on the fact that they were enclosed during the inspection at 1 p.m. Respondents, however, explained that the animals were allowed to move around the office during the day unless there were strangers--such as an inspector--present (Tr. 498). Such a temporary confinement would not be a violation of the standards.

The June 29, 1994, inspection report alleges that there were two panthers without sufficient space in an enclosure measuring approximately five feet by four feet. Respondents deny that two panthers were ever kept in one cage, or that they even own any cages measuring five by four feet. Complainant did not have any

photographic evidence of this allegation. Jonathan McKinney testified that the panthers are kept in an enclosure in the backyard which has two plastic kennel boxes with the doors open inside (Tr. 440). It seems possible, therefore, that what Ms. Kelpis observed was two panthers voluntarily sharing one of those kennels. In any case, Complainant failed to make a sufficient showing as to this allegation.

Housekeeping:

On March 24, 1992, June 23, 1992, and January 26, 1993, Complainant alleges that Respondents were in violation of the standards because the food storage area was cluttered with furniture and equipment. On March 24, 1992, Complainant alleges as a violation the fact that Respondents kept animals in a cluttered, carpeted room at night. On June 29, 1994, Complainant alleges that Respondents were in violation because the panther enclosure was next to a vacuum cleaner and a lamp and recycling boxes and bags. The inspectors testified that these are violations because such conditions make it more difficult to clean. They did not, however, provide any evidence that the areas were not, in fact, clean. Ms. Watson testified that it was indeed more difficult to clean around the furniture and equipment, but that they still did so (Tr. 511-12). The standard requires that "[p]remises . . . shall be kept clean and in good repair." As Complainant has not shown that Respondents were unable to keep the premises clean because of any clutter, the allegations are without merit.

On January 26, 1993, April 13, 1993, September 17, 1993, and June 29, 1994, Complainant alleges that Respondents were in violation of the standards because the food preparation area had a rusty surface and the wood shelving below the area was deteriorating (Gx. 6C, 10). Mr. McKinney, Ms. Watson, and Mr. Wahl all testified that food was not prepared directly on the surface of the table. Plastic cutting boards were placed on the table so that the meat never came into contact with the rust. Furthermore, they testified that both the table and the cutting boards were sanitized with bleach (Tr. 433-34, 571, 755-56). Dr. Elizabeth Goldentyer, a USDA Supervisory Animal Care Specialist, testified that a rusty surface is unsanitizable and that cutting boards would not solve the problem since germs could be transferred on hands or utensils if they came into contact with the table (Tr. 834). This argument seems to be a stretch. A potential scenario for spreading germs can be found in almost any situation. The precautions taken by Respondents--using cutting boards and bleaching the area--should have been sufficient to prevent any higher than normal risk of contamination. Those allegations are, therefore, without merit.

On April 13, 1993, September 17, 1993, and June 29, 1994, Complainant alleges as a violation the fact that bleach was stored below the table that food was prepared on (Gx. 6C, 10). Complainant states that this is a violation because the bleach could spill and contaminate the food. It is not clear, however, how bleach in a closed container, stored beneath a table, is at risk of spilling on to the table while food is being prepared. Furthermore, even if the bleach were to somehow spill onto the food, there is nothing to indicate that Respondents would then serve the contaminated food to the animals. Those allegations are, therefore, without merit.

Food Storage:

On March 24, 1992, and June 23, 1992, Complainant cited as a violation of the standards a bag of deer feed that was not stored in a container with a tight fitting lid. Government's exhibit 2P shows that the food was in a bag within the container, and that there was a lid resting on top. Respondents claim that the bag was rolled up tightly. Ms. Zordan, could not recall whether that was the case, but stated that she would have recorded it as a violation even if it was. She testified that the bag must either be sealed shut, or it must be kept in a container with a tight fitting lid (Tr. 94-96). The standard for food storage is, however, not that rigid. It provides that "[s]upplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin." 9 C.F.R. § 3.125(c). While storage in a container with a tight fitting lid might be the preferred method, there is nothing to indicate that Respondents' deer food was not adequately protected from contamination in a closed bag inside a container with a lid resting on top. Those conditions, therefore, do not amount to violations.

On March 24, 1992, June 23, 1992, and January 26, 1993, Complainant alleges that Respondents' refrigerator was in violation because it was lined with bloody newspaper and smelled foul (Gx. 1, 3, 4, 2A). Meat was thawed in plastic bags in the refrigerator, and newspapers were used to catch blood which leaked through the bags. The inspectors testified that it was not the method of thawing which was in violation, but rather failure to change the newspapers often enough. Mr. McKinney testified that the newspapers were thrown away every morning when the meat was removed from the refrigerator (Tr. 434). Complainant argues that a "foul odor" noted by the inspectors belies that claim. However, considering the inspectors' tendency to nitpick and exaggerate the seriousness of conditions, it seems possible that any odor noted may only have been the naturally unpleasant scent of blood draining from meat. Ms. Kelpis testified that during the January 26 inspection there were insects present indicating that the newspapers were old. She could not,

however, remember what kind of insects or how many, and she did not take any pictures to document the condition. There are no insects in the photograph from the March 24, 1992, inspection. The allegations with respect to the refrigerator are, therefore, unsubstantiated.

On March 24, 1992, Complainant alleges as a violation the food storage area being cluttered with animal waste bags, old equipment, and furniture. No waste bags are shown in either photograph taken of the food storage area during that inspection (Gx. 2F, 2I). That portion of the allegation is, therefore, dismissed as unsubstantiated. The allegation with regard to the furniture and equipment is identical to that made under the housekeeping provisions. That allegation, and an identical one made on January 26, 1993, are, therefore, dismissed for the same reasons as stated above.

Sanctions:

In determining sanctions the Act requires that:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith and the history of previous violations.

7 U.S.C. § 2149. The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd,* 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

After giving due consideration to these factors I conclude that the appropriate penalty is a cease and desist order, and a $1,000 fine. A license suspension is not warranted since Respondents do not operate for financial gain but rather for the benefit of the community. Causing a cessation of the important and valuable work done by Respondents would not effectuate the purposes of the Act.

Respondents consistently showed good faith in their efforts to correct conditions cited by the APHIS inspectors as violations. Neither Respondent has a history of non-compliance, and less than 15 violations were committed over the two-year period covered by the Complaint. None of the violations committed by the Respondents were of a serious nature. The recordkeeping violations were minimal. There was no deliberate attempt to falsify or withhold information. The violations stemmed largely from a misunderstanding of the regulations which require records to be kept on all animals in the exhibitor's possession, not only animals which the exhibitor owns. Any records that were unavailable were turned over by the next inspection.

With one exception, the violations relating to access for inspection were not outright refusals to allow inspections. Rather Respondent, Bert Wahl, was simply not available to accompany Ms. Kelpis when she arrived for unannounced inspections. The June 29, 1994, incident did not involve a total refusal to allow inspection; rather, Ms. Kelpis was only unable to approach three animals. This incident was also not a deliberate attempt to thwart the efforts of APHIS, but merely a misunderstanding of the regulations.

The violations with respect to shelter from inclement weather and adequate space for movement were marginal. The deer did have some shelter from the trees, however, it appeared that slightly more shelter was necessary. By the next inspection additional shelter was available. The transport kennels were only used at night, and were temporary enclosures for young or ill animals. The animals did have room to stand up and sit down. It merely appeared that slightly more room was necessary to allow the animals to turn around in a comfortable manner. The two structural violations were also relatively minor and they were corrected promptly.

Respondent, Wildlife Rescue, Inc., is a small, not-for-profit organization. Its purposes as stated in its Articles of Incorporation are: "to aid animals in distress that are either sick, injured, orphaned or unwanted; to educate the public in reference to the needs of our wildlife; and, thirdly to help the saving of endangered species." (Tr. 658). Mr. Wahl is not engaged in the business of exhibiting animals in order to profit. To the contrary, he is a great humanitarian. He shows animals for educational purposes, and is devoted to the rescue and preservation of wildlife. He accepts donations when he exhibits animals, which he in turn invests in Wildlife Rescue. Mr. Wahl takes a salary from Wildlife Rescue of approximately $1,100 per month (Tr. 660). He has mortgaged his home to finance the operation.

The Department's sanction policy requires that appropriate consideration be given to the agency's recommendation. There is no basis, however, for Complainant's proposed civil penalty of $100,000. Approximately two-thirds of

the allegations have been dismissed and the statutory considerations preclude imposing a severe penalty.

Respondents have shown good faith, no history of violations, have committed only minor violations, and, furthermore, have already suffered by having to attend a hearing and having to defend against a large number of unsubstantiated allegations. I also give great weight to the non-money making, humanitarian nature of Respondents' operations. Based on these considerations, a $1,000 civil penalty and a cease and desist order are appropriate to effectuate the purposes of the Act.

Order

1. The following allegations in the Complaint are dismissed:

a. The allegations contained in Paragraphs II.B.1, III.1, IV.B.1, V.B.1, VIII.1, and X.B.1, with respect to Respondents' failure to construct a perimeter fence around his facility;

b. The allegations contained in Paragraphs II.B.1, III.1, IV.B.1, V.B.1, VIII.1, and X.B.1, with respect to deteriorating plywood resting on top of the animals' enclosures;

c. The allegation in Paragraph III.1, as it relates to an exposed screw in the bear cage;

d. The allegation in Paragraph X.B.1, as it relates to rust on the metal ventilation wires of the animals' enclosures;

e. The allegations in Paragraphs II.B.4, III.2, and IV.B.3, pertaining to storage of food;

f. The allegations in Paragraphs II.B.5, III.3, IV.B.4, V.B.3, VIII.3, X.B.4, pertaining to proper housekeeping;

g. The allegations in Paragraph V.B.2, VIII.2, and X.B.2, pertaining to shelter from inclement weather;

h. The allegation in Paragraph X.B.3, pertaining to space requirements.

2. Respondent, Bert Allen Wahl, Jr., doing business as Wildlife Rescue, Inc., is assessed a civil penalty of $1,000.00, which shall be paid within 120 days after service of this Order by certified check or money order made payable to the "Treasurer of the United States" and sent to Robert A. Ertman, Esq., Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, DC 20250-1417.

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

a. Refusing or failing to allow APHIS to conduct full inspections of their facility, animals, and records;

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

c. Failing to construct and maintain facilities for animals so that they are structurally sound and in good repair so as to protect the animals from injury;

d. Failing to provide animals kept outdoors with adequate shelter from inclement weather; and

e. Failing to provide sufficient space for animals in primary enclosures.

This decision shall become final without further proceedings 35 days after the date of service upon Respondents as provided by section 1.142 of the Rules of Practice, 7 C.F.R. § 1.142, unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice, 7 C.F.R. § 1.145.

[This Decision and Order became final and effective June 11, 1997.-Editor]

In re: PATRICK D. HOCTOR.
AWA Docket No. 93-0010.
Order Lifting Stay Order and Decision and Order filed May 30, 1997.

Civil penalty — Suspension of license — Cease and desist order — Willful — Appropriate animal care — Primary enclosures — Animal identification — Plan for environmental enhancement — Watering receptacles.

The Judicial Officer issued an Order modifying the Judicial Officer's May 5, 1995, Decision and Order in light of the decision in *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996), vacating the Judicial Officer's May 5, 1995, decision, *In re Patrick D. Hoctor*, 54 Agric. Dec. 114 (1995). Respondent filed an appeal from the Judicial Officer's May 5, 1995, decision, which appeal was limited to the Judicial Officer's decision that Respondent violated 9 C.F.R. §§ 2.100(a) and 3.125(a) by failing to have an 8-foot high perimeter fence. The United States Court of Appeals for the Seventh Circuit held that the USDA rule governing the minimum height of enclosures for dangerous animals is a substantive rule subject to the notice and comment procedure set forth in the Administrative Procedure Act (5 U.S.C. § 553) and that the rule requiring Respondent's perimeter fence to be 8 feet high is invalid because it was not promulgated in accordance with the required procedure. None of the other violations found in the Judicial Officer's May 5, 1995, decision was the subject of Respondent's appeal. Therefore, a new Order is issued which adopts the May 5, 1995, Order modified in light of *Hoctor v. United States Dep't of Agric., supra.* The Order requires Respondent to cease and desist from failing to keep primary enclosures sanitary and in suitable condition, failing to keep watering receptacles clean, failing to provide adequate veterinarian care, and failing to establish and maintain an appropriate plan for environmental enhancement adequate to primates; assesses a $1,000 civil penalty against Respondent; and suspends Respondent's license for 15 days and thereafter until he is in full compliance with the Act, regulations, and standards. Respondent violated 9 C.F.R. § 2.50 by not individually

identifyingcats. notwithstandingthe fact that APHIS was considering his request for an interpretation of the regulation that would not require tattooing. However, only a cease and desist order will be issued as to this violation.

Sharlene A. Deskins, for Complainant.
William J. Tabor, Terre Haute, Indiana, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order Lifting Stay Order and Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), by filing a Complaint on October 22, 1992. On July 21, 1993, Complainant filed an Amended Complaint.

The Amended Complaint alleges that: (1) on May 21, 1992, Patrick D. Hoctor (hereinafter Respondent) violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and sections 2.40, 2.50, and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .50, .100(a)) and sections 3.80(a)(2), 3.81, 3.84(a), 3.125(a), and 3.130 of the Standards (9 C.F.R. §§ 3.80(a)(2), .81, .84(a), .125(a), .130) (Amended Complaint ¶ VII); (2) on March 31, 1992, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.84(a) and (b), 3.125(a), and 3.131(a) and (b) of the Standards (9 C.F.R. §§ 3.84(a), (b), .125(a), .131(a), (b)) (Amended Complaint ¶ II); (3) on October 15, 1991, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.125(a) and 3.131(a) and (b) of the Standards (9 C.F.R. §§ 3.125(a), .131(a), (b)) (Amended Complaint ¶ III); (4) on December 12, 1990, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) (Amended Complaint ¶ IV); (5) on May 29, 1990, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.125(a) and 3.131(a) of the Standards (9 C.F.R. §§ 3.125(a), .131(a)) (Amended Complaint ¶ V); and (6) on January 11, 1990, Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and sections 3.125(a) and 3.131(a) and (b) of the Standards (9 C.F.R. §§ 3.125(a), .131(a), (b)) (Amended Complaint ¶ VI).

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on June 1, 1994, in Terre Haute, Indiana. Sharlene A. Deskins, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. William J. Tabor, Esq., represented Respondent. On

October 14, 1994, the ALJ issued an Initial Decision and Order ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assessing Respondent a civil penalty of $1,000, and suspending Respondent's Animal Welfare Act license for 15 days (Initial Decision and Order at 24-26).

On January 19, 1995, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] Specifically, Complainant appealed from the ALJ's dismissal of paragraphs II(A), III(A), IV(A), V(A), VI(A), and VII(C)(1) of the Amended Complaint relating to Respondent's failure to have a proper perimeter fence, as required by section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), and the ALJ's dismissal of paragraph VII(A) of the Complaint relating to Respondent's failure to properly identify cats, as required by section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).

The case was referred to the Judicial Officer for decision on March 13, 1995. On May 5, 1995, the Judicial Officer issued a Decision and Order reversing the ALJ's dismissal of paragraphs II(A), III(A), IV(A), V(A), VI(A), and VII(C)(1) of the Amended Complaint relating to Respondent's failure to have an 8-foot high perimeter fence and paragraph VII(A) relating to Respondent's failure to properly identify cats. Moreover, the Judicial Officer increased the civil penalty assessed against Respondent from $1,000 to $7,500 and the suspension of Respondent's Animal Welfare Act license from 15 days to 40 days. *In re Patrick D. Hoctor*, 54 Agric. Dec. 114 (1995), *vacated*, 82 F.3d 165 (7th Cir. 1996).[2]

On May 25, 1995, Respondent filed a Motion for Stay Pending Appeal. On May 30, 1995, the Judicial Officer stayed the civil penalty and the suspension provisions of the May 5, 1995, Order, pending the outcome of proceedings for

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

[2]Neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license was based upon the Judicial Officer's conclusion that Respondent had violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) as alleged in paragraph VII(A) of the Amended Complaint. *In re Patrick D. Hoctor, supra*, 54 Agric. Dec. at 135-36.

judicial review, but left the cease and desist provisions of the May 5, 1995, Order, in effect. *In re Patrick D. Hoctor*, 54 Agric. Dec. 140 (1995) (Stay Order).

Respondent filed an appeal with the United States Court of Appeals for the Seventh Circuit. Respondent's appeal was limited to the Judicial Officer's determination that Respondent violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to have an 8-foot high perimeter fence as alleged in paragraphs II(A), III(A), IV(A), V(A), VI(A), and VII(C)(1) of the Amended Complaint. On April 25, 1996, the court of appeals issued a decision in which it held that the "eight-foot fence rule" for a perimeter fence was invalid and vacated the Judicial Officer's May 5, 1995, Order. *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996).

On April 9, 1997, Complainant filed a Motion to Lift Stay Order and Issue a Decision (hereinafter Complainant's Motion) in which Complainant requests: (1) the lifting of the Stay Order issued on May 30, 1995, *In re Patrick D. Hoctor*, 54 Agric. Dec. 140 (1995) (Stay Order); (2) the assessment of a civil penalty of $1,000 against Respondent; and (3) the suspension of Respondent's Animal Welfare Act license for a period of 15 days.

Respondent did not respond to Complainant's Motion, and on May 1, 1997, the case was referred to the Judicial Officer for a ruling on Complainant's Motion.

Complainant's Motion is granted. The Stay Order issued May 30, 1995, *In re Patrick D. Hoctor*, 54 Agric. Dec. 140 (1995) (Stay Order), is lifted, and the Decision and Order issued in this proceeding on May 5, 1995, is hereby adopted as the final Decision and Order in this proceeding, except that it is modified in light of *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996). Additions or changes to the Judicial Officer's May 5, 1995, Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified.

DECISION AND ORDER ISSUED BY THE JUDICIAL OFFICER ON MAY 5, 1995, MODIFIED IN LIGHT OF HOCTOR v. UNITED STATES DEP'T OF AGRIC., 82 F.3d 165 (7th Cir. 1996)

. . . .

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

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Findings of Fact

1. Patrick D. Hoctor is an individual whose address is [redacted] (Answer).

2. Respondent at all times material herein was operating as a dealer as defined in the Animal Welfare Act and [the R]egulations (Answer) and has held a license under the Animal Welfare Act for the last 13 years (CX 1, 2; Tr. 170-71).

3. Between January 11, 1990, and May 21, 1992, [United States Department of Agriculture (hereinafter] USDA) Veterinary Medical Officer Peter R. Kirsten inspected Respondent's facility on six occasions (CX 3-5, 7, 10, 12). Dr. Kirsten is an experienced veterinarian who received his veterinary medicine degree in 1975, and who was in private practice for 10 years before entering government service with the Animal and Plant Health Inspection Service ([hereinafter] APHIS) (Tr. 38-39). During his inspections of Respondent's facility, Dr. Kirsten noted conditions that, in his opinion, did not comply with the . . . [Animal Welfare Act and the Regulations and Standards] governing such facilities, including the lack of a perimeter fence at least 8 feet in height, and deficiencies with respect to veterinary care, animal identification, and various "housekeeping" provisions with respect to cleaning and sanitation (CX 3-5, 7, 10, 12).

4. Respondent's facility lacked a perimeter fence at least 8 feet in height (CX 3-5, 7, 10-12; Tr. 245).

5. During 1991, two large cats became seriously ill as a result of uremic poisoning and were subsequently euthanized by Respondent, who shot the animals (CX 12; Tr. 131-32, 145-49, 160-63, 195-97). During 1992, two lions escaped from their primary enclosure and were shot by Respondent as they were approaching an employee who had been feeding them (Tr. 167, 189-95).

6. Respondent did not tattoo or otherwise individually identify nine exotic hybrid cats. After raising concerns with APHIS officials about the identification process as it pertained to these animals, Respondent received a letter from APHIS stating that his question would be referred to the Animal Care Staff at Hyattsville, Maryland ([R]X 12, 13; Tr. 180-87). [Brackets in original.]

7. Respondent fed whole chickens, including feathers, to the large cats at his facility. As a result of this diet, the fecal matter produced by the animals was grayish in color (Tr. 164-65, 177-78).

8. On May 21, 1992, Dr. Kirsten found a bottle of Dexasone with a January 1987 expiration date that was used to provide veterinary care to animals (CX 12; Tr. 129-30, 149-55).

9. On May 21, 1992, the enclosure for a pair of ring-tailed lemurs contained a light socket without a guard to protect the animals (CX 12).

10. On May 21, 1992, Respondent did not have a plan for the environmental enhancement of nonhuman primates (CX 12).

11. On March 31, 1992, the solitary lemur enclosure contained an excessive amount of excreta (CX 10). On May 21, 1992, the enclosure for a pair of lemurs was excessively dirty with feed waste and excreta (CX 12).

12. On May 21, 1992, the water receptacle for a lion and a tiger contained bright green algae (CX 12).

13. On October 15, 1991, the binturong enclosure contained an excessive amount of feces (CX 7; Tr. 108-10, 133-35).

14. Respondent received a warning letter regarding violations of the [Animal Welfare] Act and [R]egulations (RX 3; Tr. 176).

15. In 1991, Respondent grossed $49,934 from the sale of animals covered by the [Animal Welfare] Act and, in 1992, grossed $16,230 from such sales (CX 6; RX 6).

Conclusions of Law

1. . . . .

2. Respondent violated the [Animal Welfare] Act and [the R]egulations [and Standards] in the following manner:

(a) On May 21, 1992, Respondent failed to provide adequate veterinary care to animals, in violation of 9 C.F.R. § 2.40, by using expired medication to treat animals;

(b) On May 21, 1992, Respondent failed to maintain primary enclosures for nonhuman primates so as to protect them from injury, in violation of 9 C.F.R. §§ 2.100(a) and 3.80(a)(2), when the enclosure for a pair of ring-tailed lemurs contained a light socket without a guard;

(c) On May 21, 1992, Respondent failed to develop and document a plan for the environmental enhancement of nonhuman primates signed by a veterinarian, in violation of 9 C.F.R. §§ 2.100(a) and 3.81;

(d) On March 31, 1992, and May 21, 1992, Respondent failed to properly clean and sanitize primary enclosures for nonhuman primates, in violation of 9 C.F.R. §§ 2.100(a) and 3.84, in that the enclosures for lemurs were excessively dirty and contained excessive waste;

(e) On May 21, 1992, Respondent failed to maintain proper sanitation of watering receptacles for animals, in violation of 9 C.F.R. §§ 2.100(a) and 3.130, in that a water container for a lion and tiger contained bright green algae; and

(f) On October 15, 1991, Respondent failed to maintain proper sanitation of primary enclosures for animals, in violation of 9 C.F.R. §§ 2.100(a) and 3.131, in that the enclosure for binturongs contained an excessive amount of feces.

3. Respondent's violations were willful. A willful violation occurs when the violator either intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. [*Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 108-09 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988).[3] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")]

Discussion

This proceeding arises as a result of a series of six inspections conducted at Respondent's facility by the Department's Veterinary Medical Officer, Dr. Peter R. Kirsten, between January 11, 1990, and May 21, 1992. In addition to the testimony

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[[3]The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondent's violations would still be found willful.]

of the witnesses, the evidence before me consists primarily of inspection forms, known as APHIS Form 7008, which were completed by Dr. Kirsten during the inspections and which detail the conditions that he observed at Respondent's facility (CX 3-5, 7, 10, 12). In addition, nine photographs were taken at the facility during the March 31, 1992, inspection, and the May 21, 1992, inspection was videotaped by Respondent. Both the photographs and the videotape were admitted into evidence at the hearing (CX 11; RX 15).

The main focus of this proceeding consists of the allegations that Respondent, on six occasions from January 11, 1990, to May 21, 1992, violated the . . . [dots in original] requirements of 9 C.F.R. § 3.125(a) because his facility lacked a perimeter fence at least 8 feet in height [(Amended Complaint ¶¶ II(A), III(A), IV(A), V(A), VI(A), and VII(C)(1)). The requirement that Respondent's facility have an 8-foot perimeter fence is contained in an internal memorandum issued by USDA and has never been the subject of notice and comment rulemaking in accordance with the Administrative Procedure Act (5 U.S.C. § 553). The United States Court of Appeals for the Seventh Circuit has held that the USDA rule governing the minimum height of enclosures for dangerous animals is a substantive rule subject to the notice and comment procedure set forth in the Administrative Procedure Act (5 U.S.C. § 553) and that the rule requiring Respondent's perimeter fence to be 8 feet high is invalid because it was not promulgated in accordance with the required procedure. *Hoctor v. United States Dep't of Agric., supra.* Therefore, paragraphs II(A), III(A), IV(A), V(A), VI(A), and VII(C)(1) of the Amended Complaint are dismissed]. . . .

. . . .

Complainant contends that Respondent failed to provide adequate veterinary care in violation of 9 C.F.R. § 2.40 when he euthanized two sick cats in 1991. Respondent's program of veterinary care for 1991 indicated that euthanasia would be carried out by the veterinarian using Beuthanasia, a type of drug (RX 5; Tr. 144). During his May 21, 1992, inspection, Dr. Kirsten cited Respondent for non-compliance with section 2.40 [of the Regulations] when it came to light that Respondent had personally euthanized two seriously ill large cats by shooting them (CX 12; Tr. 131-32, 160-63). The animals were experiencing uremic poisoning due to kidney failure, which resulted in severe convulsions (Tr. 145). Dr. Shew was out of town and could not be reached, but had been involved with the treatment of the animals prior to the incident (Tr. 145-46). He had discussed with Respondent the possibility that the cats might have to be euthanized in his absence (Tr. 146), and approved of the method used as humane (Tr. 147, 149). He testified that it was an emergency situation that he felt was within the parameters of the veterinary care program (Tr. 148-49), and subsequently modified the following

year's program to reflect the same (RX 6; Tr. 149). Under the circumstances, I cannot conclude that Respondent violated the [Animal Welfare] Act or [the R]egulations when these two animals were euthanized.

In 1992, two lions escaped from their primary enclosure and had to be destroyed by Respondent (Tr. 189-90). Complainant argues that Respondent attempted to mislead Dr. Kirsten when he referred to the destruction of the two escaped cats as "euthanasia" in his records. Complainant also seems to contend that the manner in which these animals were destroyed was somehow improper.

Although Respondent applied the misnomer, "euthanasia," to the event, I do not find that he intentionally misled anyone, and the [Amended] Complaint does not allege that Respondent violated the [Animal Welfare] Act's recordkeeping provisions. Moreover, it is apparent from the circumstances surrounding the escape of the animals that Respondent was faced with an emergency situation that required quick and decisive action. The two animals had escaped simultaneously, due to a handler's error, from their primary enclosure during feeding time and were approaching within 10 to 15 feet of the handler when Respondent shot them both (Tr. 189-94). Dr. Shew testified that the action was appropriate and humane (Tr. 167). Under these circumstances, I cannot conclude that there was anything improper about the actions taken by Respondent during this unfortunate incident.

. . . . [Dots in original.]

Complainant has failed to meet its burden of proof with regard to the allegations that primary enclosures for the large cats were not properly cleaned and sanitized in violation of 9 C.F.R. § 3.131. On three inspection reports, dated between January 11, 1990, and October 15, 1991, Dr. Kirsten noted accumulations of grayish-colored feces in the large cat enclosures (CX 3, 4, 7). Respondent disputed Kirsten's assessment that the feces had accumulated in some of the cages over a period of days. Respondent contended that the fecal matter was fresh, yet grayish in coloration due to the animals' diet. The animals' diet consisted primarily of whole chickens, including feathers (Tr. 164-65, 178), which made the feces appear grayish in color and appear "lighter" and "fluffier," as opposed to "gooey" (Tr. 178). Respondent's testimony, which I find reliable and credible, indicates that he or members of his family cleaned the large cat enclosures daily (Tr. 177). The inspection reports that noted the gray feces in the cat enclosures indicate that the inspections took place in the morning (CX 3, 4, 7). Therefore, I accept Respondent's testimony that the feces in the large cat enclosures had not accumulated for more than 24 hours and that the inspections had taken place before he had the opportunity to clean the cages for the day.

Complainant has met its burden of proof with respect to the allegation that on May 21, 1992, Respondent violated the [Animal Welfare] Act by failing to provide adequate veterinary care to animals in accordance with 9 C.F.R. § 2.40. On that

date, Dr. Kirsten noted that a bottle of Dexasone with an expiration date of January 1987 was found on a table in the animal area (CX 12). Dexasone is an injectable cortisone drug product (Tr. 149-51). Dr. Shew, Respondent's veterinarian, testified that this particular drug was being used topically to treat animals for conjunctivitis, and that, in his opinion, the use of outdated medication in this manner would not be harmful to the animals (Tr. 150-51). However, Dr. Kirsten testified that Dexasone only has an indication for use as an injectable drug (Tr. 129), and that the use of any expired drug could be harmful to animals because the drug could lose its potency, become contaminated, or undergo a change in its chemical makeup (Tr. 129-30). Moreover, Dr. Shew did not know whether Dexasone was the type of drug which might lose its potency over time, and agreed that the use of outdated drugs is generally not a good veterinary practice (Tr. 130, 155). Therefore, I conclude that the use of this medication at a time over 5 years after it had expired constituted a violation of section 2.40 of the [R]egulations.

Complainant has met its burden of proof with regard to the allegation that, on May 21, 1992, Respondent violated 9 C.F.R. § 3.80(a)(2) by failing to maintain a primary enclosure for nonhuman primates so as to protect them from injury. The inspection report for that date notes that a light socket in the enclosure for a pair of ring-tailed lemurs was not protected by a guard which would prevent injury to the animals (CX 12 [at] 3).

Complainant has met its burden of proof regarding the allegation that, on May 21, 1992, Respondent violated 9 C.F.R. § 3.81 by failing to develop and document an appropriate plan, signed by a veterinarian, for environmental enhancement adequate to promote the psychological well-being of nonhuman primates. I note, however, that Respondent's veterinarian developed an appropriate plan subsequent to the May 21, 1992, inspection (Tr. 127-28, 153-54).

Complainant has met its burden of proof with regard to the allegations that, on March 31, 1992, and May 21, 1992, primary enclosures for nonhuman primates were not properly cleaned and sanitized, in violation of 9 C.F.R. § 3.84(a). The inspection report for March 31, 1992, indicates that the solitary lemur enclosure contained an accumulation of excreta in a heap (CX 10 [at] 3). The inspection report for May 21, 1992, indicates that an enclosure for a pair of ring-tailed lemurs was excessively dirty with feed waste and excreta (RX 12 [at] 3). Respondent explained that the lemur cages contained kitty litter on the floor, and that the animals soiled the interior of the enclosure by accumulating kitty litter on their sticky paws and then bouncing off the walls of the enclosure (Tr. 220-22). While the animals can indeed be seen jumping against the cage walls during the videotape of the May 21, 1992, inspection (RX 15), this does not relieve Respondent of the duty to keep the cages clean. Moreover, Dr. Kirsten testified that he recalled seeing

excess feed waste and manure, not kitty litter on the floor of the lemur enclosure (Tr. 262). The fleeting glimpse provided by the videotape of the floor of the lemur enclosure is not helpful in determining whether the cages contained the kitty litter (RX 15). Therefore, I conclude that Complainant has met its burden of proof as to the alleged violations of section 3.84(a).

Complainant has met its burden of proof respecting the allegation that, on May 21, 1992, Respondent violated 9 C.F.R. § 3.130 by failing to provide animals with a clean and sanitary water receptacle. The inspection report for that date notes that a water pan for a lion and tiger was bright green with algae growth (CX 12 [at] 3).

Complainant has met its burden of proof with respect to the allegation that, on October 15, 1991, the binturong enclosure contained an excessive amount of feces, in violation of 9 C.F.R. § 3.131. Respondent averred that the accumulation of feces in the binturong enclosure was not excessive because binturongs are unusually prolific defecators and thus would produce a large quantity of fecal matter during a 24-hour period (Tr. 223). While Dr. Kirsten's testimony indicates that binturongs indeed have a certain talent for waste production, his conclusion that the enclosure contained an excessive amount of feces took that fact into consideration (Tr. 108-10, 133-35). Dr. Kirsten testified that an "excessive" accumulation of feces in animal cages occurred, in his opinion, when fecal matter accumulated to a point where it would no longer be hygienic for the animal (Tr. 108, 133-35). He testified that binturong cages need to be cleaned more often than every 24 hours (Tr. 108).

Sanction

[Complainant] seeks an Order requiring that Respondent cease and desist from violating the [Animal Welfare] Act and the [R]egulations [and Standards], assessing [a] civil penalty and suspending Respondent's license under the [Animal Welfare] Act. The [Animal Welfare] Act provides for a civil penalty of up to $2,500 per violation. 7 U.S.C. § 2149(b). According to Departmental policy, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, giving appropriate weight to the recommendations of the administrative officials having 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), 1993 WL 128889 (not to be cited as precedent under 9th Circuit Rule 36–3).

The [Animal Welfare] Act further directs that the Secretary shall give due consideration to the appropriateness of the civil penalty with respect to the size of

the business, the gravity of the violation, the good faith of the violator, and the history of previous violations. 7 U.S.C. § 2149(b). Regarding the size of the business, Respondent grossed $49,934 in 1991, and $16,230 in 1992 (CX 6, 8). . . . [Dots in original.]

. . . . [Dots in original.]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

. . . .

With respect to the allegations involving Respondent's failure to individually identify animals on May 21, 1992, [section 11 of the Animal Welfare] Act provides:

§ 2141. Marking and identification of animals

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

[7 U.S.C. § 2141.]

[Section 2.50(a)(1), (b)(1)(i)-(ii), and (b)(4) of] the Regulations provide:

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, [footnote omitted] or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the administrator.

. . . .

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats [footnote omitted]; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

. . . .

(4) When any dealer has made a reasonable effort to affix an official tag to a cat, as set forth in paragraphs (a) and (b) of this section, and has been unable to do so, or when the cat exhibits serious distress from the attachment of a collar and tag, the dealer shall attach the collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain the identity of the cat in relation to the tag.

[9 C.F.R. § 2.50(a)(1), (b)(1)(i)-(ii), (b)(4).]

The ALJ, in dismissing [paragraph VII(A) of] the Amended Complaint[, which alleges that Respondent failed to individually identify cats, in] violation [of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50)], stated:

Complainant has failed to meet its burden of proof with regard to the allegations that, on May 21, 1992, Respondent violated 7 U.S.C. § 2141 and 9 C.F.R. § 2.50 by failing to individually identify animals. On his May 21, 1992, inspection report, Dr. Kirsten noted that nine exotic hybrid cats were without individual identification. (CX 12.) The regulations require that cats receive tags or tattoos which would identify them individually for recordkeeping purposes. However, with respect to these particular animals, Respondent had raised a question regarding the appropriate method of identification in a letter to APHIS officials dated December 20, 1990 (RX 12). The cats' ears were too small to tattoo, and he felt that tattooing on the cats' legs or tagging would result in a great deal of stress to the aggressive animals (RX 12; Tr. 180-86). Respondent testified that, if he had attempted to tattoo or tag one of these hybrid animals, he would be dealing with "an angry cat, not a little house, cuddly-type cat" (Tr. 187), and that he would have to tranquilize them too often as a result (Tr. 183). He raised these concerns with APHIS officials (RX 12; Tr. 182-83), who responded with a letter stating that his question would be referred to the Animal Care staff

at Hyattsville, Maryland (RX 13). No evidence was presented which would indicate that Respondent received the requested direction from the Hyattsville staff with respect to the appropriate method of identifying the cats prior to the May 21, 1992, inspection. Indeed, the inspection form completed by Dr. Kirsten lists the item under the following heading: "Noncompliant standard or regulation documented previous inspections . . . that is waiting for interpretation from AC staff in Hyattsville" (CX 12, p. 2) (emphasis added). Therefore, I conclude that Complainant has failed to meet its burden of proof with regard to the alleged violation of 7 U.S.C. § 2141 and 9 C.F.R. § 2.50.

[Initial Decision at 18-19.]

The ALJ erred in dismissing [paragraph VII(A) of] the Amended Complaint as to Respondent's failure to individually identify animals. Assuming that the animals could not have been tattooed or tagged, Respondent could have attached a "collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain the identity of the cat in relation to the tag" (9 C.F.R. § 2.50(b)(4)). To be sure, Respondent wrote to APHIS on December 20, 1990, asking if he could use some method that would not involve tattooing (RX 12). The reply from APHIS dated February 25, 1991 (well before the violation involved here), advised Respondent that his problem would be forwarded to the Animal Care Staff in Hyattsville, Maryland, but the letter expressly stated: "Presently, you would be required to individually identify your hybrid cats" (RX 13). The fact that APHIS was willing to consider Respondent's compliance problem does not relieve him from the obligation to comply in some manner while awaiting further directions from APHIS. Moreover, the letter from APHIS expressly advised him that, presently, he would be required to individually identify his hybrid cats. Accordingly, Respondent's violation was proven (CX 12).

However, I am imposing only a cease and desist order with respect to this violation because the inspector recorded the violation under "II" of Item 7 of the Continuation Sheet for Animal Care Inspection Report(s), which is for "Non-compliant item(s) previously identified for which time remains for correction" (CX 12 [at] 2). Also, as noted by the ALJ, the inspector stated in the inspection report that the matter is "waiting for interpretation from AC staff in Hyattsville" (CX 12 [at] 2). Hence, the inspector's report indicated to Respondent that he still had time remaining to correct this problem after receiving a further interpretation. Th[ese circumstances are] not relevant in considering whether a violation occurred. But [they are] relevant in considering what sanction should be imposed for this violation.

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

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

[Section 19 of] the [Animal Welfare] Act provides:

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall

give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

[7 U.S.C. § 2149(a), (b).]

In this case, [Complainant] recommended [in Complainant's Motion] that the sanction should include a [1]5-day . . . suspension of Respondent's [Animal Welfare Act] license, a $[1],000 civil penalty, and an Order that [Respondent] cease and desist from further violations [of the Animal Welfare Act and the Regulations and Standards].

Respondent violated the [Animal Welfare] Act [and the R]egulations and [S]tandards. . . [8] times. The violations were serious. The [violations] affected, or had a strong potential to affect, the health of the animals on Respondent's premises. . . . Respondent used a drug many years beyond its expiration date. . . . The continuation of the violations from 1990 to 1992 shows that Respondent did not make serious efforts to comply with the [Animal Welfare] Act [and the Regulations and Standards]. Respondent received a warning letter in 1991 (RX 3).

Looking at the size of Respondent's business, Respondent's dealer business grossed $49,934 in 1991 and $16,230 in 1992 (CX 6, box 17; RX 6 [at] 1, box 8). Respondent testified that the size of his fenced business is 25 acres (Tr. 247).

Considering the statutory criteria and Complainant's recommendation, I believe that a civil penalty of $[1,0]00 is appropriate, no part of which is based on Respondent's failure to identify animals, as required.

Additionally, I believe that Respondent's [Animal Welfare Act] license should be suspended for [15] days, and thereafter until Respondent demonstrates compliance with the [Animal Welfare] Act [and the Regulations and Standards]. Here, again, no part of the suspension is based on Respondent's failure to identify animals, as required. Finally, I believe that Respondent should be ordered to cease and desist from further violations [of the Animal Welfare Act and the Regulations and Standards].

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the [Animal Welfare] Act and the [R]egulations and [S]tandards issued [under the Animal Welfare Act], and in particular, shall cease and desist from:

(a) failing to provide adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(b) failing to maintain primary enclosures for nonhuman primates so as to protect them from injury;

(c) failing to establish and maintain an appropriate plan for environmental enhancement adequate to [nonhuman] primates that preserves the well[-]being of the animals;

(d) failing to properly clean and sanitize primary enclosures for nonhuman primates;

(e) failing to keep water receptacles for animals clean and sanitized;

(f) failing to maintain primary enclosures for animals in a clean and sanitary condition;

(g) . . . .; and

(h) failing to individually identify cats, as required.

2. Respondent is assessed a civil penalty of $[1,0]00, which shall be paid by a certified check or money order within 90 days after service of this Order [on Respondent], made payable to the Treasurer of the United States, and shall be sent to Sharlene A. Deskins, Office of the General Counsel, Marketing Division, U.S. Department of Agriculture, Room 2014, South Building, Washington, DC 20250-1417. [The certified check or money order should indicate that payment is in reference to AWA Docket No. 93-0010.]

3. Respondent's license is suspended for a period of [15] days and continuing thereafter until [Respondent] demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the [Animal Welfare] Act [and] the [R]egulations and [S]tandards issued [under the Animal Welfare Act], and this Order, including payment of the civil penalty [assessed in this Order]. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied th[e] condition[s in this paragraph of this Order], a Supplemental Order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension [of Respondent's Animal Welfare Act license] after the expiration of the [15]-day [license suspension] period.

[4.] The [Animal Welfare Act license] suspension provisions [in this Order] shall become effective on the 35th day after service of this Order on Respondent. The cease and desist provisions [in this Order] shall become effective on the day after service of this Order on Respondent.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 94-0015.
Decision and Order filed June 6, 1997.

Cease and desist order — Civil penalty — License suspension — Recordkeeping violations — Failing to provide appropriate veterinary care and facilities — Preponderance of the evidence — Substantial evidence — Willful — Sanction policy — Supplemental order.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Initial Decision and Order suspending for 60 days Respondent's license, directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act, and assessing a civil penalty of $51,250. Complainant, as the proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. Complainant much more than met this burden and proved that Respondent failed, *inter alia*, to: make and retain complete records; mark and identify Respondent's dogs; comply with the Regulations and the Standards; provide an adequate program of veterinary care and make certain that the animals in need of veterinary care received such care; handle dogs without unnecessary trauma; maintain structurally sound dog housing in good repair; maintain physical separation of dog housing from other businesses; store food and bedding properly; properly drain and dispose of waste; provide proper ventilation in dog housing; provide proper lighting in dog housing; provide surfaces in dog housing impervious to moisture; provide proper protection from the elements to dogs housed outside; provide structurally sound primary dog housing with sufficient space and sufficient flooring, but no sharp edges; maintain clean self-feeders; maintain clean and sanitized water bowls; remove excreta often enough; and maintain enough employees to comply with the Act and the Regulations and Standards. Respondent's claims, *inter alia*, that the kennels were cleaned daily and that Respondent had always provided proper veterinary care, were not credible in light of Complainant's overwhelming evidence. Respondent did not credibly counter Complainant's evidence of repeated, serious violations, but rather, complained of overzealous enforcement during the period of the 10 inspections. An ALJ is not required to apportion his decision between the parties; rather, the ALJ decides the case based upon the evidence. The inspector is not required to walk Respondent through the inspection, but routinely gives a copy of the written report to Respondent and explains it to Respondent. It is well settled that a violation corrected prior to a subsequent inspection does not exculpate Respondent for the original violation. Respondent's failure to have an attorney and an interpreter at the hearing do not mitigate the violations.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act); the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) (hereinafter the Regulations and Standards); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by

filing a Complaint on July 6, 1994. On September 2, 1994, Respondent's Counsel, Christopher M. Patterson, Esq., filed an Answer to the Complaint on behalf of Respondent. On December 11, 1995, Respondent's Counsel filed a Motion to Withdraw Appearance, which motion Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) granted on December 18, 1995.

On December 21, 1995, Complainant filed an Amended Complaint which includes counts I-VI alleged in the July 6, 1994, Complaint and adds counts VII-XI. Respondent neither filed a timely Answer to the Amended Complaint nor objected to the filing of the Amended Complaint.

The Complaint and the Amended Complaint allege that David M. Zimmerman (hereinafter Respondent) willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on March 7-8, 1996, in Lancaster, Pennsylvania. Denise Y. Hansberry, Esq., Office of the General Counsel, United States Department of Agriculture (hereinafter USDA), represented Complainant. Respondent appeared *pro se*. On May 30, 1996, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof. Respondent filed a brief on June 3, 1996. On July 12, 1996, the ALJ issued an Initial Decision and Order directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a civil penalty; and suspending Respondent's Animal Welfare Act license.

On August 12, 1996, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On October 1, 1996, Complainant filed Complainant's Reply in Opposition to Respondent's Appeal (hereinafter Complainant's Reply). On October 3, 1996, the case was referred to the Judicial Officer for decision.

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

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ that Respondent willfully violated the Animal Welfare Act and the

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

Regulations and Standards as alleged in the Amended Complaint. The Initial Decision and Order is affirmed and adopted as the final Decision and Order with deletions shown by dots, changes or additions shown by brackets, and trivial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

Applicable Statutory Provisions, Regulations, and Standards

7 U.S.C.:

§ 2132. Definitions

When used in this chapter—

. . . .

(f) The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

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

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

7 U.S.C. § 2132(f).

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

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

available at all reasonable times for inspection and copying by the Secretary.

7 U.S.C. § 2140.

§ 2141. Marking and identification of animals

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

7 U.S.C. § 2141.

9 C.F.R.:

§ 1.1 Definitions.

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

. . . .

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

9 C.F.R. § 1.1.

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

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

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

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

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

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

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

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

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

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

9 C.F.R. § 2.40.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class "A" dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal's neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class "B" dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal's neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue

identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

9 C.F.R. § 2.50(a), (b)(1)-(3) (footnotes omitted).

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer . . . shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer. . . . The records shall include any offspring born of any animal while in his or her possession or under his or her control.

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

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom a dog or cat was sold or given and that person's license or registration number if he or she is licensed or registered under the Act;

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

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

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

(A) The species and breed or type;

(B) The sex;

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

(D) The color and any distinctive markings;

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

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

9 C.F.R. § 2.75(a)(1).

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

9 C.F.R. § 2.100(a).

SUBPART I—MISCELLANEOUS

. . . .

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating,

excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(a)(1).

PART 3—STANDARDS

. . . .

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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

(b) *Conditions and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its

nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

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

9 C.F.R. § 3.1(a), (b), (e), (f) (footnote omitted).

§ 3.2 Indoor housing facilities.

. . . .

(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient

temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

(c) *Lighting.* Indoor housing facilities for dogs and cats must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs and cats. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs and cats from excessive light.

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

9 C.F.R. § 3.2(b), (c), (d).

§ 3.4 Outdoor housing facilities.

. . . .

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

9 C.F.R. § 3.4(b).

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

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

(i) Have no sharp points or edges that could injure the dogs and cats;

(ii) Protect the dogs and cats from injury;

. . . .

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' and cats' feet to pass through any openings in the floor. If the floor of the primary enclosure is constructed of wire, a solid resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably must be provided; and

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

. . . .

(c) *Additional requirements for dogs*—(1) *Space.* (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space, calculated as follows: Find the mathematical square of the sum of the length of the dog in inches (measured from the tip of its nose to the base of its tail) plus 6 inches; then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in inches/144 = required floor space in square feet.

(ii) Each bitch with nursing puppies must be provided with an additional amount of floor space, based on her breed and behavioral characteristics,

and in accordance with generally accepted husbandry practices as determined by the attending veterinarian. If the additional amount of floor space for each nursing puppy is less than 5 percent of the minimum requirement for the bitch, such housing must be approved by the attending veterinarian in the case of a research facility, and, in the case of dealers and exhibitors, such housing must be approved by the Administrator.

(iii) The interior height of a primary enclosure must be at least 6 inches higher than the head of the tallest dog in the enclosure when it is in a normal standing position[.] . . .

9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii), (a)(2)(x)-(xi), (c)(1).

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.9 Feeding.

. . . .

(b) Food receptacles must be used for dogs and cats, must be readily accessible to all dogs and cats, and must be located so as to minimize contamination by excreta and pests, and be protected from rain and snow. Feeding pans must either be made of a durable material that can be easily cleaned and sanitized or be disposable. If the food receptacles are not disposable, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Sanitization is achieved by using one of the methods described in § 3.11(b)(3) of this subpart. If the food receptacles are disposable, they must be discarded after one use. Self-feeders may be used for the feeding of dry food. If self-feeders are used, they must be kept clean and must be sanitized in accordance with § 3.11(b) of this subpart. Measures must be taken to ensure that there is no molding, deterioration, and caking of feed.

9 C.F.R. § 3.9(b).

§ 3.10 Watering.

If potable water is not continually available to the dogs and cats, it must be offered to the dogs and cats as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian. Water receptacles must be kept clean and sanitized in accordance with § 3.11(b) of this subpart, and before being used to water a different dog or cat or social grouping of dogs or cats.

9 C.F.R. § 3.10.

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

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

9 C.F.R. § 3.11(a).

§ 3.12 Employees.

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

9 C.F.R. § 3.12.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Findings of Fact

1. Respondent David M. Zimmerman is an individual whose address is [redacted] Pennsylvania [redacted] (Tr. 238-39).

2. With the exception of December 14, 1994, through March 7, 1995, Respondent was licensed and operating as a dealer as defined in the Animal Welfare Act and the Regulations at all times material to this proceeding (Tr. 10-11).

3. When Respondent became licensed and annually thereafter for as long as the license was in effect, he received copies of the Animal Welfare Act and the Regulations and Standards, and agreed in writing to comply with the Animal Welfare Act and the Regulations and Standards (Answer ¶ I(C)).

4. Between August 1993 and October 1995, Robert Markmann, an experienced USDA Animal Care Inspector, performed several inspections at Respondent's facility. These inspections were conducted on August 3, September 27, October 4, and November 18, 1993; January 3, February 16, May 16, June 22, and August 11, 1994; and October 31, 1995 (CX 3-CX 11, CX 14). With the exception of the first two inspections, which Mr. Markmann conducted alone, a USDA veterinarian was present and took part in each inspection at Respondent's facility (CX 5, CX 11, CX 14[; Tr. 18]).

5. Each inspection revealed that Respondent's facility was not in compliance with the [Animal Welfare] Act and the Regulations [and Standards] (CX 3[-]CX 11, CX 14). Following each inspection, Respondent was given a copy of a written inspection report detailing all items at his facility which were found to be deficient under the [Animal Welfare] Act and the Regulations [and Standards] (Tr. 15-19, 338). In addition, he was given numerous opportunities to achieve compliance with the Animal Welfare Act and the Regulations and Standards.

6. On August 3, 1993, [the Animal and Plant Health Inspection Service (hereinafter] APHIS) inspected Respondent's premises and found that:

a. Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 3; Tr. 25);

b. Respondent failed to provide primary enclosures for dogs which were structurally sound and maintained in good repair (CX 3; Tr. 23-24); and

c. Respondent failed to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (CX 3; Tr. 24).

7. On September 27, 1993, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs held on the premises (CX 4; Tr. 31);

b. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 4; Tr. 31-32);

c. Respondent handled animals in a manner which caused trauma, behavioral stress, physical harm, and unnecessary discomfort to the animals (CX 4; Tr. 32);

d. Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 4; Tr. 33-36);

e. Respondent failed to physically separate housing facilities for dogs from another business (CX 4; Tr. 28, 39);

f. Respondent failed to ensure that the floors, walls, and ceilings of indoor housing facilities, and other surfaces in contact with the animals, were impervious to moisture (CX 4; Tr. 28-29); and

g. Respondent failed to ensure that primary enclosures for dogs were constructed so as to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (CX 4; Tr. 29-30).

8. On October 4, 1993, APHIS inspected Respondent's premises and found that:

a. Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 5; Tr. 122-33);

b. Respondent failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation (CX 5; Tr. 42-43);

c. Respondent failed to have outdoor housing facilities for dogs which contained shelter structures large enough to allow each animal to sit, stand, and lie in a normal manner, and to turn about freely (CX 5; Tr. 43);

d. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair so as to protect the animals from injury and which had no sharp points or edges that could injure the animals (CX 5; Tr. 43-45);

e. Respondent failed to remove excreta from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (CX 5, CX 16; Tr. 45, 4[8]-50);

f. Respondent failed to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials (CX 5; Tr. 46); and

g. Respondent failed to have primary enclosures for dogs which were constructed so as to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (CX 5; Tr. 134-35).

9. On November 18, 1993, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs on the premises (CX 6; Tr. 140);

b. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 6; Tr. 140);

c. Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 6, CX 18 at 18-25; Tr. 141-49);

d. Respondent failed to make provisions for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes, in a manner that minimized contamination and disease risks (CX 6; Tr. 52, 63-64);

e. Respondent failed to provide dogs in outdoor housing facilities with adequate protection from the elements (CX 6; Tr. 52-53);

f. Respondent failed to keep [water] receptacles for dogs clean and sanitized (CX 6, CX 18 at 17; Tr. 53, 64);

g. Respondent failed to have enough employees to carry out the required level of husbandry practices and care (CX 6; Tr. 53);

h. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair (CX 6, CX 18 at 1-2; Tr. 54, 60-61);

i. Respondent failed to have primary enclosures for dogs which were constructed so as to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (CX 6; Tr. 55-58);

j. Respondent failed to remove excreta from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (CX 6; Tr. 61-63); and

k. Respondent failed to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials (CX 6; Tr. 139).

10. On January 3, 1994, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs on the premises (CX 7; Tr. 67);

b. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 7; Tr. 67);

c. Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 7, CX 19 at 1-3; Tr. 152-56);

d. Respondent failed to store supplies of food and bedding in a manner that protected them from spoilage, contamination, and vermin infestation (CX 7; Tr. 66); and

e. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair so as to protect the animals from injury (CX 7; Tr. 66-67).

11. On February 16, 1994, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs on the premises (CX 8; Tr. 71);

b. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 8; Tr. 71-72); and

c. Respondent failed to provide veterinary care to animals in need of care (CX 8; Tr. 157).

12. On May 16, 1994, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs on the premises (CX 9; Tr. 76);

b. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 9; Tr. 76-77);

c. Respondent failed to provide veterinary care to animals in need of care (CX 9, CX 20 at 1-7; Tr. 158-66);

d. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair (CX 9; Tr. 75);

e. Respondent failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation (CX 9; Tr. [74-]75); and

f. Respondent failed to provide each dog housed in a primary enclosure with an adequate amount of floor space [(CX 9; Tr. 76).]

13. On June 22, 1994, APHIS inspected Respondent's premises and found that:

a. Respondent failed to provide veterinary care to animals in need of care (CX 10; Tr. 196-99);

b. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair (CX 10; Tr. 83);

c. Respondent failed to ensure that floors were constructed in a manner so as to protect dogs' feet from injury and failed to ensure that [floors] were . . . constructed so as not to allow the dogs' feet to pass through openings in the floor (CX 10; Tr. 84); and

d. Respondent failed to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (CX 10; Tr. 83-84).

14. On August 11, 1994, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to individually identify all dogs on the premises (CX 11; Tr. 88);

b. Respondent failed to provide veterinary care to animals in need of care (CX 11; Tr. 203);

c. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair (CX 11; Tr. 87-88); and

d. Respondent failed to physically separate housing facilities for dogs from another business (CX 11; Tr. 87).

15. On October 31, 1995, APHIS inspected Respondent's premises and records and found that:

a. Respondent failed to maintain complete records showing the acquisition, disposition, and identification of animals (CX 14; Tr. 97);

b. Respondent failed to provide veterinary care to animals in need of care (CX 14, CX 21 at 6-9; Tr. 210-13);

c. Respondent failed to individually identify all dogs on the premises (CX 14; Tr. 97);

d. Respondent failed to have housing facilities for dogs which were structurally sound and which protected the animals from injury, contained them securely, and restricted other animals from entering (CX 14; Tr. 92);

e. Respondent failed to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials (CX 14; Tr. 93);

f. Respondent failed to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation (CX 14; Tr. 93);

g. Respondent failed to provide for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes, in a manner that minimized contamination and disease risks (CX 14; Tr. 93-95);

h. Respondent failed to have indoor housing facilities for dogs which were sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (CX 14; Tr. 94);

i. Respondent failed to have indoor housing facilities for dogs which were lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs (CX 14; Tr. 94);

j. Respondent failed to ensure that dogs in outdoor housing facilities were provided with adequate protection from the elements (CX 14, CX 21 at 5; Tr. 94-95, 102);

k. Respondent failed to have primary enclosures for dogs which were structurally sound and maintained in good repair, so as to protect the animals from injury and to ensure that there were no sharp points and edges that could injure the animals (CX 14; Tr. 96);

l. Respondent failed to clean and sanitize self-feeders (CX 14; Tr. 96); and

m. Respondent failed to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (CX 14; Tr. 96).

Conclusions of Law

1. On August 3, 1993, Respondent willfully violated:

a. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1993)) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of care;

b. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1) (1993)) by failing to ensure

that primary enclosures for dogs were structurally sound and maintained in good repair; and

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a) (1993)) by failing to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of dogs and to reduce disease hazards, insects, pests, and odors.

2. On September 27, 1993, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) (1993)) by failing to identify all dogs on the premises;

b. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1993)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

c. sections 2.100(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.100(a), .131(a)(1)(1993)) by handling animals in a manner which caused trauma, behavioral stress, physical harm, and unnecessary discomfort;

d. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1993)) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of care;

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.1(b) of the Standards (9 C.F.R. § 3.1(b) (1993)) by failing to have housing facilities which were physically separated from another business;

f. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.2(d) of the Standards (9 C.F.R. § 3.2(d) (1993)) by failing to ensure that the floors, walls, and ceilings of indoor housing facilities and other surfaces coming in contact with animals were impervious to moisture; and

g. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi) (1993)) by failing to ensure that primary enclosures for dogs were constructed so as to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

3. On October 4, 1993, Respondent willfully violated:

a. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1993)) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of care;

b. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e) (1993)) by failing to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.4(b) of the Standards (9 C.F.R. § 3.4(b) (1993)) by failing to ensure that outdoor housing facilities for dogs did . . . contain shelter structures large enough to allow each animal to sit, stand, and lie in a normal manner, and to turn about freely;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(1), (a)(2)(i), and (a)(2)(ii) of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(i)-(ii) (1993)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair, so as to protect the animals from injury, and which had no sharp points or edges that could injure the animals;

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a) (1993)) by failing to remove excreta from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors;

f. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.1(b) of the Standards (9 C.F.R. § 3.1(b) (1993)) by failing to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials; and

g. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R § 3.6(a)(2)(xi) (1993)) by failing to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

4. On November 18, 1993, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1993)) by failing to individually identify all dogs on the premises;

b. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1993)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

c. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1993)) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of care;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f) (1993)) by failing to provide for

the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes, in a manner that minimized contamination and disease risks;

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.4(b) of the Standards (9 C.F.R. § 3.4(b) (1993)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements;

f. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.10 of the Standards (9 C.F.R. § 3.10 (1993)) by failing to keep watering receptacles for dogs clean and sanitized;

g. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.12 of the Standards (9 C.F.R. § 3.12 (1993)) by failing to have enough employees to carry out the required level of husbandry practices and care;

h. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1) (1993)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair;

i. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.6(a)(2)(xi) of the Standards (9 C.F.R. § 3.6(a)(2)(xi) (1993)) by failing to have primary enclosures for dogs which were constructed so as to provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;

j. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1993)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a) (1993)) by failing to remove excreta from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors; and

k. section 2.100(a) of the Regulations and section 3.1(b) of the Standards (9 C.F.R. § 3.1(b) (1993)) by failing to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials.

5. On January 3, 1994, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1994)) by failing to individually identify all dogs on the premises;

b. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1994)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

c. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1994)) by failing to maintain programs of disease control and prevention, euthanasia, and adequate

veterinary care under the supervision and assistance of a doctor of veterinary medicine and failing to provide veterinary care to animals in need of care;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e) (1994)) by failing to store supplies of food and bedding in a manner that protected them from spoilage, contamination, and vermin infestation; and

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(a)(1) and (a)(2)(ii) of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(ii) (1994)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair, so as to protect the animals from injury.

6. On February 16, 1994, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1994)) by failing to individually identify all dogs on the premises;

b. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1994)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals; and

c. section 2.40 of the Regulations (9 C.F.R. § 2.40) (1994) by failing to provide veterinary care to animals in need of care.

7. On May 16, 1994, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1994)) by failing to individually identify all dogs on the premises;

b. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1994)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

c. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1994)) by failing to provide veterinary care to animals in need of care;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1) (1994)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair;

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e) (1994)) by failing to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation; and

f. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(c) of the Standards (9 C.F.R. § 3.6(c) (1994)) by failing to provide each dog housed in a primary enclosure with an adequate amount of floor space.

8. On June 22, 1994, Respondent willfully violated:

a. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1994)) by failing to provide veterinary care to animals in need of care;

b. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1) (1994)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(a)(2)(x) of the Standards (9 C.F.R. § 3.6(a)(2)(x) (1994)) by failing to ensure that floors were constructed in a manner so as to protect dogs' feet from injury and failing to ensure that [floors] were constructed so as not to allow the dogs' feet to pass through openings in the floor; and

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a) (1994)) by failing to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors.

9. On August 11, 1994, Respondent willfully violated:

a. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1994)) by failing to individually identify all dogs on the premises;

b. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1994)) by failing to provide veterinary care to animals in need of care;

c. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.6(a)(1) of the Standards (9 C.F.R. § 3.6(a)(1) (1994)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair; and

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1994)) and section 3.1(b) of the Standards (9 C.F.R. § 3.1(b) (1994)) by failing to ensure that housing facilities for dogs were physically separated from another business.

10. On October 31, 1995, Respondent willfully violated:

a. section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1) (1995)) by failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. section 2.40 of the Regulations (9 C.F.R. § 2.40 (1995)) by failing to provide veterinary care to animals in need of care;

c. section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50 (1995)) by failing to individually identify dogs;

d. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.1(a) of the Standards (9 C.F.R. § 3.1(a) (1995)) by failing to have housing facilities for dogs which were structurally sound and protected the animals from injury, contained them securely, and restricted other animals from entering;

e. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.1(b) of the Standards (9 C.F.R. § 3.1(b) (1995)) by failing to ensure that housing facilities for dogs and areas used for storing animal food were free of an accumulation of trash, waste material, junk, and other discarded materials;

f. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.1(e) of the Standards (9 C.F.R. § 3.1(e) (1995)) by failing to store supplies of food and bedding in a manner so as to protect them from spoilage, contamination, and vermin infestation;

g. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.1(f) of the Standards (9 C.F.R. § 3.1(f) (1995)) by failing to provide for the regular and frequent collection, removal, and disposal of animal wastes and other fluids and wastes, in a manner that minimizes contamination and disease risks;

h. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.2(b) of the Standards (9 C.F.R. § 3.2(b) (1995)) by failing to have indoor housing facilities for dogs which were sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation;

i. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.2(c) of the Standards (9 C.F.R. § 3.2(c) (1995)) by failing to ensure that indoor housing facilities for dogs were lighted well enough to permit routine inspection and cleaning of the facility, and observation of the dogs;

j. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.4(b) of the Standards (9 C.F.R. § 3.4(b) (1995)) by failing to provide dogs in outdoor housing facilities with adequate protection from the elements;

k. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.6(a)(1) and (a)(2)(i) of the Standards (9 C.F.R. § 3.6(a)(1), (a)(2)(i) (1995)) by failing to have primary enclosures for dogs which were structurally sound and maintained in good repair, so as to protect the animals from injury and which had no sharp points and edges that could injure the animals;

l. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.9(b) of the Standards (9 C.F.R. § 3.9(b) (1995)) by failing to clean and sanitize self-feeders; and

m. section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a) (1995)) and section 3.11(a) of the Standards (9 C.F.R. § 3.11(a) (1995)) by failing to remove excreta from primary enclosures on a daily basis, in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors.

Discussion

USDA conducted 10 inspections at Respondent's facility. During the first two inspections on August 3 and September 27, 1993, Robert Markmann was the sole USDA representative. During the following eight inspections, Mr. Markmann was accompanied by a USDA veterinarian. On [October 4, and] November 18, 1993, and January 3, February 16, [and] May 16, . . . 1994, Dr. James O'Malley accompanied Mr. Markmann [(Tr. 122)]; on June 22 and August 11, 1994, Dr. Mary Geib accompanied Mr. Markmann [(Tr. 194)]; and on October 31, 1995, Dr. Norma Harlan accompanied Mr. Markmann [(Tr. 210)]. Respondent was present during all of these inspections.

I found Mr. Markmann and Drs. O'Malley, Geib, and Harlan to be highly qualified witnesses who performed careful and thorough inspections and whose testimonies were completely credible. During his 10 years of employment with USDA, Mr. Markmann has performed over 4,000 inspections of licensed facilities under the Animal Welfare Act (Tr. 13-14). Dr. O'Malley has performed approximately 1,000 such inspections (Tr. 120); Dr. Geib has performed approximately 500 such inspections (Tr. 192); and Dr. Harlan has performed over 3,500 inspections (Tr. 208). All of these officials testified impressively as to their careful inspection routines and all testified with great credibility as to the violations that they observed at Respondent's facility. Their observations were carefully documented in their written reports and many of the violations, including violations for lack of care for the animals and the facilities, were documented by graphic and often shocking photographs (CX 15-[CX 16, CX 18-CX 21]).

Respondent's sole evidence in dispute of Complainant's overwhelming evidence was his own testimony. Respondent testified that the kennels were cleaned daily (Tr. 240). However, based upon the many photographs and the credible testimony of Complainant's witnesses, I did not find [that Respondent's kennels were cleaned daily]. I did not find credible [Respondent's testimony] that the USDA inspectors made the dogs nervous and caused the dogs' excrement found in the kennels during the inspectors' visits [(Tr. 253-54)]. I found more credible evidence that this excrement was improperly allowed to accumulate. Respondent's explanations with regard to the many other types of violations were similarly not credible in the face of the shocking photographs and detailed and consistent testimony of the USDA

inspectors. Many photographs of the wounds and sores of the animals showed that the animals were poorly cared for. Other photographs showed badly maintained cages and pens, [accumulated] excrement, and dirty feeding bowls. The testimony of overcrowding of animals in pens [seemingly] smaller than the animals themselves was also shocking. Overall, I was appalled by the conditions to which the animals were exposed and did not find that Respondent credibly contradicted any of Complainant's [evidence].

The Appropriate Sanction

Complainant has recommended [that Respondent be issued a cease and desist order,] that a civil penalty be assessed against Respondent in the amount of $51,250, and that Respondent's license be suspended for 60 days [(Complainant's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof at 25-28)]. Although the amount of the requested [civil] penalty is large, upon consideration of the facts and the statutory criteria, I find that the assessment of a civil penalty of $51,250 in this matter is appropriate.

Section 19(b) of the [Animal Welfare] Act states:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

7 U.S.C. § 2149(b) (1988).

Respondent has a business of significant size. His facility generally houses between 200 and 300 dogs and appears to be profitable (Tr.[19,] 332[-33]). Recently [(October 1995), Respondent] constructed a new . . . facility on his premises (Tr. 21).

The gravity of Respondent's violations was serious. Over the course of 10 separate USDA inspections spanning over 2 years, as documented by credible testimony of USDA inspectors and by shocking, graphic photographs, dogs in Respondent's care were found to be badly miscared for.

With respect to good faith and Respondent's history of previous violations, the record contains abundant evidence that Respondent was given clear notice of the many deficiencies at his facility and ample opportunity to correct them (CX 3[-]CX 11, CX 14). During each of the 10 inspections, Mr. Markmann and/or a USDA veterinarian, pointed out deficiencies to Respondent, made recommendations for corrections, and assigned reasonable deadline dates for corrections (CX 3[-]CX 11, CX 14). Respondent received a copy of each inspection report which served as a

written notice that certain items were found to be deficient (Tr. 15-19). In addition, Mr. Markmann and the USDA veterinarians discussed the Animal Welfare Act with Respondent and spent time educating him as to the requirements of the Animal Welfare Act and the Regulations and Standards (CX 3[-]CX 11, CX 14; Tr. 15-19, [120-22, 166, 195, 209-10]). Although APHIS officials tried to work with the Respondent and help him bring his facility into compliance with the Animal Welfare Act, Respondent continued to commit many of the violations. Throughout the 27-month period that APHIS inspected his facility, Respondent was continuously cited for numerous, serious violations.

The purpose of sanctions is to deter Respondent, as well as others, from committing the same or similar violations. Over the course of 10 inspections, during a period of over 2 years, the USDA officials were unable to persuade Respondent to correct his many violations of the Animal Welfare Act [and the] Regulations and Standards. In view of this history, and Respondent's lack of good faith, the requested penalty of $51,250 is not excessive. Hopefully, the assessment of this penalty will persuade this Respondent and other would-be violators that such practices are intolerable.

In addition to the civil penalty, [Respondent is ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and] Respondent's license [is] suspended for a period of 60 days and continuing until he is in compliance with the Animal Welfare Act [and the] Regulations and Standards, and the Order [in this Decision and Order].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant has carried its burden of proof by much more than a preponderance of the evidence, which is all that is required for the violations alleged in the Amended Complaint.[2]

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[2]The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 4 n.4 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d

Respondent's appeal reads in its entirety, as follows:

I want to appeal for another hearing as I am not satis[]fied with the statement the judge wrote as it is very one sided.

Markmann said he alway[s] told us what to do so I can fix it but the last 8 inspections he did not talk to me during inspection and that was brought out in the hearing. We cannot see how he can stand there and say he did because that is very untruthful. We do not feel that is a fair trial as it is just how Markmann told us that the judge will rule in his favor and that is how it is. We were alway[s] taught to respect our authorities but they are so unthrust [sic] that we do not know what to do. We tried to correct everything we could find and more then [sic] once we could not find anything wrong and till the next time it was alright [sic].

He also stated that some pens were smaller then [sic] the dog itself and we never found anything like that in my kennel. They said we had junk around the dog feed and we alway[s] made sure it was cleaned up then the last inspection I asked where do you find trash and they said there are a couple empty feed bags there and that is trash and before that we always had them on a nice pile and everything was alright [sic].

Veterinary care we do not know why he thinks we don't have vet care as we have a care program and he gave us the list of times we were in contact with him at the hearing so that was a very dishonest statement.

He stated we do not have enough help but we had 7 people working here on the farm as we work long days as we grew up on the farm and are use to work[.]

409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

We would like to keep our farm so please help us as we do not have any money for something like that as we think we are not treated farely [sic] with our inspectors[.]

According to other places that he inspects as Markmann told a friend he is going to put us out of business and that is how everything looks[.]

/s/ David M. Zimmerman

Respondent argues that the ALJ's decision is "very one sided." I infer that Respondent's point is that the ALJ erred when he completely agreed with the Complainant's version of the facts. I reject this argument because there is no legal requirement that the ALJ apportion his decision between the parties. Rather, the ALJ should decide the case based upon the evidence. Here, the ALJ correctly weighed Complainant's evidence, but Respondent did not directly address and refute Complainant's evidence. When Complainant puts on evidence to prove its case, and Respondent does not refute that case, it is not error for the ALJ to side completely with Complainant.

Respondent argues that the hearing showed that Inspector Robert Markmann was very untruthful in his saying he always told Respondent what to fix, because Inspector Markmann did not talk with Respondent during the last eight inspections, thereby depriving Respondent of the knowledge of, and the opportunity to correct, the deficiencies. I reject this argument for a number of reasons.

First, Respondent does not cite to any Markmann statements in the transcript to support Respondent's allegation that this Markmann untruthfulness is in the record. Second, Inspector Markmann testified in great detail of his routine procedures, utilized in Respondent's facility as in all other licensed facilities, which procedures include that during inspections Inspector Markmann completes a USDA inspection report giving notice to the licensed facility owner of the cited operational deficiencies; that after inspections Inspector Markmann reviews with licensees his written inspection report and advises of non-compliant items; and that after the licensee signs the report, a copy is provided to the licensee (Tr. 14-16).

Third, Inspector Markmann specifically rebutted these charges in direct testimony, as follows:

BY MS. HANSBERRY:

Q. You've heard the testimony today Mr. Markmann and one thing that has been brought up was that the -- Mr. Zimmerman felt that he did not

always know what non-compliant items there were that were found on a given day and he said that sometimes you would -- sometimes you would say something was non-compliant and then come back and say the same thing was compliant. And my question is were you consistent in the way that you inspected the facility. Did you do it by the same standards and regulations every time?

[BY MR. MARKMANN]

A. I think we did our best over the course of the last years. When I was alone, Mr. Zimmerman would be right next to me and we would converse as we were walking through. Often times when I had a veterinarian with me, Mr. Zimmerman would kind of observe us unless we had questions. Then we'd call him to our attention but he wouldn't walk to us. It's very difficult to do an inspection when he is 20 or 30 paces behind you. So we would call him if we had questions on veterinary care. If the dog needed to be examined, I would ask Mr. Zimmerman if he could pull the dog out so that the veterinarian could examine the animal.

If we needed to take a photograph, Mr. Zimmerman would then turn the dog over to one of our veterinariansso that I could take a picture of the animal.

Q. So he accompanied you on every inspection and you're saying that if you found a veterinary violation you would call him over?

A. Yes. If there were structural things, we would point them out during the inspection. Sometimes if his sons were handy, they could correct some of the things right there. If there was any kind of serious thing like boards or nails, we could mention that as we were going through so he could easily fix them.

Q. Okay. He said or he testified that in the last quarter of '93 things changed and you did not communicate with him as much about what non-compliant items you found. Do you agree with that?

A. No, I do not.

Q. So you're saying you always did communicate the non-compliant items and let him know what you were finding?

licensee's questions. This routine was accorded Respondent in all eight of the inspections of which Respondent complains.

Fourth, in all but the first two of the ten inspections, Inspector Markmann was accompanied by a USDA veterinarian. Each of the veterinarians for each of the eight inspections testified that they discussed with Respondent the requirements of the Animal Welfare Act and the Regulations and Standards, usually at an exit interview. Dr. James O'Malley testified that he helped conduct the October 4 and November 18, 1993, and the January 3, February 16, and May 16, 1994, inspections, after each of which he gave Respondent an exit interview (Tr. 120-22, 166). Dr. Mary Geib testified that she helped conduct the June 22 and the August 11, 1994, inspections, and that she spent time with Respondent and his representatives discussing with them, and educating them, about the Animal Welfare Act and the Regulations and Standards (Tr. 195). Dr. Norma Jean Harlan testified to the same effect about the October 31, 1995, inspection (Tr. 209-10).

Therefore, even if Respondent was correct that Inspector Markmann did not talk with Respondent in the last eight inspections in the same manner as in the first two inspections, it would not affect the outcome of this proceeding.

Moreover, it is well settled that a violation corrected prior to a subsequent inspection does not exculpate Respondent for the original violation. Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Animal Welfare Act and the Regulations and Standards. This duty exists regardless of any correction date suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violations.[3]

Respondent argues on appeal that he did not receive a fair trial and even testified that Inspector Markmann told Respondent the ALJ would rule for the Department (Tr. 311). Also, Respondent states that he corrected everything that he could find and that he more than once could not find anything wrong. These statements are irrelevant, because they neither describe error by the ALJ, nor do they independently set forth questions of error. I find that Respondent received a fair hearing. In fact, the evidence is overwhelming that the violations occurred as

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[3]*In re John Walker*, 56 Agric. Dec. ___, slip op. at 21 (Mar. 21, 1997); *In re Mary Meyers*, 56 Agric. Dec. ___, slip op. at 31 (Mar. 13, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 106 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, *supra*, 51 Agric. Dec. at 1070.

A. Especially if he stood next to us. If he was down like I said if he was behind us and more observing at a distance, we would have to call him up when we had specific questions especially on veterinary care.

Q. Why was he behind you. Was he doing something else?

A. He might be more observing us. He may not be right there.

Q. But he had the opportunity to be with you and talk to you if he wanted to?

A. Yes.

Q. Okay. And he signed every report and you read every report to him?

A. Yes.

Q. In full?

A. Yes.

Q. You didn't skip over anything?

A. Not that I can recall.

Tr. 336-39.

Based upon this testimony, I find that Respondent was at fault for the Respondent's perceived difference between the first two and the last eight inspections. That is, Respondent by his own choice followed the inspector and the USDA veterinarian at a large distance, and that is the reason Mr. Markmann did not speak to Respondent in the same fashion as in the first two inspections. Nevertheless, Respondent's argument is irrelevant to the violations, because the inspector is not required to provide Respondent a running account of what must be corrected while the inspection is being conducted. Rather, the APHIS inspector and veterinarian routinely provide a licensee with copies of the Animal Care Inspection Report, APHIS Forms 7008 and 7100, and the APHIS personnel routinely conduct an exit interview to explain their findings and to answer a

charged; and Respondent produced no significant rebuttal evidence. Respondent, beyond bald denials, did not have answers to the charges.

Moreover, throughout this proceeding, Respondent complains that the problem is Inspector Markmann's zealotry. Respondent does not so much deny the violations as Respondent complains that these conditions were not even cited as violations by APHIS inspectors in the recent past. The fact that Respondent was not cited for conditions on his premises in the past is not a basis for dismissing the violations alleged in the Amended Complaint. The ALJ found that Respondent's continuing violations through 10 inspections by Inspector Markmann constituted a lack of good faith, and I agree.

Respondent understandably denies having some pens in his kennel smaller than the dogs housed in those kennels. Nonetheless, I find it obvious from the testimony, documentary evidence, and photographs that the overcrowding was so bad that it must have seemed to an observer that the dogs were larger than the pens. Thus, I conclude that the ALJ was merely repeating hyperbole when the ALJ expressed shock at the "testimony of overcrowding of animals in pens sometimes smaller than the animals themselves" (Initial Decision and Order at 22; CX 4, CX 5 at 8-9, CX 6 at 4, CX 9, CX 15 at 3-5, CX 16 at 1-2; Tr. 29-30, 39-40, 55-58, 76, 134-35). Of course, it being literally impossible for a dog to be larger than its pen, I have modified the ALJ's statement by adding the word "seemingly" in place of "sometimes." In any event, Respondent has provided no rebuttal evidence in response to the clearly overwhelming evidence of Respondent's repeated space requirements violations under section 3.6(a)(2)(xi) and (c) of the Standards (9 C.F.R. § 3.6(a)(2)(xi), (c)).

Respondent disputes the violation that he had "junk around the dog feed" in violation of section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)). However, Respondent constructively admits the violation by admitting that he put empty feedbags in a "nice pile," which Respondent contends used to be all right. Irrespective of prior inspections where Respondent may or may not have been cited for trash in the form of empty feedbags stored with dog feed, Respondent presents no probative evidence for dismissing this violation.

Respondent denies not having a program of adequate veterinary care, as required by section 2.40 of the Regulations (9 C.F.R. § 2.40). This argument is totally without merit. The medical condition of many of Respondent's animals shocked the ALJ. I concur with the ALJ after reviewing Complainant's witnesses' testimony and the photographs of dogs under Respondent's control. I find that Respondent's dogs were not given adequate veterinary care and that this violation was documented in great detail during all 10 inspections, covered in the Amended Complaint, by Inspector Robert Markmann, and Drs. O'Malley, Geib, and Harlan

(CX 3-CX 11, CX 14, CX 15 at 8-10, CX 16 at 4-5, CX 18 at 18-25, CX 19 at 1-3, CX 20 at 1-7, CX 21 at 6-9; Tr. 25, 33-36, 122-23, 141-49, 152-66, 196-98, 203, 210-13).

Moreover, I find that Respondent's evidence of veterinary care, which consists of billing invoices and short notes from veterinarians George F. Zimmerman and Melvyn G. Wenger of the Conestoga Animal Hospital, Inc., of Ephrata, Pennsylvania, does not suffice to show that an adequate veterinary care program was executed (RX 1-RX 6). Rather, I find that these records are anecdotal and show an *ad hoc* approach to veterinary care. Not only does Respondent's evidence fail to show compliance with the requirements of section 2.40 of the Regulations (9 C.F.R. § 2.40), the billing records document how little veterinary care was given to the 250 to 300 dogs at Respondent's kennel at any given time. Of the 32 months included in the billing records (August 3, 1992, to April 21, 1995, which I note is a period both beginning earlier and ending sooner than the pertinent time frame), veterinary care was charged to Respondent on approximately 62 days out of approximately 960 days. Approximately eight of the 62 entries indicate treatment of Respondent's cows, and another six apparently indicate a kennel check, with no treatment charged. Without well documented testimony from the treating veterinarian to show that an adequate level of care was actually provided, I cannot conclude that the veterinary care evidenced by Respondent's records (RX 6) is sufficient to rebut Complainant's evidence of Respondent's violations of section 2.40 of the Regulations (9 C.F.R. § 2.40). The ALJ's understanding at the hearing was that Respondent's exhibits merely showed "that Respondent did consult with the vets." (Tr. 303.)

Inspector Markmann found serious the fact that Respondent did not follow the veterinary plan on file. For instance, Respondent admitted that he would sometimes euthanize dogs with a gunshot to the head, rather than call the veterinarian as required by his plan. The following testimony by Inspector Markmann about his September 27, 1993, inspection describes the lack of adequate veterinary care and is representative of the level of veterinary care found on the other inspection dates as follows:

[BY MS. HANSBERRY]

Q. Can you explain the difference between the category 3 items and the category 4 items?

[BY MR. MARKMANN]

A. The category 3 items are newly identified items, category 4 are items that are previously cited that have not been corrected.

Q. Okay, and what were your category 4 items?

A. Veterinary care, Section 2.40. I mentioned that the following dogs were in need of veterinary care. I also considered this to be a direct violation. Outdoor enclosure housing a yellow lab tag 623, was noted to be lame in the right rear leg. The leg was swollen and the dog could not bear weight on the leg.

No treatment was recorded for [t]his dog. The owner indicated the dog was recently removed for fighting. The next dog I had a was a pug female, identified by Lancaster County tag 12162. I found the dog along the north row with two other dogs present.

The pug was in a moribund condition. [Sh]e had two large wounds, approximately one and a half by two inches in diameter on both inner front legs. The wounds were deep and infected areas present with greenish discoloration. No medical records were present on this dog.

I approached Mr. Zimmerman on the condition of this dog and Mr. Zimmerman took the dog away and placed the dog in the wood shed trailer.

I asked Mr. Zimmerman how he was going to handle this dog and Mr. Zimmerman said he was going to put the dog to sleep. I asked the owner what products he had available and Mr. Zimmerman produced a ten millimeter [sic] bottle of ketoset from the house.

I further questioned the use of ketoset and whether the product was to be given IV or IM, intravenous, or intramuscle, but Mr. Zimmerman was not sure at first, but later said IV.

I also asked if ketoset was going to be used in combination with another product to produce euthanasia and Mr. Zimmerman went into the house and returned with a bottle or [sic] Prom Ace, also referred to as Ace Promozine, the tranquilizer.

I asked about dosage levels and Mr. Zimmerman claimed Dr. Stevenson wrote levels down on paper. I further discussed with Mr. Zimmerman that his program veterinary care dated 4-30-91 listed Dr. W[e]nger as his attending veterinarian and the program indicated that the veterinarian would euthanize dogs using IV euthanasia.

Mr. Zimmerman went on to say that he should just shoot the dog in the head, but that I was present. I suggested Mr. Zimmerman call Dr. W[e]nger to seek his advice. The dog was properly brought to Dr. W[e]nger's office, after discussing the condition of the dog, and the dog was euthanized.

I also wrote up dog number 112. The dog was found dead on the floor in one of the sheds, the David Jr. shed. No record of treatment was present for this dog. I mentioned that the owner needed to maintain written medical records on dogs being treated.

The medical records should indicate which dogs are under treatment, observations or signs, significant findings of physical exams, working diagnosis, dates of treatments administered, date the condition was resolved.

In addition, I mentioned that the daily observations of all the dogs on premises to assess their health and well being must be conducted and a mechanism of direct and frequent communication with the attending vet must be done to discuss problems with affected animals.

I also questioned Mr. Zimmerman on dog tag 395, which was cited on the August 3rd inspection. It was a cocker spaniel that had the teary eye with the pus. Mr. Zimmerman informed me that he put the dog to sleep on August 4th.

I also mentioned that dog tag 235, a cocker spaniel that previously had overgrown nails, and they were trimmed. I mentioned to the owner that the program veterinary care on file does not list the licensee to euthanize these dogs until the licensee is trained and approved by the attending veterinarian, he must not euthanize dogs other than the method described on his program veterinary care which was on file.

Q. When you talk about the program for veterinary care on file, where on file is it and what is that?

A. Back then, you were required to have a program of veterinary care. There was a time, '91 and '92, those programs would be on file in our office. Since that time period, we now require the licensee to have that program on file at his home.

Q. So this was in '93, so was it on file with him?

A. It was in both places, it was in the office and it was on file with him.

Q. Okay, and he was required to follow that program and you're saying that in these violations, he wasn't following the program of veterinary care?

A. Yes, the program mentioned that Dr. W[e]nger would euthanize his animals and the owner mentioned that he had euthanized cocker number 395.

Q. Without the attending veterinarian?

A. Yes. . . .

Tr. 32-36

The record demonstrates that Respondent merely reacted to sick or injured dogs on an *ad hoc* basis, rather than following the veterinary plan on file.

Respondent disagrees that he violated section 3.12 of the Standards (9 C.F.R. § 3.12) by not having enough employees at work during the November 18, 1993, inspection to provide the animals with the level of care required by 9 C.F.R. part 3, subpart A. Respondent asserts in his appeal that he had seven people working on the farm (Respondent's Appeal at 2). However, Respondent's testimony was that there were a total of six family members--Respondent, his wife, and four children--working the farm, the cows, the feed business, and the kennels (Tr. 322). Respondent admitted that these family members worked the kennels part time (Tr. 322-23). Therefore, I find that Respondent's argument that there were enough employees, as charged, during the November 18, 1993, inspection to be without merit, and it is hereby rejected.

Respondent's final argument is that Respondent was treated unfairly by Inspector Markmann, allegedly because a friend was told by Inspector Markmann that he (Markmann) was going to put Respondent out of business. This argument is rejected for a number of reasons, as explained below.

Reliable hearsay is routinely admissible in federal administrative hearings and can be substantial evidence as long as it is reliable, probative, and meets the test of fundamental fairness,[4] and responsible hearsay has long been admitted in the Department's administrative proceedings.[5] However, Respondent gives no details of the alleged hearsay, other than Respondent's testimony that a breeder dealer told Respondent in the fall of 1993, that Markmann told her that he (Markmann) was going to build a case with the biggest citation ever against Respondent (Tr. 310). I am not persuaded that Respondent's alleged scenario is true. Inspector Markmann denied it (Tr. 342). However, even if Respondent's scenario is accepted as true, and Inspector Markmann was heard to say that he sought to put Respondent out of business, it would not change the outcome of this proceeding. Inspector Markmann does not have the power of the Secretary of Agriculture to decide who remains licensed, but merely provides evidence of alleged violations. Even if the inspector is shown to have said that he wished to put Respondent out of business (which is not shown to be the case in this proceeding), such a bias being allowed by the ALJ is not necessarily a reversible error, and it certainly does not, by itself, exculpate Respondent for violations of the Animal Welfare Act and the Regulations and Standards for which there is a preponderance of the evidence.

Although not to the level of an argument, Respondent raises three points apparently designed to mitigate the violations. One is that Respondent's beliefs preclude the use of an attorney, the second is that Respondent's beliefs include

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[4]*See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981).

[5]*In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 6 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re John T. Gray* (Decision as to Glen Edward Cole) 55 Agric. Dec. 853, 871 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822-23 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

getting along with the authorities over him, and the third is that no interpreter was provided to Respondent at the hearing. These points are neither persuasive nor ameliorating and are rejected.

The record reveals that Respondent retained counsel early in this matter, and Respondent's counsel, Christopher M. Patterson, Esq., of Gray, Miller, Patterson & Cody, of Lancaster, Pennsylvania, prepared Respondent's Answer to the original Complaint. Further, Respondent states in a letter which he filed January 14, 1997, that "if we have to have another hearing[,] the community is going to have a lawyer there as they did not think it was a fair trial." This use of counsel and intention to use counsel in any future hearing does not square with Respondent's stated disbelief in the use of lawyers. Respondent may appear *pro se* or with counsel (7 C.F.R. § 1.141(c)), and Respondent has proceeded both ways in this proceeding. This situation, therefore, is not one for mitigation.

Similarly, I am unable to reconcile Respondent's statements that Respondent abides by the "rules of the government" (Respondent's letter filed December 21, 1995), that Respondent was taught always "to respect [his] authorities" (Respondent's letter filed August 12, 1996), and that Respondent was "taught to work with [the] authorit[ies] over [him]" (Respondent's letter filed January 14, 1997), with Respondent's record of non-compliance with the Animal Welfare Act and the Regulations and Standards as exposed by the 10 inspections of Respondent's kennel.

Finally, Respondent complains that no interpreter was provided at the hearing (Respondent's letter filed January 14, 1997). Respondent's complaint comes 9 months after the hearing, 6 months after the Initial Decision and Order was filed, and 5 months after Respondent's appeal petition was due. Respondent should have raised the issue of his need to obtain an interpreter prior to the hearing. Further, it is well settled that new issues cannot be raised for the first time on appeal to the Judicial Officer.[6] Respondent's failure to raise the issue of his need to obtain an

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[6] *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, No. 95-6778 (11th Cir. May 29, 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th Cir. Mar. 27, 1997) (unpublished); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Petition for Reconsideration), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re*

interpreter until after the time for appeal is too late. Moreover, the record establishes that Respondent adequately understands English and speaks and writes English fluently. Thus, I find that Respondent's complaint that no interpreter was present at the hearing to be without merit.

Sanction

As to the appropriate sanction, section 19 of the Animal Welfare Act provides:

§ 2149. Violations by licensees

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

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

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates

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Conesus Milk Producers, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385 (9th Cir. 1989), 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(a), (b).

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

[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 ALJ properly considered the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and determined that Respondent has a business of significant size, and there was evidence that Respondent had a large and profitable business (Tr. 19-20, 332-33). In October 1995, Respondent started construction of a new kennel facility (Tr. 21). Thus, I conclude that Respondent operated a large kennel facility and the civil penalty requested by Complainant would be appropriate.

Although prior to August 3, 1993, Respondent had only one minor violation (Tr. 305-07) in approximately 19 years as a licensee under the Animal Welfare Act, this fact is offset by the gravity and the number of violations proven in this proceeding.

There is no evidence that Respondent deliberately harmed his animals. However, Respondent repeatedly and willfully violated the Animal Welfare Act and the Regulations and Standards. Many of Respondent's violations are serious and constitute a failure to humanely treat Respondent's animals. I find that Respondent did not act in good faith to correct these violations. Respondent has been a licensed dealer for a long time, and a licensed dealer at all times pertinent

to this proceeding. Respondent admitted in the Answer that when Respondent became licensed, and annually thereafter, Respondent received copies of the Animal Welfare Act and the Regulations and Standards, and agreed in writing to comply with them (Answer ¶ I(C)).

An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. United States Dep't of Agric.*, *supra*, 925 F.2d at 1105; *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Volpe Vito, Inc.*, *supra*, 56 Agric. Dec. ___, slip op. at 108-09 (Jan. 13, 1997); *In re Big Bear Farm, Inc.*, *supra*, 55 Agric. Dec. at 138; *In re Julian J. Toney*, *supra*, 54 Agric. Dec. at 971; *In re Zoological Consortium of Maryland, Inc.*, *supra*, 47 Agric. Dec. at 1284; *In re David Sabo*, *supra*, 47 Agric. Dec. at 554.[7] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973). ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent.") *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

Even though Complainant does not have to prove willfulness, because Respondent received written warnings concerning the violations and opportunities to correct the deficiencies, Respondent's willfulness is relevant to the gravity of Respondent's violations (see 5 U.S.C. § 558(c)(1)-(2)).

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[7]The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, many of Respondent's violations would still be found willful.

Complainant could have sought $2,500 for each violation.[8] In light of the amount that Complainant could have requested, the number of violations, the number of repeated violations, and the serious nature of many of the violations, the requested sanction of a civil penalty of $51,250, and suspension of Respondent's Animal Welfare Act license, is appropriate. Finally, I believe that Respondent should be ordered to cease and desist from further violations of the Animal Welfare Act and the Regulations and Standards.

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

Order

PARAGRAPH I

Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. failing to maintain complete records showing the acquisition, disposition, and identification of animals;

b. failing to maintain a current, written program of veterinary care under the supervision of a veterinarian;

c. failing to provide veterinary care to animals as needed;

d. failing to provide a suitable method for the removal and disposal of animal wastes from primary enclosures;

e. failing to provide animals with shelter from inclement weather;

f. failing to maintain primary enclosures which are structurally sound and in good repair and are free of any sharp points or edges which could injure animals;

g. failing to provide enclosures for animals that are constructed and maintained so as to provide sufficient space to allow each animal to turn about freely and to easily stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner;

h. failing to have housing facilities for dogs physically separated from other businesses;

i. failing to store food so as to protect it against spoilage, contamination, and vermin infestation;

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[8]I found that Complainant proved its case by a preponderance of the evidence with respect to 75 violations alleged in the Complaint. Complainant could have sought to have assessed a maximum civil penalty of $2,500 for each of these 75 violations, for a total civil penalty of $187,500.

j. failing to clean primary enclosures for animals, as required;

k. failing to keep food and water receptacles for animals clean and sanitized, as required;

l. failing to have a sufficient number of employees to maintain the prescribed level of husbandry practices and care;

m. failing to ensure that the floors, walls, and ceilings of indoor housing facilities and other surfaces coming in contact with animals are impervious to moisture;

n. failing to handle animals in a manner which does not cause trauma, behavioral stress, physical harm, and unnecessary discomfort;

o. failing to ensure that housing facilities for dogs and areas used for storing animal food are free of an accumulation of trash, waste material, junk, and other discarded materials;

p. failing to provide each dog housed in an enclosure with an adequate amount of floor space;

q. failing to provide indoor housing facilities for dogs which are sufficiently ventilated and lighted well enough to provide for their health and well-being and to allow routine inspection and cleaning of the facility, and observation of the dogs;

r. failing to individually identify all dogs on the premises by means of an identification tag or a legible tattoo; and

s. failing to maintain a means of direct and frequent communication with an attending veterinarian so as to ensure that timely and accurate information affecting an animal's health and well-being is accurately conveyed to the attending veterinarian.

Paragraph I of this Order shall become effective on the day after service of this Order on Respondent.

PARAGRAPH II

Respondent David M. Zimmerman is assessed a civil penalty of $51,250 which shall be paid by certified check or money order made payable to the Treasurer of the United States and forwarded within 60 days after service of this Order on Respondent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, D.C. 20250-1417

The certified check or money order shall indicate that payment is in reference to AWA Docket No. 94-0015.

PARAGRAPH III

Respondent's Animal Welfare Act license is hereby suspended, effective on the 30th day after service of this Order on Respondent, for a period of 60 days, and continuing thereafter until Respondent demonstrates to APHIS that he is in full compliance with the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and this Order, including payment of the civil penalty assessed in this Order. It is Respondent's responsibility to contact APHIS to arrange for an inspection of his facility in order to demonstrate that he is in compliance with the Animal Welfare Act and the Regulations and Standards. When Respondent demonstrates to APHIS that he has satisfied the conditions in this paragraph of this Order, a supplemental order will be issued in this proceeding upon the motion of Complainant, terminating the suspension of Respondent's Animal Welfare Act license.

FEDERAL RESOURCES CONSERVATION and SHORTAGE RELIEF ACT

DEPARTMENTAL DECISION

In re: STIMSON LUMBER COMPANY.
FSSAA Docket No. 97-0001.
Decision and Order filed March 18, 1997.

Sourcing area application— Violation of FRCSRA irrelevant— ALJ's modification of the rules of practice— Manufacturing facilities — ALJ lacks authority to transfer proceeding to district court — Judicial Officer must consider the record.

The Judicial Officer affirmed the Initial Decision and Order by Chief Judge Palmer (Chief ALJ) approving the Applicant's proposed sourcing area. The sourcing area is geographically and economically separate from any geographic area from which the Applicant harvests for export timber originating from private lands. The evidence adequately supports the Chief ALJ's Findings and Conclusions. Alleged violations of the Federal Resources Conservation and Shortage Relief Act of 1990 (FRCSRA) by the Applicant are not relevant to this proceeding. Generally, the ALJs and the Judicial Officer are bound by the Rules of Practice, but they may modify the Rules of Practice when modification is necessary to comply with statutory requirements, such as the deadline in section 490(c)(3) of the FRCSRA. Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1997, of the Omnibus Consolidated Appropriations Act, 1997, does not prohibit consideration of applications for new sourcing areas. The ALJs have no authority to transfer cases to district courts of the United States or to consolidate a case with a case in a district court of the United States. The review by the Forest Service was adequate, but even if it were not, that is irrelevant as long as a preponderance of the evidence supports the Applicant. There was no failure to comply with the 4-month statutory deadline, but even if there were, it would have no effect on granting the application. The Judicial Officer must review the record prior to issuing a decision. Sourcing area applications can be filed after December 20, 1990.

Jim Kauble, Portland, Oregon. Forest Service, United States Department of Agriculture.
Peter H. Koehler, Portland, Oregon, for Applicant.
Jeffrey D. Neumeyer, Boise, Idaho, for Boise Cascade Corporation.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Stimson Lumber Company instituted this proceeding pursuant to the Federal Resources Conservation and Shortage Relief Act of 1990, as amended (16 U.S.C. §§ 620-620j) (hereinafter FRCSRA); the regulations promulgated pursuant to the FRCSRA (36 C.F.R. §§ 223.185-.203) (hereinafter the Regulations); and the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (7 C.F.R. §§ 1.410-.429) (hereinafter Rules of

Practice), by filing an application for a sourcing area for its Arden, Washington, manufacturing facility, on November 18, 1996.

The Regional Forester, Region 6, completed publication of a notice of Stimson Lumber Company's sourcing area application in newspapers of general circulation in the proposed sourcing area on January 15, 1997. Comments were received until February 14, 1997, and recommendations and requests for a hearing were received until February 18, 1997. Fourteen comments were received, with 12 of the commenters opposed to the sourcing area. Crown Pacific Limited Partnership and Rocky Mountain Log Homes commented favorably. The Regional Forester, Region 6, submitted a recommendation that Stimson Lumber Company's application for a sourcing area for its Arden, Washington, manufacturing facility, be approved.

Pursuant to a request by Boise Cascade Corporation, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) conducted a hearing on March 5, 1997, in Portland, Oregon. Peter H. Koehler, Portland, Oregon, represented Stimson Lumber Company; Jeffrey D. Neumeyer, Associate General Counsel, Boise Cascade Corporation, Boise, Idaho, represented Boise Cascade Corporation; and Jim Kauble, Deputy Regional Attorney, Office of the General Counsel, United States Department of Agriculture, Portland, Oregon, represented the Regional Forester, Region 6, Forest Service, United States Department of Agriculture.

The Chief ALJ filed an Initial Decision and Order on March 7, 1997, in which the Chief ALJ approved Stimson Lumber Company's November 18, 1996, application for a sourcing area (Initial Decision and Order at 6). The Chief ALJ provided that, in order to comply with the statutory deadline in section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)),[1] any party appealing the Initial Decision and Order must file the appeal no later than March 12, 1997 (Initial Decision and Order at 6). On March 12, 1997, Boise Cascade Corporation appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to

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[1]Section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)) provides that the "Secretary concerned shall, on the record and after an opportunity for a hearing, not later than 4 months after receipt of the application for a sourcing area, either approve or disapprove the application." Stimson Lumber Company's application for a sourcing area, which is the subject of this proceeding, was filed with the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, on November 18, 1996. Therefore, in order to comply with section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)), the Secretary of Agriculture must approve or disapprove Stimson Lumber Company's sourcing area application no later than March 18, 1997. This Decision and Order is issued March 18, 1997, and is issued in accordance with the statutory deadline in section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)).

5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On March 13, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Chief ALJ's Initial Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

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

. . . .

Findings of Fact

1. Stimson Lumber Company is located at [redacted] [redacted] Oregon [redacted] [(Stimson Lumber Company's Application (hereinafter Application) at 1)].

2. Stimson [Lumber Company] has a previously approved sourcing area for its Bonner and Libby manufacturing facilities in Montana [(Application at 1; Tr. 65, 86, 88, 162-63)].

3. Stimson [Lumber Company] recently purchased the Arden Sawmill and timberlands, located in northeast Washington and northern Idaho, from Plum Creek Timber Company [Limited Partnership] and Plum Creek Manufacturing [Limited Partnership (Tr. 49-50)]. The Arden sawmill is located in northeast Washington, east of the crest of the Cascade mountain range [(Application Exhibit A)]. The timberlands' management offices are located in Newport, Washington [(Application at 1)].

4. Stimson [Lumber Company's] wholly owned subsidiary, Miller Redwood Company, has, within the last 12 months, sold logs for export from its own lands west of the crest of the Cascade mountain range (located in Del Norte County, California) [(Tr. 22-24)].

5. The Arden sawmill is located within Stimson [Lumber Company's] previously approved sourcing area, and the boundaries of the proposed sourcing

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

area are identical to those of the [previously] approved [sourcing] area [(Tr. 65, 86, 88, 162-63)].

6. The proposed sourcing area is described as follows:

> All lands in the states of Montana, Idaho, and Wyoming.
>
> All lands located east of the crest of the Cascade Mountains in the State of Washington.
>
> A northeast portion of the State of Oregon bounded on the south by a line running generally west from the southeast corner of Baker County along the southern most boundaries of the following counties: Baker, Grant, Wheeler, and Jefferson, to the common point between the following counties: Jefferson, Linn and Deschutes, thence northerly along the crest of the Cascade Mountains to the Columbia River.

[Application Exhibit B].

7. A map was enclosed with [Stimson Lumber Company's sourcing area] application which [is] of sufficient scale and detail to clearly show [Stimson Lumber Company's proposed] sourcing area boundary and the locations of the timber manufacturing facilities owned or operated by [Stimson Lumber Company] within the proposed sourcing area where it intends to process timber originating from federal lands [(Application Exhibit A)].

8. The proposed sourcing area boundaries follow appropriate natural [and] cultural features[, as shown on the map attached to this Decision and Order as Appendix A. The proposed sourcing area boundaries do not follow] random property lines [(Application Exhibit A)]. The boundaries include both private and federal lands from which [Stimson Lumber Company] intends to acquire unprocessed timber for its [Arden, Washington, manufacturing facility].

9. The application include[s] a list of five persons with timber manufacturing facilities in the same vicinity [as the Arden, Washington, manufacturing facility (Application Exhibit C; Tr. 171). At the request of the Regional Forester, Region 6, Stimson Lumber Company] supplemented [its application and in this supplement identified 16 additional manufacturers in the vicinity of the Arden, Washington, manufacturing facility (Letter dated January 8, 1997, from Jeffrey S. Cronn to Mr. Bob Williams, Regional Forester, Region 6; Regional Forester's Review and Recommendation, filed February 26, 1997 (hereinafter Regional Forester's Recommendation) at 2]. . . .

10. None of the states in the proposed sourcing area have large amounts of commercial timberlands [(Regional Forester's Recommendation at 3)]. The Regional Forester was unable to obtain information on the sale of private timber in the relevant states [(Regional Forester's Recommendation at 3)].

11. [Stimson Lumber Company's] application [is] printed on company letterhead, include[s] the required certification statement, and [is] properly signed and notarized [(Application)].

12. The proposed sourcing area is geographically and economically separate from private lands from which [Stimson Lumber Company] harvests or acquires private timber for export [(Tr. 66-71)]. The area from which Stimson [Lumber Company] exports [logs] is on the west side of the Cascade Mountain Range in northwestern California [(Application Exhibit A)]. The proposed sourcing area is entirely east of the Cascade Mountain Range, which runs approximately north-south through the western part of California, Oregon, and Washington [(Stimson Lumber Company's Exhibit 1)].

13. Purchase patterns of companies in Oregon and Washington generally do not flow from west to east [(Regional Forester's Recommendation at 3)].

14. Stimson [Lumber Company's] purchasing patterns are consistent with other area timber-using facilities [(Regional Forester's Recommendation at 4)].

Conclusions of Law

1. The sourcing area that is the subject of the application is geographically and economically separate from any geographic area from which Stimson [Lumber Company] harvests for export any unprocessed timber originating from private [l]ands.

2. Stimson [Lumber Company] has satisfied all of the procedural and technical requirements of the [FRCSRA] and the [Regulations].

Discussion

[Section 490(c)(3) of the FRCSRA] provides that the Secretary may approve a sourcing area application only if the Secretary determines that:

> [T]he area that is the subject of the application, in which the timber manufacturing facilities at which the applicant desires to process timber originating from Federal lands are located, is geographically and economically separate from any geographic area from which that person harvests for export any unprocessed timber originating from private lands. In making a determination referred to in this paragraph, the Secretary

concerned shall consider equally the timber purchasing patterns, on private and Federal lands, of the applicant as well as other persons in the same local vicinity as the applicant, and the relative similarity of such purchasing patterns.

16 U.S.C. § 620b(c)(3).

The Regional Forester reviewed the sourcing area application and the purchasing patterns of Stimson Lumber [Company] and its competitors, and determined that the requirements of the [FRCSRA] were met [(Regional Forester's Recommendation at 4; Tr. 150-53)]. There was no evidence introduced which would warrant a finding in contravention of the Regional Forester's determinations.

The boundaries of the sourcing area proposed in the [sourcing area] application[, which is the subject of this proceeding,] are identical to [the boundaries of a] previously approved [sourcing area] for the Libby and Bonner manufacturing facilities in *In re Stimson Lumber Company*, [54 Agric. Dec. 155 (1995) (Tr. 65, 86, 88, 162-63)]. In that case, it was determined that the Cascade Mountain Range was an appropriate western boundary for the sourcing area, as lumber is rarely moved from west to east. [In the instant proceeding,] Boise Cascade [Corporation] did introduce evidence through Ernie Dunlap, a manager of motor carrier services, that it is physically feasible to move [logs] in the north[east] direction from the Miller Redwood [Company] export area to the Arden[, Washington, manufacturing facility (Tr. 105-06, 118-20)]. He could not, however, testify as to the economic ramifications of transporting lumber in that direction [(Tr. 125-28)].

In addition to the infrequency in the lumber industry of transporting lumber from west to east, the timber exported by Miller Redwood [Company] is not of the same type as that processed by the Arden[, Washington, manufacturing facility]. Miller Redwood [Company] exports exclusively Douglas Fir logs [(Tr. 33-34)]. The Arden manufacturing facility is a board mill which produces kiln dried pine, spruce, and cedar boards [(Tr. 60-61)].

There is, therefore, nothing to indicate that the proposed sourcing area for [Stimson Lumber Company's] Arden[, Washington, manufacturing facility,] is not geographically and economically distinct from the Miller Redwood [Company] export area. The recommendation of the Regional Forester should be followed, and the sourcing area approved.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Boise Cascade Corporation raises 11 issues in Boise Cascade Corporation's Appeal Petition and Brief (hereinafter Boise Cascade's Appeal Petition). On March 17, 1997, Small Business Timber Council filed a response to Boise Cascade's Appeal Petition in accordance with section 1.426(b) of the Rules of Practice (7 C.F.R. § 1.426(b)) in which Small Business Timber Council stated that it concurs with the points, objections, and authorities cited in Boise Cascade's Appeal Petition and requests that the Initial Decision and Order be reversed.

First, Boise Cascade Corporation contends that Stimson Lumber Company's application for a sourcing area must be denied because Stimson Lumber Company has violated and continues to violate the FRCSRA, as follows:

> 1. The Administrative Law Judge failed to consider the ramifications of Stimson Lumber's federal timber purchases prior to and while its application was pending.
>
> . . . .
>
> Stimson Lumber's application should have been disapproved based on its federal timber purchases prior to and while its application was pending which were in violation of the Forest Resources Conservation and Shortage Relief Act of 1990.
>
> . . . .
>
> 2. The Administrative Law Judge failed to consider the ramifications of Stimson Lumber's exports of unprocessed timber.
>
> . . . .
>
> Stimson Lumber's application should have been disapproved due to its export activities. Stimson Lumber violated the [FRCSRA] by exporting unprocessed timber within an approved and existing sourcing area.

Boise Cascade's Appeal Petition at 1, 6 (emphasis in original).

I disagree with Boise Cascade's contention that Stimson Lumber Company's application must be denied for violations of the FRCSRA. The FRCSRA does not contain any provision for disapproving a sourcing area application based upon an applicant's violation of the FRCSRA. Moreover, the FRCSRA has separate

procedures for violations. An administrative disciplinary action may be brought by the Secretary to assess a civil penalty of not more than $500,000 for each violation or 3 times the gross value of the unprocessed timber involved in the violation, whichever amount is greater (16 U.S.C. § 620d(c)(1)). A violator may also be debarred from entry into any contract for the purchase of unprocessed timber from Federal lands for a period of not more than 5 years (16 U.S.C. § 620d(d)(1)). Contracts with a violator may also be canceled (16 U.S.C. § 620d(d)(2)). However, nothing in the FRCSRA or the Regulations requires that a sourcing area application be disapproved because of possible violations of the FRCSRA by an applicant. *In re Stimson Lumber Company, supra*, 54 Agric. Dec. 161-62.

Second, Boise Cascade Corporation contends that:

> 3. The Administrative Law Judge erred in failing to disapprove the application due to lack of compliance with the statutory and regulatory time deadlines.
>
> . . . .
>
> The [FRCSRA] requires a decision on any sourcing area application to be made within 4 months. Clearly, the application process will not be completed within the required time-frame as the four-month period will expire before the appeal process ends. The application was dated November 15, 1996, and apparently filed on November 18, 1996. The Decision and Order states that it will become final 21 calendar days after service of the applicant (which couldn't occur before March 7, 1997, the date of the Order and Decision). Further, with the time frames allowed for Appeal and Response to Appeal, as set out in 7 C.F.R. § 1.426, the four-month time frame will have expired. There is simply no allowance to circumvent the four-month statutory deadline, and the application must be disapproved.

Boise Cascade's Appeal Petition at 8-9 (footnote omitted).

Section 490(c)(3) of the FRCSRA provides:

> **§ 620b. Limitations on substitution of unprocessed Federal timber for unprocessed timber exported from private lands**
>
> . . . .

(c) Approval of sourcing areas

. . . .

(3) Grant of approval

For each applicant, the Secretary concerned shall, on the record and after an opportunity for a hearing, not later than 4 months after receipt of the application for a sourcing area, either approve or disapprove the application. . . .

16 U.S.C. § 620b(c)(3).

The Chief ALJ provides in the Initial Decision and Order that:

This decision and order shall become effective without further proceedings, 21 calendar days after service upon the applicant, unless there is an appeal to the Judicial Officer, by a party to the proceeding.

Initial Decision and Order at 6.

The Chief ALJ's Initial Decision and Order was served on Stimson Lumber Company on March 7, 1997. Thus, under its terms, the Initial Decision and Order would have become effective on March 28, 1997, 10 days after the statutory deadline. However, the issue of the effective date of the Initial Decision and Order is moot because Boise Cascade Corporation appealed the Initial Decision and Order to the Judicial Officer, and thus the Initial Decision and Order will not become effective on March 28, 1997, or at any other time. Instead, this Decision and Order is effective on March 18, 1997, in accordance with the statutory deadline in section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)) for the approval or disapproval of sourcing area applications.

Section 1.426(a) of the Rules of Practice provides:

§ 1.426 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 10 calendar 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 deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.426(a).

The Chief ALJ did not provide the parties with the time for filing an appeal, as set forth in the Rules of Practice. Instead, the Chief ALJ provides in the Initial Decision and Order served on the parties on March 7, 1997, that:

> . . . In order to comply with the statutory deadline, an appeal must be filed no later than March 12, 1997; it may be filed by telefax directed to the Hearing Clerk at (202)720-9776.

Initial Decision and Order at 6.

If the Chief ALJ had given the parties 10 calendar days in which to file appeals, a final agency decision could not have been issued by March 18, 1997, the date that Stimson Lumber Company's application for a sourcing area must be approved or disapproved, as required by section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)). The Chief ALJ's Initial Decision and Order provided the parties with actual notice that the Chief ALJ had modified the Rules of Practice in this proceeding by ordering that any appeal must be filed no later than March 12, 1997, rather than within 10 calendar days after service of the Initial Decision and Order. While generally administrative law judges and the judicial officer are bound by rules of practice,[3] they may modify rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)). The Chief ALJ did not err when he modified the Rules of Practice in order to meet a statutory deadline.

Boise Cascade Corporation contends that the application must be disapproved because of the failure to comply with the 4-month deadline (16 U.S.C. § 620b(c)(3)). This Decision and Order is issued on March 18, 1997, within 4 months after the application in this proceeding was filed, in accordance with section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)) and section 1.426(d) of the Rules of Practice (7 C.F.R. § 1.426(d)). However, even if the deadline had not been met, the FRCSRA does not state that failure to comply with the 4-month deadline is fatal to the approval of a sourcing area application. To construe the

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[3]*See In re Far West Meats*, 55 Agric. Dec. ___, slip op. at 4 n.4 (Sept. 27, 1996) (Ruling on Certified Question) (the Judicial Officer and the ALJ are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (the Judicial Officer and the ALJ are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (the Judicial Officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders).

FRCSRA as requiring such a result would be an unreasonable construction which would defeat the purpose of the statutory deadline, which is speed, rather than delay. That is, if Boise Cascade Corporation's argument were sound, whenever the statutory deadline could not be met, a new proceeding would have to be instituted, adding further delay. Such an unreasonable intent cannot be attributed to Congress. The Secretary of Agriculture and Congress, in their oversight capacity, can deal with any failure to comply with the statutory deadline. But such a failure has no effect on the approval of a sourcing area application. *In re Stimson Lumber Company, supra*, 54 Agric. Dec. at 164-65.

Third, Boise Cascade Corporation contends that:

> 4. Stimson Lumber's application for a new sourcing area should have been dismissed or stayed.
>
> . . . .
>
> On January 25, 1997, Boise Cascade moved to dismiss or stay FSSAA Docket No. 97-00[0]1. That motion was improperly denied by the Administrative Law Judge on February 19, 1997. Section 319 [sic] of the Department of the Interior and Related Agencies Appropriations Act, 1997, of the Omnibus Consolidated Appropriations Act, 1997, Public Law 104-28, [sic] 110 Stat. 3009, September 30, 1996, has prohibited funding for review of sourcing areas. . . . Congress also cut off all funds to enforce or implement the sourcing area regulations at 36 CFR part 223 promulgated on September 8, 1995. . . . In light of the funding prohibitions, this application should have been dismissed since the forest service is prohibited from performing the necessary review. Alternatively, the application should have been stayed until funds for review of sourcing areas are appropriated.

Boise Cascade's Appeal Petition at 9-10.

As an initial matter, Boise Cascade Corporation's citation to "[s]ection 319 [sic] of the Department of the Interior and Related Agencies Appropriations Act, 1997, of the Omnibus Consolidated Appropriations Act, 1997, Public Law 104-28, [sic] 110 Stat. 3009, September 30, 1996" appears to be incorrect. However, section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1997, of the Omnibus Consolidated Appropriations Act, 1997 (hereinafter Omnibus Consolidated Appropriations Act, 1997), provides that:

SEC. 318. No funds appropriated under this or any other Act shall be used to review or modify sourcing areas previously approved under section 490(c)(3) of the Forest Resources Conservation and Shortage Relief Act of 1990 (Public Law 101-382) or to enforce or implement Federal regulations 36 CFR part 223 promulgated on September 8, 1995. The regulations and interim rules in effect prior to September 8, 1995 (36 CFR 223.48, 36 CFR 223.87, 36 CFR 223 subpart D, 36 CFR 223 subpart F, and 36 CFR 261.6) shall remain in effect. The Secretary of Agriculture or the Secretary of the Interior shall not adopt any policies concerning Public Law 101-382 or existing regulations that would restrain domestic transportation or processing of timber from private lands or impose additional accountability requirements on any timber. . . .

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 318, 110 Stat. 3009 (1996).

Section 318 of the Omnibus Consolidated Appropriations Act, 1997, prohibits the use of appropriated funds to review or modify sourcing areas previously approved under section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)). The boundaries of the sourcing area, which is the subject of this proceeding, are identical to the boundaries of the sourcing area which was the subject of and approved in *In re Stimson Lumber Co.*, 54 Agric. Dec. 155 (1995) (Tr. 65, 86, 88, 162-63). However, sourcing area applications in proceedings under the FRCSRA are for sourcing areas for specified manufacturing facilities.[4] The manufacturing facilities, which were the subject of *In re Stimson Lumber Company*, 54 Agric. Dec. 155 (1995), are manufacturing facilities located in Bonner, Montana, and

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[4]*See* 16 U.S.C. § 620b(c)(2)(B) (the applicant must provide information regarding the location of each *timber manufacturing facility* owned or operated by such person within the proposed sourcing area boundaries at which the applicant proposes to process timber originating from Federal lands); 16 U.S.C. § 620(c)(3) (the Secretary concerned may approve an application only if the Secretary determines that the area that is the subject of the application, in which the *timber manufacturing facilities* at which the applicant desires to process timber originating from Federal lands are located, is geographically and economically separate from any geographic area from which that person harvests for export any unprocessed timber originating from private lands); 36 C.F.R. § 223.186 (sourcing area means the geographic *area approved by the Secretary which includes a person's timber manufacturing facility* and the private and Federal lands from which the person acquires or intends to acquire unprocessed timber *to supply such manufacturing facility*); 36 C.F.R. § 190(a) (*a person who owns or operates a manufacturing facility* and who exports unprocessed timber originating from private lands *may apply for a sourcing area; a person who intends to acquire or become affiliated with a manufacturing facility* that processes Federal timber and who is an exporter *may apply for a sourcing area*).

Libby, Montana. The application for a sourcing area in this proceeding is for Stimson Lumber Company's manufacturing facility in Arden, Washington, which has not previously been approved under section 490(c)(3) of the FRCSRA (16 U.S.C. § 620b(c)(3)) (Tr. 75). Therefore, this is a proceeding concerning an application for a new sourcing area, not a proceeding to review or modify a sourcing area previously approved under section 490(c)(3) of the FRCSRA, and the prohibition in section 318 of the Omnibus Consolidated Appropriations Act, 1997, on the use of funds *to review or modify sourcing areas previously approved*, is not applicable to this proceeding.

Fourth, Boise Cascade Corporation contends:

> 5. The Administrative Law Judge erred in failing to grant Boise Cascade's motion to transfer and/or consolidate FSSAA Docket No. 97-00[0]1 with [*Boise Cascade Corp. v. United States Dep't. of Agric.*,] case No. CIV 95-0290-S-BLW [(D. Idaho 1996)], and erred in failing to grant Boise Cascade's motion at the hearing to join or consolidate this sourcing area application with Stimson's sourcing area for its facilities in Montana.

Boise Cascade's Appeal Petition at 10.

The Chief ALJ does not have the authority under the Rules of Practice to transfer a case to a district court of the United States or to consolidate a case with a case in a district court of the United States. The Rules of Practice provide that judicial review is available only after a final decision by the Judicial Officer, as follows:

> **§ 1.423 Post-hearing procedure.**
>
> . . . .
>
> (c) *Judge's decision.*
>
> . . . .
>
> (4) . . . [N]o decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.423(c)(4).

Fifth, Boise Cascade Corporation contends that:

6. The Forest Service review of Stimson Lumber's sourcing area application is incomplete and flawed.

. . . .

The Forest Service's review of the purchasing patterns for Stimson Lumber and of competitor timber manufacturing facilities was deficient in several respects as reflected in the record and the transcript of the hearing. It is clear that the proper evaluation and review, as is required under the [FRCSRA], the regulations, and the Criteria and Guidelines for Sourcing Areas (BCC Exhibit 17) was never performed on this application. The required review and documentation is simply absent anywhere in this record. Further, the Forest Service testimony at the hearing reflects an absence of the review required under the Forest Service's Criteria and Guidelines for Sourcing Areas.

Boise Cascade's Appeal Petition at 12.

I disagree with Boise Cascade Corporation's contention that the Forest Service's review of Stimson Lumber Company's application for a sourcing area was not properly conducted. Mr. Jerry Hustead, the forester with the Forest Service, United States Department of Agriculture, who reviewed Stimson Lumber Company's sourcing area application, which is the subject of this proceeding, testified as to the review of the application, as follows:

[BY MR. KAUBLE:]

Q. So as a part of your duties as a forester for the Forest Service, you were called upon to review the application for this proposed sourcing area?

[MR. HUSTEAD:]

A. Yes.

Q. And what did you do after you received the application?

A. We have a -- we have developed a fairly standard set of criteria based on the law and the regulations, and it asks us certain questions which we respond to and ultimately make our recommendations based on those kinds of things, which we provide to the Judge's office.

Q. And did you cause Notice to be published to interested parties that a sourcing area had been applied for?

A. Oh yes.

Q. And how did you do that?

A. We did it first off by many newspapers throughout the states that had applied for the sourcing area, and then I personally faxed copies of the advertisement to the 30 or so competitors that I listed on my recommendation to the Judge.

Q. One of the allegations in Boise Cascade's proposed findings, Number 10, says that, "The Regional Forester failed to publish Notice of the application to all prospective parties within the boundaries of the requested sourcing area." To your knowledge, is that a correct statement?

A. I think what we did, everyone had a chance to be aware of it that would be interested in it.

Q. And as a result of your publication and solicitation of comments from interested parties, did you receive comments?

A. Very few, but, yes.

Q. And did any of the comments indicate information concerning whether the proposed sourcing area was separate economically and geographically from the area near Crescent City where Miller Redwood has exported?

A. As I recall, some of them said words to the effect that it was not economically and geographically separate, but they didn't give any reason for it not being.

Q. Did you undertake any analysis and inquiry on your own to determine the purchasing patterns of mills in the vicinity of the Arden Mill, which is the subject of the proposed sourcing area?

A. I did contact each one of the mills by fax to the effect that, "If you would have comments to offer us, we would be glad to get them." We had very few mills that did respond to that, and I stopped with that.

Q. Did you do anything else or beyond that to determine what the purchasing patterns of the area around Arden would be?

A. I looked at the big book, and --

Q. All right, what's the big book?

A. I would have to look back at my response to the application to give you the specific name to it, but it is listed in there for mills within the approximate same area, and those were the ones that I picked out that I felt could be competitors, and they are the ones that I sent the fax to. And I checked with the big book or they didn't respond, to see if they were doing roughly the same species, same -- producing the same product, and those kinds of things.

Q. And did you make any inquiry of the states --

A. Yes.

Q. -- of -- which states did you inquire?

A. Talked with the State of Oregon, the State of Washington, the State of Idaho, and I did not talk with Montana or Wyoming. I talked to some Forest Service people about the state timber availability. Plus I have some knowledge of it myself.

Q. And what is that based on?

A. Living basically in the center of this applied-for sourcing area for some 12 years.

Q. And based upon your inquiry, and the comments that you received, and your experience and knowledge of this area, did you determine that there were any facts to indicate that the proposed sourcing area and the historical export area were not separate geographically and economically?

A. No.

Q. And in your opinion, are they separate?

A. They are.

Q. And what -- what is the basis of that opinion, if you could just explain it?

A. Over time, as companies have purchased logs to feed their mills, they historically purchase from a much smaller area than this, and they will continue to do that as long as the logs are available, and frankly over time, they just have not hauled from this great a distance.

Q. In your opinion, would it be economically feasible for a mill in Arden to obtain any significant quantity of its raw source material from the Crescent City area?

A. Definitely not today.

. . . .

[BY MR. NEUMEYER:]

. . . .

Q. For purposes of the sourcing area application of Stimson Lumber, can you tell me what mills you considered to be within the same general vicinity as the Arden Mill?

[MR. HUSTEAD:]

A. From memory I think most of these are, but I believe I had attached an attachment to my letter to the Administrative Law Judge citing specifically the mills, and I'm sure most of all of these were on there.

Q. It would be the mills listed on your recommendation concerning this sourcing area?

A. Yes.

Q. The original application of Stimson Lumber only indicated five mills, is that right?

A. I believe it was five.

Q. Did you take any action to identify additional mills or did they voluntarily provide that information to you?

A. I went to my books again and looked to see that, plus a map, what I felt would be in the area. And then I did contact them and I said, "I really think you have more plants that you should consider and give us some supplemental information."

Q. Do you know how many miles the mills go out that you identified as being in the same general vicinity?

A. I didn't look at it from a standpoint of mileage. I just looked at it where they were on the map.

Q. Mr. Hustead, could you identify for me Boise Cascade Exhibit 17?

A. Shall I describe it to you or what?

Q. I would like you to tell me what that document is.

A. It's a document from the Chief of the Forest Service to the Regional Foresters, and it gives an outline of the criteria that we are to use when processing sourcing area applications.

Q. Is this criteria and guidelines for sourcing areas dated July 8th, 1994 still in effect?

A. Correct.

Q. And these are criteria and guidelines that the Region Offices are required to follow in evaluating sourcing area applications, is that correct?

A. That's correct.

Q. And did you follow these criteria and guidelines in evaluating the Stimson sourcing area?

A. Yes.

Tr. 150-53, 171-72

Moreover, the Regional Forester's Recommendation, which is attached to this Decision and Order as Appendix B, reveals that the Regional Forester properly reviewed Stimson Lumber Company's application for a sourcing area. Under these circumstances, I reject Boise Cascade Corporation's argument that Stimson Lumber Company's application for a sourcing area was not properly reviewed. But, even if I were to agree with Boise Cascade Corporation, that would not change the result in this case. The review by the Forest Service is merely one portion of the evidence relating to whether the proposed sourcing area is geographically and economically separate from any geographic area from which the applicant harvests for export unprocessed timber originating from private lands. As long as a preponderance of the evidence supports the applicant as to the geographic and economic issue, it matters not whether that portion of the evidence relating to the Forest Service's review is adequate. *In re Stimson Lumber Co., supra*, 54 Agric. Dec. at 164.

Sixth, Boise Cascade Corporation contends that:

7. The Administrative Law Judge erred in failing to summarily deny Stimson Lumber's sourcing area application as not falling within the limited exception which allows sourcing areas only for those persons who were exporting logs at the time, or within 24 months prior to, the enactment of the Forest Resources Conservation and Shortage Relief Act of 1990.

. . . .

The Interim Rules state that applications for sourcing areas were to have been submitted no later than December 20, 1990. Preamble to Interim Rules 56 Fed. Reg. 3354. Stimson Lumber elected to proceed under the Interim Rules in effect at the time its application was filed. Since this application was not submitted by the December 20, 1990, deadline, under the Interim Rules, Stimson is not eligible for a sourcing area. . . .

Boise Cascade's Appeal Petition at 12-13.

The supplementary information in the notice of proposed rulemaking cited by Boise Cascade Corporation states that:

> Applications for sourcing areas were to have been submitted no later than December 20, 1990, one month after the application procedures were published in the interim rule (55 FR 48572).

56 Fed. Reg. 3360 (1991).

However, a final rulemaking document issued by the Forest Service after the notice of proposed rulemaking cited by Boise Cascade Corporation clarifies that applications for sourcing areas may be filed after December 20, 1990 (56 Fed. Reg. 65,834 (1991)). A final rulemaking document fully implementing the FRCSRA, except for the determination of surplus species pursuant to 16 U.S.C. § 620a(b), specifically addresses the issue of applications filed after December 20, 1990, as follows:

> 4. A final rule delegating the Secretary of Agriculture's authority to make the final decision on sourcing area applications received by December 20, 1990 to the Department's Office of Administrative Law Judges (OALJ) was published April 5, 1991 (56 FR 14009)[.]
>
> . . . .
>
> 6. A final rule was published on April 2, 1992 (57 FR 11261), which delegates the Secretary's authority to adjudicate sourcing area applications received after December 20, 1990 to the Department's Office of Administrative Law Judges and the Judicial Officer.
>
> . . . .
>
> *Comment.* One respondent said the rule should state that a person may apply for a sourcing area at any time, but will receive certain advantages if the person applied by December 20, 1990.
>
> *Response.* The Department believes this was clarified in the final rule of limited scope, published on December 19, 1991 (56 FR 65834). . . .

60 Fed. Reg. 46,890-91, 46,907 (1995).

Moreover, Boise Cascade Corporation's contention, that an application for a sourcing area cannot be filed after December 20, 1990, and may only be filed by persons who were exporting logs at the time of the enactment of the FRCSRA on August 20, 1990, or within 24 months prior to the enactment of the FRCSRA, has been rejected in at least two previous sourcing area cases instituted under the

FRCSRA. *In re Stimson Lumber Company, supra*, 54 Agric. Dec. at 165; *In re Springdale Lumber Company*, 53 Agric. Dec. 1185, 1193 (1994).

The FRCSRA provides for specific treatment of applications filed before December 20, 1990 (16 U.S.C. § 620b(c)(2)), but does not preclude persons from filing applications for sourcing areas after December 20, 1990. Boise Cascade Corporation's interpretation of the FRCSRA would preclude competition on an equal basis and disadvantage all those who enter into timber export activities after 1990. The objectives of the FRCSRA are to preserve work for domestic sawmills and to preclude purchase of unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 states if such unprocessed timber is to be used in substitution for exported unprocessed timber originating from private lands or such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands. These objectives are accomplished when a person's approved sourcing area is geographically and economically separate from any geographic area from which that person harvests for export unprocessed timber originating from private lands. These objectives are not advanced by restricting sourcing areas to only those who exported lumber in 1990.

Seventh, Boise Cascade Corporation contends that:

> 8. The Administrative Law Judge erred in his Findings of Fact and Conclusion of Law that the proposed sourcing area of Stimson Lumber is geographically and economically separate from any area outside the proposed sourcing area from which Stimson Lumber may export timber.
>
> . . . .
>
> The Administrative Law Judge improperly relies on the Cascade mountain range as a geographic and economic dividing line. This dividing line was improperly adopted from prior sourcing area proceedings. Further, the record shows that log transportation by highway and rail is feasible and in fact more economical than log transportation from the east side of the proposed sourcing area which is a greater haul distance and has to traverse the continental divide.

Boise Cascade's Appeal Petition at 13-15.

I disagree with Boise Cascade Corporation's contention. The record supports the Chief ALJ's finding that the proposed sourcing area is geographically and economically separate from private lands from which Stimson Lumber Company harvests or acquires private timber for export. The area from which Stimson

Lumber Company exports is on the west side of the Cascade Mountain Range in northwestern California (Tr. 22-26, 28-29, 66-71). Boise Cascade Corporation did introduce evidence through Ernie Dunlap, a manager of motor carrier services, that it is physically feasible to move lumber in the northeast direction from the Miller Redwood Company export area to the Arden, Washington, manufacturing facility (Tr. 105-06, 118-20). He could not, however, testify as to the economic ramifications of transporting lumber in that direction (Tr. 125-28).

In addition to the infrequency in the lumber industry of transporting lumber from west to east, the timber exported by Miller Redwood Company is not of the same type as that processed by the Arden, Washington, manufacturing facility. Miller Redwood Company exports exclusively Douglas Fir logs (Tr. 33-34). The Arden manufacturing facility is a board mill which produces kiln dried pine, spruce, and cedar boards (Tr. 60-61).

There is, therefore, nothing in the record to indicate that the proposed sourcing area for Stimson Lumber Company's Arden, Washington, manufacturing facility, is not geographically and economically distinct from the Miller Redwood Company export area and I agree with and have adopted the Chief ALJ's Finding of Fact and Conclusion of Law on this issue.

Eighth, Boise Cascade Corporation contends that "Findings of Fact Nos. 5; 7; 8; 10-first sentence; 12; 13; and 14 [and] Conclusions of Law Nos. 1 and 2" . . . contravene the FRCSRA and the Regulations and are in conflict with the record and that the Chief ALJ erred in failing to adopt Boise Cascade Corporation's Proposed Findings of Fact, Conclusions, and Order (Boise Cascade's Appeal Petition at 15).

I disagree with Boise Cascade Corporation's contention. I have adopted, with only slight modification the Chief ALJ's Findings of Fact Nos. 5, 7, 8, 10-first sentence, 12, 13, and 14 and Conclusions of Law Nos. 1 and 2. I find that these findings of fact and conclusions of law are in accordance with the FRCSRA and the Regulations and are supported by the record.

Ninth, Boise Cascade Corporation contends that the Initial Decision and Order in this proceeding, which requires that the parties file an appeal no later than March 12, 1997, may not have been served on all parties by March 12, 1997, thereby depriving those parties of the right to appeal (Boise Cascade's Appeal Petition at 16).

Boise Cascade Corporation states that it was served with the Initial Decision and Order on March 7, 1997, and Boise Cascade Corporation filed its appeal on March 12, 1997. Therefore, Boise Cascade Corporation was not deprived of its right to appeal the Chief ALJ's Initial Decision and Order. Even if other parties in this proceeding were not served with the Initial Decision and Order until after the

date on which the appeal had to be filed (which I do not find on the basis of this record), Boise Cascade Corporation cannot claim that it was deprived of the right to file an appeal.

Tenth, Boise Cascade Corporation contends that the transcript will not be available for at least 15 days following March 5, 1997, and that Boise Cascade Corporation is therefore unable to review the transcript, make changes in accordance with 7 C.F.R. § 1.423, and incorporate specific citations into its appeal (Boise Cascade's Appeal Petition at 17).

Although it is unfortunate that the time constraints in this proceeding have precluded Boise Cascade Corporation's opportunity to review the transcript and incorporate specific citations of the transcript into its Appeal Petition, I do not find that Boise Cascade's inability to obtain the transcript prior to filing its Appeal Petition resulted in actual prejudicial error that affected the outcome of this proceeding. Boise Cascade Corporation's views were fully set forth at the hearing and in Boise Cascade's Appeal Petition.

Eleventh, Boise Cascade Corporation contends that:

> [T]he Judicial Officer has no way to properly decide an Appeal without having the entire record, including the transcript of the hearing. This is in direct violation of 7 C.F.R. § 1.426(c) and (d).

Boise Cascade's Appeal Petition at 17.

I agree with Boise Cascade Corporation that I must consider the record, including the transcript, before issuing a Decision and Order in this proceeding. The record in this proceeding, with the exception of the transcript, was provided to me on March 13, 1997, and the transcript was provided to me on March 17, 1997. I have reviewed the entire record in this proceeding, and this Decision and Order is based upon my consideration of the entire record.

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

Order

The application of Stimson Lumber Company for a sourcing area for its Arden, Washington, manufacturing facility is approved, and the sourcing area is established pursuant to the FRCSRA and the Regulations.

APPENDIX A

Insert Sourcing area map here.

APPENDIX B

Not published herein.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: BILLY JACOBS, SR.
HPA Docket No. 95-5.
Decision and Order filed August 15, 1996.

Default — Complainant's counsel not obligated to file Respondent's answer - Violation of disqualification period — Civil penalty — Failure to file timely answer.

The Judicial Officer affirmed the Default Decision by Judge Baker (ALJ) assessing a civil penalty of $3,000 against Respondent, but reversed with respect to the imposition of a 5-year disqualification period against Respondent. The record in this case does not establish a basis for imposing a disqualification period against Respondent for his failure to obey a previously-imposed disqualification period in violation of 15 U.S.C. § 1825(c). Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). The Rules of Practice provide that Respondent shall file with the Hearing Clerk an Answer, (7 C.F.R. § 1.136(a)); but Complainant's counsel's receipt of Respondent's Answer does not constitute filing with the Hearing Clerk. Further, Complainant's counsel is not obligated to file with the Hearing Clerk on a Respondent's behalf any Answer which Complainant's counsel may receive from a Respondent. The Rules of Practice clearly place the duty on Respondent for filing Respondent's Answer with the Hearing Clerk. (7 C.F.R. § 1.136(a)). Accordingly, the Default Decision was properly issued.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by a Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on February 17, 1995. The Complaint alleges that on May 23, 1992, Billy Jacobs, Sr. (hereinafter Respondent), in violation of section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), exhibited a horse known as "Pride's Golden Star" as Entry No. 115, in Class No. 37, at the Wiregrass Charity Horse Show at Dothan, Alabama, while Respondent was disqualified from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction, pursuant to an order of disqualification

entered in *In re Barbara Jacobs*, HPA Docket No. 91-147 (Dec. 12, 1991).[1] (Complaint, ¶ II, p. 2.) Mr. Stephen C. Fuller, Senior Investigator, United States Department of Agriculture, personally served a copy of the Complaint and the Rules of Practice on Respondent on June 28, 1995. (Certificate of Personal Service of Stephen C. Fuller.)

Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice, (7 C.F.R. § 1.136), and on April 9, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Default Decision) in which the ALJ found that Respondent violated section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), as alleged in the Complaint, and assessed a civil penalty of $3,000 against Respondent and disqualified Respondent for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. (Default Decision, pp. 2-3.)

On May 7, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[2] On June 25, 1996, Respondent filed an Amended Appeal, and on June 28, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order. On July 3, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I have adopted the Default Decision as the final Decision and Order; except that, I have not imposed a disqualification period on Respondent. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

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[1]The Consent Decision containing the disqualification order issued against Respondent on December 12, 1991, is referenced at 50 Agric. Dec. 1721 (1991).

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

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Respondent has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by [Respondent's] failure to file an Answer, are adopted and set forth herein as Findings of Fact. In response to Complainant's Motion for Adoption of Proposed Decision and Order, Respondent submitted letters filed April 2, 1996. Consideration of said filings does not alter the fact that a timely Answer has not been filed herein. This Decision and Order [is] issued pursuant to section 1.139 of the Rules of Practice[, (7 C.F.R. § 1.139)].

Findings of Fact

1. Respondent Billy Jacobs, Sr., is an individual whose mailing address is [redacted]

2. On December 12, 1991, an Order was issued in [*In re Barbara Jacobs*,] HPA Docket No. 91-147 [(Dec. 12, 1991),] disqualifying Respondent Billy Jacobs, Sr., for one year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

3. At all times material herein, Respondent Billy Jacobs, Sr., was the owner of the horse known as "Pride's Golden Star."

4. On May 23, 1992, Respondent Billy Jacobs, Sr., violated section 6(c) of the [Horse Protection] Act, (15 U.S.C. § 1825(c)), by exhibiting Pride's Golden Star as Entry No. 115, in Class No. 37, at the Wiregrass Charity Horse Show at Dothan, Alabama, while Respondent was disqualified from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction, pursuant to the disqualification order issued in [*In re Barbara Jacobs*,] HPA Docket No. 91-147 [(Dec. 12, 1991)].

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, Respondent Billy Jacobs, Sr., has violated section 6(c) of the [Horse Protection] Act, (15 U.S.C. § 1825(c)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends in his Appeal and his Amended Appeal that he did not own Pride's Golden Star on May 23, 1992, and did not exhibit Pride's Golden Star as Entry No. 115, in Class No. 37, at the Wiregrass Charity Horse Show at Dothan, Alabama, on May 23, 1992. Attached to Respondent's Amended Appeal, filed June 25, 1996, is a copy of a bill of sale that indicates that Respondent sold Pride's Golden Star to Mr. Jerry Strickland on May 15, 1992.

Respondent's denial of the material allegations of the Complaint comes too late. On June 28, 1995, Respondent was personally served at his horse stable near Enterprise, Alabama, with a copy of the Complaint and a copy of the Rules of Practice. (Certificate of Personal Service of Stephen C. Fuller.)

Section 1.147(c)(3)(ii) of the Rules of Practice provides:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (c) *Service on party other than the Secretary*. . . .
>
> . . . .
>
> (3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:
>
> . . . .
>
> (ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

7 C.F.R. § 1.147(c)(3)(ii).

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .
>
> . . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) [,(7 C.F.R. § 1.136(a)),] shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[, (7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for Hearing.

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

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on June 28, 1995, states:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice governing proceedings under the Act

(7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely Answer. Moreover, Complainant alleges that, when Mr. Stephen C. Fuller personally served Respondent with a copy of the Complaint and a copy of the Rules of Practice, Mr. Fuller informed Respondent that he should file an answer to the Complaint pursuant to the Rules of Practice and that the failure to answer any allegation in the Complaint would constitute an admission of that allegation. (Complainant's Response to Respondent's Appeal of Decision and Order ¶ 2, p. 1.) Complainant further alleges that counsel for Complainant spoke with Respondent the week after Respondent was served with the Complaint and advised Respondent that he should file an Answer. (Complainant's Response to Respondent's Appeal of Decision and Order ¶ 3, p. 2.)

Respondent's Answer was due July 18, 1995. Respondent's first filing in this proceeding is dated March 27, 1996, and was filed with the Hearing Clerk April 2, 1996, more than 9 months after the Complaint was served on Respondent. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)).

On March 11, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Default Decision and Order (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a).

On April 2, 1996, Respondent filed a response to the Complainant's Motion for Proposed Default Decision and Proposed Default Decision which states, as follows:

> As I stated in the letter that I sent to Ms. Carroll (which I am enclosing [a] copy of), we talked on the phone a couple of times and I also talked with Dennis Hansberry (?sp) and I was of the opinion that if I needed to do anything else they would notify me. I did not show the horse myself - my son showed the horse and he did not think he was doing anything wrong. As we have stated before, we had sold the horse and Mr. Strickland never transferred the papers into his name.
>
> . . . .
>
> While I was on suspension my son sold and showed Pride[']s Golden Star not knowing he was doing anything wrong and I was not at the show,

> so you can see it was just a misunderstanding and we apologize for our carelessness.
>
> . . . .
>
> P.S. You will see from the other enclosures that I made several calls trying to do everything possible to take care of this matter.

Letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated March 27, 1996, and filed April 2, 1996.

Attached to Respondent's response to Complainant's Motion for Proposed Default Decision and Proposed Default Decision is a copy of a letter dated July 7, 1995, from Respondent addressed to Complainant's counsel, Ms. Colleen A. Carroll,[3] which states, as follows:

> I wish to submit evidence to prove my innocence and clear my name of the charges filed against me in HPA Docket No. 95-5.
>
> 1) The horse in question, PRIDE'S GOLDEN STAR, Racking Horse Breeders' Association of America (RHBAA), Registration No. 882558, was sold to Mr. Jerry Strickland on May 15, 1992. (See enclosed copy of Bill of Sale)
>
> 2) Upon purchase of above stated horse Mr. Strickland failed to transfer the Certificate of Registration into his name.
>
> 3) In accordance with the rules and regulations of the RHBAA and the National Horse Show Commission the horse, when entered in Class 37 on May 23, 1992 at the Wiregrass Charity Horse Show at Dothan, Alabama, had to be registered under the name that appears on the Certificate of Registration.
>
> 4) On July 25, 1992, Mr. Strickland traded PRIDE'S GOLDEN STAR with Billy Jacobs Jr. for another horse. At that time the Certificate of Registration was transferred into the name of Billy Jacobs Jr. without ever having been registered in the name of Mr. Strickland.

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[3]Complainant asserts that Complainant's counsel never received Respondent's letter dated July 7, 1995, or the copy of the bill of sale which Respondent's July 7, 1995, letter states is attached to the letter. (Complainant's Response to Respondent's Appeal of Decision and Order ¶ 6, p. 2.)

> 5) I apologize for any inconvenience this incident may have caused you or others. This situation has taught me to be more careful in the completion of transactions and the necessary paperwork included. I assure you that I will do my best to avoid any future problems.
>
> In conclusion, the incident that occur[r]ed is the result of Mr. Strickland's failure to transfer the registration of PRIDE'S GOLDEN STAR. The horse in question at the time in question was neither owned nor showed by my person.

Respondent's July 7, 1995, letter addressed to Colleen A. Carroll.

On April 9, 1996, the ALJ filed the Default Decision which states that the two letters filed April 2, 1996, by Respondent in response to Complainant's Motion for Proposed Default Decision do not alter the fact that a timely Answer has not been filed herein. Respondent was served with the Default Decision on April 15, 1996, and filed an appeal on May 7, 1996, in which he states:

> As I stated in my previous letter to you I did not show the horse, my son did. We had sold the horse but the papers had not been transfer[r]ed. I realize this was my fault.

Respondent's Appeal filed May 7, 1996, pp. 1-2.

Attached to Respondent's Appeal is a copy of Respondent's letter dated July 7, 1995, addressed to Complainant's counsel, Colleen A. Carroll, which Respondent had previously attached to his response to Complainant's Motion for Proposed Default Decision.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[4] Respondent has shown no basis for

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

setting aside the Default Decision here.[5] The Rules of Practice, a copy

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[5]*See In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed;

of which was served on Respondent on June 28, 1995, with a copy of the Complaint, clearly provide that an Answer must be filed within 20 days after the service of the Complaint. (7 C.F.R. § 1.136(a).) Respondent's first filing in this proceeding is dated March 27, 1996, and was filed April 2, 1996, more than 9 months after Respondent was personally served with the Complaint.

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

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[6] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have

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Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

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

to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived his right to a hearing by failing to file a timely Answer. (7 C.F.R. §§ 1.139, .141(a).) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c).)

Even if I were to find that Complainant's counsel received Respondent's July 7, 1995, letter within 20 days after service of the Complaint on Respondent, Respondent's July 7, 1995, letter would not operate as a timely Answer in this proceeding.[7] The Rules of Practice provide that *respondent shall file with the Hearing Clerk an answer.* (7 C.F.R. § 1.136(a).) Complainant's counsel's receipt of Respondent's Answer does not constitute filing with the Hearing Clerk. Moreover, Complainant's counsel is not obligated to file any Answer which he or she may receive from a Respondent with the Hearing Clerk on a Respondent's behalf. The Rules of Practice clearly place the duty for filing Respondent's Answer with the Hearing Clerk on Respondent.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

The ALJ found that Respondent violated section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), and assessed a $3,000 civil penalty against Respondent and disqualified Respondent for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. (Default Decision, pp. 2-3.) I have not imposed any disqualification period against Respondent because the record in this proceeding does not provide a basis for the imposition of a disqualification period against Respondent.

Section 6(c) of the Horse Protection Act provides:

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[7]There is nothing in the record to support a finding that Complainant's counsel received Respondent's July 7, 1995, letter. Complainant's counsel asserts that she never received Respondent's July 7, 1995, letter or a copy of the bill of sale that is referenced in Respondent's July 7, 1995, letter as being attached to the letter. (Complainant's Response to Respondent's Appeal of Decision and Order ¶ 6, p. 2.)

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation.

15 U.S.C. § 1825(c).

There is no evidence in the record in this proceeding and Complainant does not allege that Respondent has ever been convicted under 15 U.S.C. § 1824(a). Moreover, there is no evidence in the record of this proceeding that Respondent has ever paid a civil penalty under 15 U.S.C. § 1825(b) and Complainant does not allege that Respondent has paid such a civil penalty. The Complaint alleges and Respondent admits by his failure to file a timely Answer that:

> On December 12, 1991, an order was issued in HPA Docket No. 91-147, disqualifying respondent for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

Complaint ¶ I.C., p. 1.

The record contains no evidence that Respondent paid a civil penalty in connection with the Consent Decision issued in *In re Barbara Jacobs*, HPA Docket No. 91-147 (Dec. 12, 1991).

Finally, there is no evidence in the record in this proceeding that Respondent is subject to a final order under 15 U.S.C. § 1825(b) assessing a civil penalty for any violation of the Horse Protection Act or any regulation issued under the Horse Protection Act. While Respondent is subject to this final Decision and Order assessing a civil penalty for a violation of the Horse Protection Act, the $3,000 civil

penalty assessed against Respondent in this final Decision and Order is not assessed under *15 U.S.C. § 1825(b)*; but, rather, is assessed under *15 U.S.C. § 1825(c)* for knowingly failing to obey an order of disqualification.

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

Order

Respondent Billy Jacobs, Sr., is assessed a civil penalty of $3,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States, and forwarded to: Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

In re: BILLY JACOBS, SR.
HPA Docket No. 95-5.
Stay Order filed January 29, 1997.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Stay Order issued by William G. Jenson, Judicial Officer.

The Order previously issued in this case, which would have required Billy Jacobs, Sr. (hereinafter Respondent) to pay civil penalty of $3,000 no later than September 22, 1996, is hereby stayed pending the outcome of proceedings for judicial review. Respondent filed a motion for a stay pending judicial review on October 21, 1996, and Respondent's motion was referred to the Judicial Officer on January 28, 1997. This Stay Order is issued *nunc pro tunc* and is effective September 22, 1996.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: GERALD FUNCHES.
HPA Docket No. 96-0002.
Decision and Order filed January 15, 1997.

Default— Civil penalty— Disqualification— Failure to file timely answer — Attempts to reach Hearing Clerk.

The Judicial Officer affirmed the Default Decision by Judge Bernstein (ALJ). Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). The Rules of Practice provide that Respondent shall file with the Hearing Clerk an Answer signed by the Respondent or the attorney of record, (7 C.F.R. § 1.136(a)); but Respondent's unsuccessful attempts to reach the Hearing Clerk do not constitute filing with the Hearing Clerk. Accordingly, the Default Decision was properly issued.

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

The Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on September 11, 1996.

The Complaint alleges that on or about May 20, 1994, Gerald Funches (hereinafter Respondent) transported, for the purposes of showing or exhibiting, a horse known as "Ladies Secret" to the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)). (Complaint at 1, ¶ II(A).) Further, the Complaint alleges that on May 20, 1994, Respondent entered, for the purposes of showing or exhibiting, a horse known as "Ladies Secret" as Entry No. 15, in Class No. 15, at the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana, while the horse was sore, in violation of section 5(1) of the Horse Protection Act, (15 U.S.C. § 1824(1)). (Complaint at 2, ¶ II(B).)

Respondent was served with the Complaint on September 16, 1996. Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), and on November 18, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) issued a Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Default

Decision) in which the ALJ found that Respondent violated sections 5(1) and 5(2)(B) of the Horse Protection Act, (15 U.S.C. §§ 1824(1), 1824(2)(B)), as alleged in the Complaint, assessed a civil penalty of $4,000 against Respondent, and disqualified Respondent for 2 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. (Default Decision at 2-3.)

On December 19, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)[1] On January 2, 1997, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order (hereinafter Complainant's Response). On January 6, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, I have adopted the Default Decision as the final Decision and Order. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Applicable Statutory Provisions

15 U.S.C.:

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

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

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(1), (2).

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. . . .

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(b)(1), (c).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

The Hearing Clerk served on the Respondent, by [certified] mail, copies of the Complaint and the Rules of Practice . . ., (7 C.F.R. §§ 1.130-.151). Respondent was informed in the accompanying letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation. Respondent has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are [deemed] admitted by

Respondent's failure to file an Answer, are adopted and set forth [in this Decision and Order] as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice[, (7 C.F.R. § 1.139)].

Findings of Fact

A. Respondent Gerald Funches is an individual whose mailing address is [redacted] Louisiana [redacted]

B. At all times mentioned in the Complaint, Respondent was the owner . . . of the horse known as "Ladies Secret" and entered this horse as Entry No. 15, Class No. 15, on May 20, 1994, at the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana.

[C. On or about May 20, 1994, Respondent transported, for the purpose of showing or exhibiting, the horse known as "Ladies Secret" to the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana.]

Conclusions [of Law]

A. On or about May 20, 1994, Respondent Gerald Funches transported, for the purpose of showing or exhibiting, the horse known as "Ladies Secret" to the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana, while the horse was sore, in violation of section 5[(1)] of the [Horse Protection] Act, (15 U.S.C. § 1824[(1)]).

B. On May 20, 1994, Respondent Gerald Funches entered, for the purpose of showing or exhibiting, the horse known as "Ladies Secret" as Entry No. 15, in Class No. 15, at the Southwest Louisiana Charity Tennessee Walking and Racking Horse Show at Lake Charles, Louisiana, while the horse was sore, in violation of section 5[(2)(B)] of the [Horse Protection] Act, (15 U.S.C. § 1824[(2)(B)]).

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter dated December 18, 1996, addressed to "Mrs. J.A. Dawson" (hereinafter Respondent's Appeal Petition), which was filed on December 19, 1996, appears to be and is treated in this Decision and Order as Respondent's appeal of the Default Decision.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) [,(7 C.F.R. § 1.136(a)),] shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[, (7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

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

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

7 C.F.R. § 1.139.

§ 1.141 Procedure for hearing.

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

7 C.F.R. § 1.141(a).

The Complaint, the Rules of Practice, and a letter dated September 12, 1996, from the Office of the Hearing Clerk were served on Respondent on September 16, 1996, by certified mail. The Complaint states:

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

Complaint at 2.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying September 12, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

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

September 12, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Gerald Funches, at 1. (Emphasis in the original.)

Respondent's Answer was due October 7, 1996. Respondent's first and only filing in this proceeding is Respondent's Appeal Petition which Respondent filed on December 19, 1996, 94 days after the Complaint was served on Respondent. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)).

On October 16, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed

in 7 C.F.R. § 1.136(a). The Office of the Hearing Clerk served one copy each of Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision on Respondent, by certified mail, on October 21, 1996. A letter from the Office of the Hearing Clerk dated October 16, 1996, which accompanied Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision states, as follows:

> October 16, 1996
>
> Mr. Gerald Funches
>
>
>
> Dear Mr. Funches:
>
> **Subject: <u>In re: Gerald Funches, Respondent</u> - HPA Docket No. 96-0002**
>
> Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Decision and Order Upon Admission of Facts by Reason of Default, which have been filed with this office in the above-captioned proceeding.
>
> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

October 16, 1996, letter from Pamela M. Wright, Legal Technician, to Gerald Funches.

Respondent failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and on November 18, 1996, the ALJ filed the Default Decision, which was served on Respondent on November 22, 1996. On December 19, 1996, Respondent filed Respondent's Appeal Petition, which states, as follows:

> Ref. HPA Docket #
> 96-0002
>
> Room 1081

Dear Mrs. J. A. Dawson.

I've tried to reach you several times, to no aviale [sic]. I am responding to the suit against mee [sic]. I appreciate your time and patience. I am not formiler [sic] with the Rules, or clear on how to file. But I thought this matter was resolved.

Pg. 2

Signed by me, plus arecorded [sic] affenidved [sic]. Mrs. Dawson I have done nothing wrong or any thing to harm my animals. I appsolotey [sic] love all my [illegible].

Respondent's Appeal Petition.

Respondent's denial of the material allegations of the Complaint comes too late. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[2] Respondent has shown no basis for setting aside the Default Decision here.[3] The Rules of Practice, a copy of which

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[2]*In re Arizona Livestock Auction, Inc.*, 55 Agric Dec. ___ (Nov. 21, 1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[3]*See In re City of Orange*, 55 Agric. Dec. ___ (Sept. 12, 1996) (default decision proper where Respondent's first and only filing in the proceeding was filed 70 days after Respondent's Answer was due); *In re Bibi Uddin*, 55 Agric. Dec. ___ (Aug. 23, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint was filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53

Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (default order proper where Respondent was given an extension of time to file an Answer, but the Answer was not filed until 69 days after the extended date for filing the Answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William*

was served on Respondent on September 16, 1996, with a copy of the Complaint, clearly provide that an Answer must be filed within 20 days after the service of the Complaint. (7 C.F.R. § 1.136(a).) Respondent's first filing in this proceeding is dated December 18, 1996, and was filed December 19, 1996, 94 days after Respondent was served with the Complaint.

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

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[4] If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

Lambert, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

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

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived his right to a hearing by failing to file a timely Answer. (7 C.F.R. §§ 1.139, .141(a).) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c).)

Even if I were to find that Respondent "tried to reach [the Hearing Clerk] several times, to no [avail,]" as Respondent contends in Respondent's Appeal Petition, and I found that Respondent's attempts were made prior to the time Respondent's Answer was due, (which I do not find on the basis of the record in this proceeding[5]), Respondent's unsuccessful attempts to contact the Hearing Clerk would not operate as a timely Answer. The Rules of Practice provide that *respondent shall file with the Hearing Clerk an answer signed by the respondent* . . . ." (7 C.F.R. § 1.136(a).) Attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk.[6]

Respondent also contends that "this matter was resolved." (Respondent's Appeal Petition at 1.) I find nothing on the record that supports Respondent's contention that "this matter was resolved."

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

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

Order

1. Respondent is assessed a civil penalty of $4,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States, and forwarded to: Colleen A. Carroll, Office of the General Counsel, United States

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[5]There is nothing in the record to support a finding that Respondent attempted to reach the Hearing Clerk prior to his mailing Respondent's Appeal Petition dated December 18, 1996.

[6]*Cf. In re Billy Jacobs, Sr., supra*, slip op. at 14 (even if Respondent's letter had been received by Complainant's counsel within 20 days after service of the Complaint on Respondent, the letter would not operate as a timely answer because Complainant's counsel's receipt of Respondent's Answer does not constitute filing with the Hearing Clerk).

Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days after the date of service of this Order on Respondent.

2. Respondent is disqualified for 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. This disqualification order shall become effective on the 30th day after service of this Order on Respondent.

In re: CARL EDWARDS & SONS STABLES, GARY R. EDWARDS, LARRY E. EDWARDS, ETTA EDWARDS, AND MR. AND MRS. BRENT A. BUCK.
HPA Docket No. 93-15.
Decision and Order as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards filed March 13, 1997.

Civil penalty — Disqualification order — Entering a sored horse — Preponderance of the evidence — Statutory presumption — Palpation — Past recollection recorded — Absolute guarantor — Scar rule.

The Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondent Gary R. Edwards entered a horse while the horse was sore, but held that the other Respondents, Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables, did not violate the Horse Protection Act. Respondent Gary R. Edwards was assessed a civil penalty of $2,000 and was disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, and from managing, judging, or otherwise participating in any horse show, exhibition, sale, or auction; such period of disqualification to run consecutively with the disqualification period imposed in *In re Gary R. Edwards*. Respondent Gary R. Edwards admitted transporting the horse to the show, which admission could have supported the Complaint's allegation of transporting a horse while sore with intent to enter the horse while sore in an exhibition or show, but sufficiency of the imposed sanction, and the unique facts of this case, cause Judicial Officer to demur, based on *Livolsi*. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinions of veterinarians who relied solely upon digital palpation of the horse's pasterns. Past recollection recorded made while the events were still fresh in the minds of the witnesses is reliable, probative, and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raises the statutory presumption of a sore horse. The evidence of bilateral pain response upon moderate palpation, *e.g.*, tucking of abdominal muscles, withdrawing of feet, rearing, etc., with the expert Veterinary Medical Officers' opinions that the horse would be likely to experience pain while moving, are sufficient to make out a *prima facie* case, which supports a violation of the Horse Protection Act, even in the absence of the presumption. Agency VMOs found bilateral excessive scarring on the horse, and hair loss, which surpasses the minimum requirements of bilateral evidence of abuse indicative of soring, which invokes the irrebuttable presumption: horses which do not meet scar rule criteria are considered sore. Only Gary R. Edwards entered Time Around Town;

Respondents Larry E. Edwards. Etta Edwards, and Carl Edwards & Sons Stables, the partnership, did not violate the Horse Protection Act, merely because they were partners of the violator. Pre-show passage by the DQP is meaningless to the USDA pre-show inspection. Videotapes of horse inspections are of reduced value when made by private veterinarians after the official inspection, but non-subjective evidence on a videotape for anyone to see may be considered to corroborate or contradict expert witnesses testifying about the videotape. Expert witness testimony based upon examinations conducted some time after the official inspection with no proper safeguards are of little value. Private veterinarians who require multiple indicia of soreness, such as gait dysfunction, heat, or increased respiration--beyond the requirements of the HPA--deserve little credibility. ALJ's theories on palpation, that palpation is a rule subject to APA rulemaking and that palpation lacks a required "scientific" basis, are both rejected. ALJ erred: by giving no or scant credibility to USDA witnesses and by assigning unwarranted great weight to Respondents' witnesses. The ALJ's attack on palpation evidence, based upon the *Young* decision, is refuted by the Judicial Officer's *Bennett* decision. Respondent Gary R. Edwards was an absolute guarantor that the horse would not be sore when entered. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 5-year disqualification, in addition to the $2,000 civil penalty.

Colleen Carroll, for Complainant.
Paul D. Priamos, Torrance, CA, for Respondents.
Initial decision issued by Paul Kane, Administrative Law Judge.
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I. INTRODUCTION.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) (hereinafter the HPA); the regulations issued

pursuant to the HPA (9 C.F.R. §§ 11.1-.41); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on July 30, 1993.

The Complaint alleges, *inter alia*, that: (1) on or before March 30, 1991, Carl Edwards & Sons Stables, through its partners, transported a horse known as "Time Around Town" to the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, with reason to believe that the horse would be entered while sore for the purpose of showing or exhibiting, in violation of section 5(1) of the HPA (15 U.S.C. § 1824(1)) (Complaint ¶ II(A)); (2) on March 30, 1991, Carl Edwards & Sons Stables, through its partners, entered for the purpose of showing or exhibiting a horse known as "Time Around Town" as entry number 265 in class number 76 in the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)) (Complaint ¶ II(B)); and (3) on March 30, 1991, Mr. and Mrs. Brent A. Buck, allowed the entry for the purpose of showing or exhibiting a horse known as "Time Around Town" as entry number 265 in class number 76 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(D) of the HPA (15 U.S.C. § 1824(2)(D)) (Complaint ¶ II(C)).[1]

On August 13, 1994, Gary R. Edwards, Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables (hereinafter Respondents) filed Answers to the Complaint admitting that Carl Edwards & Sons Stables is a general partnership in which Gary R. Edwards, Larry E. Edwards, and Etta Edwards are partners and denying all other material allegations in the Complaint.

On October 5 and October 6, 1994, the ALJ held a hearing in Washington, D.C. Mr. Paul D. Priamos of Torrance, California, represented Respondents, and Ms. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. On November 24, 1995, the ALJ filed an Initial Decision and Order in which he dismissed the Complaint because he

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[1]Mr. and Mrs. Brent A. Buck failed to file an Answer to the Complaint, and on May 17, 1994, Administrative Law Judge Paul Kane (hereinafter ALJ) issued a Decision and Order in which the ALJ found that Mr. and Mrs. Buck violated 15 U.S.C. § 1824(2)(D) and assessed a civil penalty of $2,000 against Mr. and Mrs. Buck and disqualified Mr. and Mrs. Buck for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or otherwise, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction. *In re Carl Edwards & Sons Stables* (Decision and Order as to Mr. and Mrs. Brent Buck), 53 Agric. Dec. 583 (1994).

found that Complainant had failed to prove by a preponderance of the evidence that Respondents violated the HPA.

On February 20, 1996, Complainant appealed to the Judicial Officer, to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On May 1, 1996, Respondents filed a response to Complainant's Appeal. The case was referred to the Judicial Officer for decision on May 6, 1996.

Upon a careful consideration of the record in this case, the Initial Decision and Order is reversed and vacated, and Respondent Gary R. Edwards is assessed a civil penalty of $2,000 and disqualified for 5 years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

As used in this Decision and Order, "Tr." refers to the transcript of the hearing; "CX" refers to Complainant's exhibits; and "RX" refers to Respondents' exhibits.

II. APPLICABLE STATUTORY PROVISIONS AND REGULATION

The following statutory provisions are applicable to this case.

Section 2(3) of the HPA provides:

> As used in this chapter unless the context otherwise requires:
>
> . . . .
>
> (3) The term "sore" when used to describe a horse means that—
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

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

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

Section 5(1)-(2) of the HPA provides:

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(1)-(2).

Section 6(b) of the HPA states:

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

15 U.S.C. § 1825(b).

Section 6(c) of the HPA states in part:

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

Section 6(d)(5) of the HPA provides:

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

The following regulation is applicable to this case:

§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,[5] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

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[5]Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3 (1991).

III. RESPONDENT GARY R. EDWARDS ENTERED TIME AROUND TOWN AT THE NATIONAL WALKING HORSE TRAINERS SHOW ON MARCH 30, 1991, IN SHELBYVILLE, TENNESSEE, WHILE THE HORSE WAS SORE.

A. Findings of Fact.

1. Respondents Gary R. Edwards, Larry E. Edwards, and Etta Edwards are partners in the general partnership of Carl Edwards & Sons Stables, which is in the business of boarding, training, and exhibiting Tennessee Walking Horses (Answer). Although the individual partners own and train their own horses, the partners also train and show Tennessee Walking Horses belonging to others.

2. The mailing address of Respondents Gary R. Edwards, Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables is [redacted] (Answer).

3. At all times material herein, Respondent Gary R. Edwards was the trainer of the horse, Time Around Town, and entered the horse in the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 30, 1991, as entry number 265 in class number 76, while the horse was sore (Tr. 213-17).

4. On March 30, 1991, Time Around Town exhibited bilateral, abnormal sensitivity in both front pasterns when palpated there by two Veterinary Medical Officers (hereinafter VMOs) employed by the Animal and Plant Health Inspection Service (hereinafter APHIS) of the United States Department of Agriculture (hereinafter USDA) (CX 2, 3, 4; Tr. 68, 72-75, 157-60).

5. The VMOs' examination on March 30, 1991, revealed that Time Around Town could reasonably have been expected to have experienced pain, while moving, in the pastern areas of both his forelimbs (Tr. 74-75, 159-60).

6. On March 30, 1991, the two USDA VMOs' individual examinations of Time Around Town revealed that Time Around Town (a horse born after October 1, 1975) exhibited evidence of bilateral abuse indicative of soring, which the VMOs both illustrated and described as "scars--granulation tissue on anterior lateral surface of both forepasterns" on item 31 of APHIS FORM 7077 (CX 2). Dr. Zaidlicz stated in his affidavit that Time Around Town had this bilateral scarring (CX 4). Dr. Hendricks documented the bilateral excessive scars on the anterior medial and lateral surfaces in his affidavit (CX 3) and testified that there was enough hair loss where "you could see the scars." (Tr. 166.)

B. Conclusion of Law.

On March 30, 1991, Respondent Gary R. Edwards, in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)), entered the horse known as "Time Around Town" as entry number 265 in class number 76 in the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore.

C. Discussion.

Complainant, as the proponent of an Order, has the burden of proof in cases under the Administrative Procedure Act (hereinafter APA), such as this one, and the standard of proof by which the burden is met is the preponderance of the evidence standard.[3] In this proceeding, Complainant has shown by much more

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[3]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. ___, slip op. at 9 (Nov. 5, 1996), *appeal docketed*, No. 96-9472 (Dec. 18, 1996); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. ___, slip op. at 5 (Aug. 19, 1996); *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 3 n.2 (July 23, 1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P.*

than a preponderance of the evidence that Respondent Gary R. Edwards entered Time Around Town in the National Walking Horse Trainers Horse Show on March 30, 1991, in Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)). However, Complainant has failed to prove by a preponderance of the evidence that Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables violated the HPA.

1. Complainant's Case.

Complainant presented the testimony of two highly qualified and experienced USDA VMOs, Drs. Hugh V. Hendricks and Ronald Zaidlicz, both of whom examined Time Around Town at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 30, 1991, and both of whom found abnormal, bilateral sensitivity in both front pasterns.

a. Expert USDA VMOs Used Time-Tested Procedures and Techniques to Establish Detailed Factual Basis for Determination That Time Around Town Was Sore.

Dr. Zaidlicz has been a practicing veterinarian since 1976, primarily focusing on horses. He has been a racetrack veterinarian and is a certified farrier, and testified to this experience, as follows:

[BY MS. CARROLL:]

Q. Can you describe your background in veterinary medicine?

[BY DR. ZAIDLICZ:]

Holt (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

A. I graduated from the University of Illinois in 1976 and practiced briefly in New York state. A short time in Idaho. New York state was an equine small animal practice. Idaho was a mixed practice, and then I practiced in Colorado between February, 1977, I believe, until October '89 and basically I was in my own practice, primarily a horse practice, but as time went on I bought other practices so I had to also do other species and at the same time I was doing a lot of things nationally with wild horses and wild burros and teaching large animal medicine at Del Ray Institute of Animal Technology in Denver and then probably three years -- about three years prior to going with the USDA I had a program in a prison system in Colorado where I teach inmates shoeing, breaking and training wild horses --

Tr. 50-51.

Dr. Zaidlicz worked as a VMO for USDA for several months in 1989, and from January 1991, in which time he has examined approximately 1,600 horses for compliance with the HPA (Tr. 51, 54).

Dr. Hendricks has been a USDA VMO since 1978 and was in private practice for 15 years prior to government service (Tr. 144-45). Dr. Hendricks has attended a HPA training course in each of his service years and during his tenure has examined between 3,000 and 5,000 horses for compliance with the HPA (Tr. 145-46).

The examination procedure used by these and other USDA VMOs was developed by USDA, has been used for the enforcement of the HPA for more than 20 years, and is based on experience with many thousands of Tennessee Walking Horses examined by USDA VMOs. The examination procedure distinguishes sore horses from horses that are not sore and entails a different procedure than does the diagnosis of lameness or an illness (Tr. 56-62, 146-49).

Both Drs. Hendricks and Zaidlicz described their examination techniques in great detail, as follows: they watch the horse walk; they use their thumbs to palpate primarily both pastern areas with a light to moderate pressure; and they look for signs of pain, which may include withdrawing the feet, tucking the abdominal muscles, raising the head, and rearing (Tr. 56-62, 146-49). The horse will indicate which areas are painful by responding when those areas are palpated (Tr. 58-60, 147).

If a horse exhibits a response to pain once, the veterinarians will continue to palpate other areas of the foot and then return to palpate the reactive spot for confirmation (Tr. 59-60, 148-49). Repeated, consistent pain responses to palpation of the pasterns indicate that a horse feels pain in those spots, and thus distinguishes

a sore horse from one that is merely nervous or silly (Tr. 59-60). A sound horse, i.e., one that is not sore, will not respond repeatedly to and in concert with palpation of specific areas (Tr. 60). If the veterinarians agree that a horse has exhibited bilateral pain response that is due to soring, they will describe their findings on APHIS FORM 7077 (Tr. 60, 68-69, 74, 150-51, 154). Shortly thereafter, each prepares an affidavit based on that form and his own recollection of the examination. (Tr. 71-72, 154-55).

Both Dr. Hendricks and Dr. Zaidlicz recalled working at the National Walking Horse Trainers Show on March 30, 1991 (Tr. 62-63, 149). Their duties were to inspect the horses, to ensure compliance with the HPA, and to evaluate the work of the Designated Qualified Persons (hereinafter DQPs) who were there to limit the liability of the show's management as provided in the regulations issued pursuant to the HPA (Tr. 56-57, 149; 9 C.F.R. § 11.20).

Dr. Zaidlicz did not have an independent recollection of his examination of Time Around Town, but had fully documented his examination and findings (CX 2, 4; Tr. 63-64). Dr. Hendricks recalled certain aspects of his examination of Time Around Town and had also prepared documentation of his examination and findings (CX 2, 3). He remembered "examining a horse presented by Mr. Edwards" and having to "write up the horse," because he and Edwards "come from the same part of the country, lived pretty close together and when you write up your neighbor, you don't forget it." (Tr. 149-50.) In addition, Dr. Hendricks' recollection of certain aspects of the examination was refreshed after he read the APHIS FORM 7077 inspection report that he and Dr. Zaidlicz had prepared (Tr. 149-51).

Dr. Zaidlicz filled out items 30 and 31 of APHIS FORM 7077 (in which Dr. Hendricks concurred) immediately after he and Dr. Hendricks examined Time Around Town and agreed that he was sore (CX 2; Tr. 66-70, 154). Both identified CX 2 as that form and said that the notations on it represent their findings (Tr. 66, 71, 150-51). Thereafter, each prepared an affidavit describing his examination. Dr. Hendricks and Dr. Zaidlicz identified their respective affidavits and said that they reflected their examinations and observations of Time Around Town and were prepared while those examinations were fresh in their minds (CX 3, 4; Tr. 71-72, 76, 151-55). The veterinarians' affidavits and report provide a detailed factual basis for their conclusions that Time Around Town was sore (CX 2, 3, 4).[4]

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[4]*In re A.P. Holt, supra,* 52 Agric. Dec. at 239 ("Although the veterinarians did not at the time of the hearing specifically recall examining the horse, their affidavits and reports provide a detailed factual basis for their conclusions that 'Flashing Gold' was sore"); *In re Pat Sparkman, supra,* 50 Agric. Dec. at 612-14; *In re Edward Whaley,* 35 Agric. Dec. 1519, 1523 (1976); *In re A.S. Holcomb,* 35 Agric. Dec. 1165, 1167 (1976) (professional opinion of Department veterinarian based on physical

b. Time Around Town Exhibited Abnormal, Bilateral Sensitivity in His Front Feet, Thereby Raising the Rebuttable Presumption of Section 6 of the HPA.

Section 6(d)(5) of the HPA (15 U.S.C. § 1825(d)(5)) provides that a horse that is abnormally sensitive in both front feet is presumed to be sore.

The testimony of Dr. Hendricks and Dr. Zaidlicz reveals that Time Around Town exhibited abnormal pain in both front pasterns on March 30, 1991, which raises the statutory presumption of soreness (CX 2, 3, 4; Tr. 68, 72-75, 157-60). While the burden of persuading the trier of fact that the horse was sored remains with Complainant, once Complainant introduces evidence of bilateral, abnormal sensitivity, the burden of coming forward with evidence shifts to Respondents. *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), *printed in* 40 Agric. Dec. 922, 924-25 (1981).

Dr. Hendricks examined Time Around Town using his regular examination protocol and described his observations in his affidavit, as follows:

> On examination by me the horse showed sensitivity in both front feet and there were excessive scars on the anterior lateral surface of both forepasterns. On palpation of the anterior-medial & lateral surface of both forepasterns the horse would express a definite response to the pain. The posterior surface of both forepasterns were also sensitive to moderate palpation. When the sensitive areas were palpated the horse would jerk his foot upward trying to remove his foot from my grip. The horse would flex the abdominal muscles and jerk his head upward each time the sensitive areas were palpated. The pain responses were repeatable and definite each time the above mentioned areas were palpated.

CX 3.

Dr. Zaidlicz observed both the DQP and Dr. Hendricks examine the horse, and stated that "the horse exhibited pain responses to [Dr. Hendricks'] palpation of both forepastern areas." (CX 4.)

Dr. Hendricks asked Dr. Zaidlicz to examine the horse. Dr. Zaidlicz examined Time Around Town and described the examination in his affidavit, as follows:

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examination of horse is sufficient to support finding that horse was sored).

I performed a soreness exam on the horse myself and upon digital palpation of the left forepastern area using light to moderate pressure the horse exhibited definite pain responses over the anterior lateral, anterior medial, posterior lateral, and posterior medial surfaces of the pastern. Upon examination of the right forepastern area, the horse exhibited pain responses over the anterior lateral, anterior medial, posterior lateral and posterior medial surfaces of the pastern. The horse also exhibited granulation tissue (scars) bilaterally on the anterior lateral surfaces of both forepasterns in violation of the "scar rule," as shown on APHIS Form 7077. Upon digital examination of both forepasterns the horse would exhibit pain by pulling the head up, pulling the affected limbs back, tensing abdominal and flank muscle and shifting weight to the rear. The pain responses were consistent and repeatable every time the areas marked on APHIS form 7077 were palpated."

CX 4.

Dr. Hendricks watched Dr. Zaidlicz's examination and stated in his affidavit that "[o]n Dr. Zaidlicz's palpation the horse produced similar responses to those that I found." (CX 3.)

The horse responded *only* when the veterinarians palpated certain spots of his front feet (CX 2, 3, 4). The SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077 (CX 2), depicts front and back views of a horse's feet. On those diagrams, Dr. Zaidlicz, with Dr. Hendricks' agreement, marked the painful areas on the front feet of Time Around Town, all located on the pasterns at about the same distance from the coronary band (CX 2, 3, 4; Tr. 71, 150-60).

It is not normal for a horse to exhibit pain when its pasterns are palpated and, according to Dr. Zaidlicz, Time Around Town's "responses [were] not normal." (Tr. 74.)

Dr. Hendricks testified that "[t]his was not a naturally occurring thing like an injury or fracture or anything like that because it was symmetrical, it was definite, the pain responses were in a definite position." (Tr. 160.) Also, Dr. Zaidlicz testified that he did not "know of anything other than [human intervention] that could have caused these sorts of things." (Tr. 75.)

Because this horse exhibited abnormal pain in both front feet, he is presumed to be sore under section 6(d)(5) of the HPA (15 U.S.C. § 1825(d)(5)).

c. Time Around Town Was Likely To Be in Pain While Moving in the Show Ring, Which Proves the *Prima Facie* Case.

The government did not rely solely on the statutory presumption of soreness, but proved by a preponderance of evidence that Time Around Town met the HPA's definition of "sore" on March 30, 1991. A sore horse is one that as a result of an artificial device or practice "suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)). If a horse consistently exhibits pain in both front pasterns, the USDA veterinarians can be reasonably certain that it will be in pain when it moves (Tr. 74-75). The Tennessee Walking Horse has a rapid, high-stepping gait. If such a horse's pasterns are painful to the light-to-moderate pressure applied when the horse is standing, it is reasonably likely that the pasterns will be more painful still when the horse travels at a fast clip in the ring and places weight on its front feet. That pain will greatly increase if the horse is shown in chains that hit the same painful areas.

Time Around Town's responses showed that specific areas of both of his pasterns were painful when Dr. Hendricks and Dr. Zaidlicz palpated them during the pre-show examination. Chains would have hit the same areas that Dr. Hendricks and Dr. Zaidlicz found to be painful (Tr. 75). Because of the location of the painful areas, the veterinarians could reasonably expect that Time Around Town would have been in physical pain if he had been exhibited on March 30, 1991. (Dr. Zaidlicz testified that the horse would have been in pain even if he had been shown *without* chains: "Well, it's just the -- the increase in motions across tissues that are -- if they're sore enough to palpation and we're giving it very minimal amount of things, just that increase in movement of these tissues is going to be sore" (Tr. 75, 159-60). Both veterinarians said that the horse's pain was due to an artificial cause (Tr. 75, 160).

The testimony of Dr. Hendricks and Dr. Zaidlicz, that Time Around Town was likely to experience pain caused by artificial means if he had been exhibited in the ring, constitutes direct evidence that the horse met the HPA's definition of "sore." *In re A.S. Holcomb*, *supra*, 35 Agric. Dec. at 1167 (professional opinion of Department veterinarian based on physical examination of horse is sufficient to support finding that horse was sored). Complainant has not only relied upon the presumption available in section 6(d)(5) of the HPA (15 U.S.C. § 1825(d)(5)), but has also made out a *prima facie* case, as was explained in *Elliott*, as follows:

> The examining veterinarians did not simply conclude that the horses were abnormally sensitive in two limbs and, therefore, were "sore." Each

> veterinarian testified to the effect that the three horses plainly experienced a high degree of pain upon palpation of their forelimbs, demonstrated by the horses' immediate and reflexive pulling away from the palpation, rearing up and sagging down on the hindquarters, and instinctively cinching up the abdominal muscles. The diagnosis was not based upon mere abnormal sensitivity. The veterinarians specifically opined that the pain responses were not the result of some other type of injury but rather were deliberately inflicted. In other words, the horses, when inspected, were "sore" within the meaning of the Act. . . . The testimony was in the form of professional opinions linking cause and effect, not simple reliance on a statutory presumption. . . . Where there is a factual finding that a horse was "sore", even in the absence of the presumption, it is irrelevant that there may have been reliance on a presumption. *Thornton v. USDA*, 715 F.2d 1508, 1511 (11th Cir. 1983) (citing *Fleming v. USDA*, 713 F.2d 179, 188 (6th Cir. 1983)).

Elliott v. Administrator, *supra*, 990 F.2d at 146.

d. **Time Around Town Did Not Meet the "Scar Rule" Criteria.**

The scar rule provides that horses that do not meet certain criteria are deemed "sore" under the HPA and is intended to eliminate the entry or exhibition of horses that meet the age requirement and are scarred to the extent that they show bilateral evidence of abuse indicative of soring (9 C.F.R. § 11.3). Time Around Town is subject to the scar rule because he was born after October 1, 1975, and Time Around Town did not meet the rule's criteria because the horse exhibited bilateral evidence of abuse indicative of soring (CX 2; Tr. 136; *In re F. Dale Rowland*, 52 Agric. Dec. 1103, 1126 (1993), *aff'd*, 43 F.3d 1112, 1995 WL 10829 (6th Cir.), *cert. denied*, 115 S.Ct. 2610 (1995)).

In his affidavit, Dr. Zaidlicz stated that "[t]he horse also exhibited granulation tissue (scars) bilaterally on the anterior lateral surfaces of both forepasterns in violation of the 'Scar Rule' as shown on APHIS FORM 7077." (CX 4.) Dr. Zaidlicz indicated the center of the horse's front pasterns as the location of the scars (CX 2, item 31). Irritated areas of approximately the same degree and at approximately the same location are not likely to have been accidental and are indicative of soring. *See In re F. Dale Rowland*, *supra*, 52 Agric. Dec. at 1115-17, citing 43 Fed. Reg. 18,519 (1978) ("This conclusion is particularly warranted, where, as here, multiple scars appear at the same relative positions on each foot"). Dr. Hendricks stated in his affidavit that "there were excessive scars on the anterior-lateral surface of both forepasterns." (CX 3.) Moreover, Dr. Hendricks testified

on cross-examination that there was hair loss "[e]nough where you could see the scars" on Time Around Town (Tr. 166). Dr. Zaidlicz testified that what he saw on the horse's front pasterns "would have had to have been there for some time." (Tr. 132-33.)

2. **Respondents' Case.**

Respondents' arguments are contained in Respondent's [sic] Proposed Findings of Fact, Conclusions of Law, Order, and Brief; Memorandum of Points and Authorities in Support Thereof, filed March 10, 1995 (hereinafter Respondents' Brief). Since Respondents' Response To Appeal Petition of Decision and Order, and Points and Authorities in Opposition To Appeal of Complainant, filed May 1, 1996 (hereinafter Respondents' Response), is virtually identical to Respondents' Brief, it is unnecessary to summarize it.

a. **The Government Did Not Establish a Prima Facie Case and Raise the Statutory Presumption of Soreness.**

Respondents argue that "[t]he two government veterinarians in this case, namely DR. RONALD ZAIDLICZ ('DR. ZAIDLICZ') and DR. HUGH HENDRICKS ('DR. HENDRICKS') did not at the time of the trial have an independent recollection of the examination of the horse Time Around Town at the Trainer's [sic] Show on March 30, 1991." (Respondents' Brief at 7.) Respondents cite testimony by the two government veterinarians to support this contention (Tr. 64-65, 149-52). Furthermore, Respondents aver that the VMOs' recollection could not be "rehabilitated" by APHIS FORM 7077, or the individual affidavits of the two VMOs (Respondents' Brief at 9).

Respondents state that items 9, 27, and 28 on the "SUMMARY OF ALLEGED VIOLATIONS," APHIS FORM 7077, are blank. Specifically, these blanks would name the person who paid the entry fee, who transported the horse, and who entered the horse, respectively. The VMOs' affidavits do not explain these discrepancies. (*Id.*)

Respondents argue that the government failed to meet its burden of proof because the VMOs had no independent recollection of their examinations of Time Around Town and neither VMO's recollection was refreshed upon review of the documents each prepared at the time of their respective examinations. (*Id.*)

Finally, Respondents dispute the charge that they transported Time Around Town to the National Walking Horse Trainers Show while the horse was sore (Respondents' Brief at 9-10). Respondents argue that there is no evidence concerning transportation of the horse other than Gary R. Edwards' testimony that

he transported the horse to the show (Tr. 216). Moreover, there is no evidence that the horse was sore when transported or that Gary R. Edwards transported the horse for anyone other than the owners, Mr. and Mrs. Brent Buck.

b. There Is No Evidence That Respondents Entered Time Around Town in the National Walking Horse Trainers Show.

Respondents argue that the "Entry Blank" (CX 1) does not evidence that Respondents entered Time Around Town in the National Walking Horse Trainers Show on March 30, 1991 (Respondents' Brief at 10). Specifically, Respondents argue that CX 1 does not state that Respondents exhibited Time Around Town on March 30, 1991. CX 1 does not state who paid the entry fees. Paige Edwards is the wife of Gary R. Edwards, and although she signed the Entry Blank, she is not an owner of Carl Edwards & Sons Stables and did not pay the entry fees. The exhibitor, owner, and rider of Time Around Town was Becca Buck (Respondents' Brief at 10).

Respondents reiterate that items 9, 27, and 28 are blank on the SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077 (CX 2), so that the names of the person(s) who paid the entry fee, who was responsible for transportation, and who entered the horse, respectively, are missing. Respondents admit that Gary R. Edwards was the trainer of Time Around Town and that he presented this horse for pre-show inspection, citing the transcript (Tr. 213-14, 217) for proof. Although Respondents admit that Gary R. Edwards, Larry E. Edwards, and Ernest Upton all had individual trainer licenses during the pertinent period, neither Larry E. Edwards nor Ernest Upton rode or trained Time Around Town (Tr. 213, 215). Respondents argue that the evidence does not establish who entered this horse, "as required under the case [sic] of *In re Martin*, 53 Agric. [Dec.] at 222; *In re Bobo*, 53 Agric. Dec. at 184, 186." (Respondents' Brief at 11).

c. Time Around Town Was Not Sore When Gary R. Edwards Transported Him to and Presented Him for Pre-show Inspection at the National Walking Horse Trainers Show.

Respondents present their arguments by examining the testimony of principal witnesses.

(1) **DR. RONALD S. ZAIDLICZ.**

"A. DR. ZAIDLICZ was not an experienced veterinarian in APHIS HORSE PROTECTION ACT INSPECTION MATTERS on November 30, 1991, and was

not a credible witness at the Hearing" (Respondents' Brief at 11). Respondents analyze Dr. Zaidlicz's testimony to show that Dr. Zaidlicz rejoined APHIS in January 1991, and had one training course in HPA cases before the March 30, 1991, National Walking Horse Trainers Show (Tr. 77-78). Further testimony shows that Dr. Zaidlicz's training course lasted between 2 and 3½ days; that the National Walking Horse Trainers Show was the second show at which Dr. Zaidlicz carried out duties under the HPA since returning to APHIS; and that this case, *sub judice*, is the first case in which Dr. Zaidlicz found a scar rule violation (Tr. 100-02). Thus, Respondents argue that the 1,600 horses Complainant claims that Dr. Zaidlicz examined actually were examined in 1991-1992, which proves that Dr. Zaidlicz was not experienced in examining horses for soreness under the HPA.

Respondents argue that Dr. Zaidlicz's responses to questions about a training tape expose Dr. Zaidlicz's lack of credibility (Respondents' Brief at 13). Specifically, Respondents allege that Dr. Zaidlicz's inability to determine soreness in two horses depicted on the training film indicates a lack of credibility (RX 16; Tr. 78-79).

Respondents argue (Respondents' Brief at 13-14) that the fact that Dr. Zaidlicz testified that a sound horse will not move when palpated by the fleshy part of one's thumbs, even when one squeezes as hard as possible, means that Dr. Zaidlicz's testimony is not credible (Tr. 419-20). Respondents assert that the logical conclusion of this belief is that if the horse moves, no matter what the pressure applied, the horse is deemed sore under the HPA.

Respondents next point out, without specifically characterizing it, the fact that Dr. Zaidlicz testified that he thought that the necessity of both pasterns showing scars was an agency policy, when it is actually in the scar rule (9 C.F.R. § 11.3) (Respondents' Brief at 14). Apparently, Respondents believe this discrepancy hurts Dr. Zaidlicz's credibility.

Respondents quote testimony (Tr. 85-89) which establishes that Dr. Zaidlicz is of the opinion that "a small scar could be removed surgically with no remaining signs." (Respondents' Brief at 15.) Respondents note that Dr. Hendricks testified that a scar could not be made to vanish surgically (Tr. 194). Respondents also mention (Respondents' Brief at 15-16) that Dr. Humburg, who worked on the Auburn Study, testified essentially that he agrees with Dr. Hendricks that surgery to remove a scar could be detected (Tr. 386, 388).

Respondents argue that the SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077 (CX 2), and the statements of the DQP, Charles Thomas, as reported by Gary R. Edwards in his testimony (Tr. 220-24), support Respondents' contention that the DQP found no sensitivity, no scar rule violations, and nothing wrong with Time Around Town. Moreover, Respondents argue that the facts that the VMOs could

not remember if the DQP told Gary R. Edwards to show the horse anyway (Tr. 164-65) and that the VMOs did not make any mention of Charles Thomas, the DQP, relative to the scar rule, means that Charles Thomas found no scars on Time Around Town (Respondents' Brief at 17).

Respondents argue that Dr. Zaidlicz testified that both he and Dr. Hendricks palpated the scars (Tr. 95-96) and found sensitivity in both feet (Respondents' Brief at 17). However, Respondents argue that Dr. Hendricks testified (Tr. 167-68) to the contrary that he (Dr. Hendricks) found no sensitivity (Respondents' Brief at 18).

The remainder of Respondents' discussion concerning Dr. Zaidlicz consists of the reproduction of large portions of the transcript (Tr. 97-100, 102-04, 106-10, 143-44, 416) and four comments (Respondents' Brief at 18-23). The first two comments merely clarify transcript language (Respondents' Brief at 19, 21) and make no arguments. The second two comments are reproduced below:

> IT IS MINDBOGGLING THAT A LICENSED VETERINARIAN COULD CONCEIVE OF SUCH ANSWERS, LET ALONE GIVE THEM UNDER OATH!
>
> . . . .
>
> IT IS ABSOLUTELY APPALLING THAT THIS GOVERNMENT VETERINARIAN COULD TESTIFY UNDER OATH, THAT HE COULD NOT DESCRIBE FOR THE COURT THE SCARS THAT HE "ALLEGEDLY" SAW ON TIME AROUND TOWN. AND ESPECIALLY BECAUSE HE HAS ACCUSED THE RESPONDENTS OF VIOLATING THE HORSE PROTECTION ACT! IT IS EVEN MORE DISGUSTING TO RESPONDENTS TO BE ACCUSED OF PERFORMING ACTS TO ALLOW TIME AROUND TOWN TO GET GRANULOMAS! NOW, WHEN THE GOVERNMENT VETS HAVE TO "FISH OR CUT BAIT", THEY MAKE STATEMENTS UNDER OATH AS AFOREMENTIONED. HOW SAD!

Respondents' Brief at 22-23.

(2) **DR. HENDRICKS.**

"B. Dr. HENDRICKS was not a credible witness at the Hearing" (Respondents' Brief at 23). Respondents argue that Dr. Hendricks testified (Tr. 146) that he examines a horse by watching "the horse walk and move and turn,"

but that neither Dr. Hendricks' affidavit nor the SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077, contains a statement that either VMO watched Time Around Town "walk and move and turn." However, Respondents include testimony (Tr. 162-63) on cross-examination of Dr. Hendricks that Dr. Hendricks watched the horse walk as DQP Thomas had Time Around Town walk just prior to the DQP's palpation (Respondents' Brief at 24).

Respondents reproduce large portions of the transcript (Tr. 162-67) of Dr. Hendricks' testimony concerning the DQP's examination, the scar rule, Time Around Town's scars, and Dr. Hendricks' recollection of many events, and comment, as follows:

> IT IS IMPORTANT TO NOTE HERE THAT GARY EDWARDS TESTIFIED THAT HE AND LARRY EDWARDS HAVE SHOWN CLOSE TO 15,000 HORSES SINCE THE HORSE PROTECTION ACT WAS PASSED. (T. 213:7-12) CAN YOU IMAGINE THESE MEN BRINGING A HORSE TO INSPECTION THAT HAD BILATERAL 1/4 TO 1/2 INCH TALL SCARS! ALSO, GARY EDWARDS (T. 230), DR. BAKER (T. [2]97), DR. MILLER (T. 366-367), DR. COOK (T. 369), AND DR. HUMBURG (T. 389-393) DID NOT FIND ANY GRANULOMAS ON TIME AROUND TOWN.

Respondents' Brief at 26.

Continuing this approach, Respondents reproduce portions of Dr. Hendricks testimony on cross-examination (Tr. 167-70, 172-78) covering such topics as whether scars may be surgically removed; whether Dr. Hendricks palpated the scars; whether the DQP mentioned the scars; whether APHIS FORM 7077 listed the horse's reactions to the palpation; whether Dr. Hendricks had any recollection of the horse's reactions to his palpations; whether Dr. Hendricks remembered Dr. Zaidlicz's examination of the horse's left or right foot, specifically; and whether Dr. Hendricks recollected Dr. Baker approaching him with certain questions (Respondents' Brief at 26-28). However, the only argument after the reproduction of this testimony is as follows:

> It is important to note here that DR. BAKER could remember his conversation with DR. HENDRICKS. DR. BAKER asked DR. HENDRICKS WHAT HE HAD BASE [sic] HIS DIAGNOSIS OF THIS HORSE AS BEING SORE UPON, AND DR. HENDRICKS DID NOT ANSWER HIM. (T. 8-20)

Respondents' Brief at 28.

Next, Respondents reproduce portions of the transcript (Tr. 187-88) in which Dr. Hendricks testified that the fact that Dr. Humburg would testify that there were no scars found on Time Around Town's right foot would not cause him (Dr. Hendricks) to change his opinion. After the quotation from the transcript, Respondents make the following argument:

> THIS TESTIMONY OF DR. HENDRICKS IS OUTRAGEOUS. UNDER OATH, DR. HENDRICKS TESTIFIED THAT HE COULD SEE A SCAR ON THE RIGHT FOOT OF TIME AROUND TOWN IN THE VIDEO. NO ONE ELSE COULD SEE SUCH A SCAR! FURTHER, DR. HUMBURG OF AUBURN TESTIFIED THAT THERE WERE NO SCARS ON THE RIGHT FOOT OF TIME AROUND TOWN. BUT, THIS REACTION OF DR. HENDRICKS TO THE VIDEO IS INDICATIVE OF WHAT LENGTHS THESE TWO GOVERNMENT VETS WOULD GO TO, TO TRY TO PROTECT THEMSELVES!

Respondents' Brief at 28-29.

(3) GARY EDWARDS.

"C. Gary Edwards testimony was convincing that Time Around Town was not sore on March 30, 1991" (Respondents' Brief at 29). Respondents argue that what Gary Edwards did when he was "informed by the government vets about an 'alleged' problem with Time Around Town" is important. (*Id.*) Respondents reproduce major portions of Gary Edwards testimony (Tr. 217, 220-21, 223-25) covering such topics as the March 27, 1991, preliminary show, where Time Around Town was inspected and passed before and after the show; the horse's failure to pass Dr. Hendricks' inspection of March 30, 1991; Gary Edwards' memory of the inspections by DQP Thomas and VMOs Hendricks and Zaidlicz; and Gary Edwards' recollection that the DQP told him that there was nothing wrong with the horse and that Edwards should go ahead and show the horse. However, the only item related to Respondents' argument, that it is important what Gary Edwards did when told of the infraction, is Gary Edwards' statement that he "could not believe it" when told that the VMOs found the horse to be sore (Tr. 224).

Next, Respondents argue that Gary Edwards was unaware that Time Around Town had been cited for the scar rule until APHIS investigator Lynwood Suber went to the Edwards stable and told him on May 29, 1991 (Respondents' Brief at 30). Gary Edwards testified that he asked Suber to return to his office and check that information, which Suber did, and Suber called to confirm the scar rule violation (Tr. 210, 225-29). Respondents then took pictures of the horse's pasterns, which are in the record as RX 12.

Respondents then reproduce large portions of Gary Edwards' testimony (Tr. 230-37), but Respondents make no arguments thereupon (Respondents' Brief at 30-32). Some of the matters addressed in this reproduced testimony are: that Gary Edwards never found a scar on Time Around Town's right leg, but there has always been a little place from "maybe a wire cut" on this horse's left leg (Tr. 230); that Time Around Town was shown many times in 1991-1992 and checked by government veterinarians on many occasions without being cited for a scar rule violation (Tr. 231-34); that Time Around Town was examined by Dr. Jay Humburg at Auburn University in 1994 and was found to have "nothing" on the right foot, and but a "little bitty" (not named) on the left foot (Tr. 234-35); and that, when the VMOs found Time Around Town sore on March 30, 1991, Gary Edwards kept the horse in the inspection area for Dr. Baker's examination and videotaped Dr. Baker's re-examination, which is in the record as RX 11 (Tr. 235-36).

Respondents end this section of their argument with the following statement:

> After Dr. Baker[] examined the horse, Dr. Charlene Cook examined the horse in the warmup area. (T. 267) [sic] Then, Dr. Ray Miller examined the horse (T. 239). So, a total of three private veterinarians examined the horse Time Around Town on March 30, 1991 and found the horse not to be sore, and each of them found no scars on the horse Time Around Town.

Respondents' Brief at 32.

(4) DR. RANDALL BAKER.

"D. Dr. Randy Baker was credible and conducted a thorough examination of Time Around Town" (Respondents' Brief at 32). Respondents argue that Dr. Baker conducted a thorough examination of Time Around Town in the same warm-up area shortly after the government veterinarians found Time Around Town sore, but make no further specific arguments. Respondents reproduce

portions of Dr. Baker's testimony. Some of the issues covered by Dr. Baker's quoted testimony are: that the horse's rectal temperature, respiration rate, and heart rate were normal (Tr. 275); that observation of the horse walking straight and in a figure-eight revealed a normal gait without lameness or unsoundness (*Id.*); that digital palpation revealed no redness, swelling, or heat to indicate inflammation, and that the movement detected on palpation revealed no reliable pattern (*Id*); that this examination and the observation of the horse being ridden after the examination caused Dr. Baker to conclude that the horse was sound (*Id.*); that Dr. Baker checked the horse's pasterns for hair loss and for scars but found none (Tr. 279-80; but see Tr. 281, where Dr. Baker concedes that there "might be some hair loss," and Tr. 282, where Dr. Baker testifies that "I can't tell you whether that's just a part in the hair or whether there is some hair loss there"); that Dr. Baker testified that the horse was free of granulomas, which Dr. Baker defined as a break in the "epithelioma" layer of the skin, with subsequent healing, so that scar tissue appears (Tr. 283); that granulomas do not have hair follicles, so that there is a loss of hair (*Id.*); that Dr. Baker saw no evidence of granulomas in the pictures in RX 12 (Tr. 284-85); and that palpation is a highly subjective test and using the same amount of pressure as that used to determine lameness, Dr. Baker found no sensitivity that he considered excessive in either front pastern of Time Around Town (Tr. 289-90).

(5) **DR. RAY MILLER.**

"E. Dr. Ray Miller was credible and conducted a thorough examination of Time Around Town" (Respondents' Brief at 33). Respondents merely reproduce portions of the transcript with some of Dr. Miller's testimony, but make no arguments based upon Dr. Miller's testimony. Some of the issues covered in the quoted testimony include: that Dr. Miller followed Gary R. Edwards, as Mr. Edwards led Time Around Town to Respondents' rented barn, located 50 yards from the Calsonic Arena warm-up area, for the purpose of examining Time Around Town after the USDA VMOs found the horse sore (Tr. 330); that Dr. Miller's inspection first included having the horse led and turned left and right, starting and stopping, and repeating, to determine how freely the horse led (Tr. 331); that Dr. Miller's opinion is that a horse that is reluctant to lead has a possible alteration of gait which could indicate soreness or lameness, but Time Around Town led freely and moved as a sound horse should (Tr. 331-32); that Dr. Miller observed the horse's disposition and found the horse to be alert, happy, and aware, which is indicative of a sound horse (Tr. 332); that a sore horse would stand with back legs tucked under close to the front legs, would be

reluctant to move, and would not normally turn its head to observe events or other horses (Tr. 333); that Dr. Miller palpated Time Around Town with more pressure than that used by VMOs, but found no sensitivity (Tr. 335-36); and that Dr. Miller found no hair loss, no scars, and no granulomas on Time Around Town (Tr. 336-37).

(6) DR. CHARLENE COOK.

"F. Dr. Charlene Cook was credible and conducted a thorough examination of Time Around Town" (Respondents' Brief at 35). Respondents merely reproduce large portions of Dr. Cook's testimony, but make no arguments based on Dr. Cook's testimony. Some of the issues addressed in Dr. Cook's quoted testimony include: that Dr. Cook examined Time Around Town at about 11:00 p.m., March 30, 1991, in the warm-up area of the Calsonic Arena; that Dr. Cook found the horse to be bright, alert, and overall in excellent flesh, with no sweating or any appearance of distress (Tr. 364); that Dr. Cook palpated the horse with a moderate amount of pressure, not so light as to be not enough, but not so much as to get a false reaction (Tr. 365); that the palpation got no reaction from the horse (Tr. 366); that on a loose lead the horse led in tight circles and could spin in its tracks, which Dr. Cook characterized as something a sore horse could not do (*Id.*); and that Dr. Cook found no hair loss, no scars, and no granulation on Time Around Town (Tr. 366-67).

(7) DR. JAY HUMBURG.

"G. Dr. Jay Humburg was a credible expert witness, and conducted a thorough examination of Time Around Town at Auburn University" (Respondents' Brief at 36). Respondents assert that Dr. Humburg is currently a veterinarian in the Equine Section of the large animal clinic at Auburn University where he participated in the Auburn Study on the scarring of horses and the complications from scarring (Tr. 385-87). Respondents quote large portions of Dr. Humburg's testimony without making any arguments. Some of the issues addressed in Dr. Humburg's quoted testimony include: that the Auburn Study's methods required 2 months to create a scar (Tr. 387); that Dr. Humburg's professional opinion is that the only way to remove a granuloma/scar would be surgically, but it would be very difficult, and close examination would surely reveal the surgery (Tr. 388); that a granuloma forms when the epidermis and the deeper layer of the skin is broken, a proliferation of tissue closes the defect, and then a layer grows over the top of that (Tr. 388-89); that because the break in the

dermis, which controls hair follicles, is replaced by the granuloma, there won't be any hair on a granuloma (*Id.*); that Dr. Humburg examined Time Around Town's pasterns for scars and the horse's general condition at Auburn on August 1, 1994, 2 months before the hearing by request of Respondent Gary R. Edwards (*Id.*); that after careful visual and palpation examination, Dr. Humburg found several hairless areas, slightly thickened, on the anterior surface of the left pastern (Tr. 390); that Dr. Humburg found no scars or lesions on the right pastern and no evidence of surgery to take the scars off (*Id.*); that Dr. Humburg does not believe that Time Around Town could be in violation of the scar rule because he does not have a bilateral problem (Tr. 391); that Dr. Humburg does not believe that there could have been granulation as illustrated on CX 2, item 31, on the right pastern on March 31, 1991, because he does not believe that such lesions could have been reduced to nothing as he saw it (Tr. 392); and that Dr. Humburg disagrees both with CX 3, in which Dr. Hendricks describes excessive scars on both front pasterns, and with CX 4, in which Dr. Zaidlicz describes granulation tissue (scars) bilaterally on the anterior lateral surfaces of both legs (Tr. 393).

d. **Conclusion.**

Respondents' conclusion (Respondents' Brief at 39) is that the government VMOs lied about excessive scar tissue on both front pasterns of Time Around Town, since scar tissue cannot disappear. Moreover, three qualified private veterinarians testified that on March 30, 1991, each of them checked for scars and found no scars on either of the horse's front limbs. Approximately 3½ years later, Dr. Humburg checked the horse at Auburn and found no scars on the right leg and three little scars on the left leg. Dr. Humburg testified that he did not believe the horse could have had a granuloma on his right leg on March 30, 1991.

e. **Demonstrative Evidence.**

Respondents include three exhibits of demonstrative evidence, consisting of a set of photographs and two videotapes. Respondents' Exhibit No. 11 is a videotape of a horse identified as "Time Around Town" being examined by Dr. Randy Baker, and also being led around and then ridden by Gary R. Edwards. The subscript on the videotape reads March 30, 1991, at 10:21 p.m. There is no commentary other than Gary R. Edwards stating the name of the horse and the circumstances which caused him to ask Dr. Baker to inspect Time Around Town for soreness.

Respondents' Exhibit No. 12 is a portfolio of 16 (approximately 8x10-inch) photographs of Time Around Town and the horse's pasterns, and photocopies of photographs, accompanied by a June 4, 1991, letter from Paige Edwards to Mr. Priamos, which reads in its entirety, as follows:

> After the two U.S.D.A. Area Investigators left our barn, they called Gary and Larry back and told them the U.S.D.A. veterinarian from the Trainer's Show also wrote Time Around Town up for the scar rule, in addition to sore. That was the first Gary and Larry had heard anything about it. They said when he was "writted up" at The Trainer's Show, the vet only mentioned palpation.
>
> We immediately took pictures of his SCAR-FREE feet. Enclosed is a set of copies for you.
>
> /s/ Paige

RX 12.

The second videotape (RX 16) is entitled "Horse Protection Examination Procedures" and is a training tape produced by APHIS.

3. A Preponderance of the Evidence Supports a Finding That Time Around Town Was Sore When Entered by Gary R. Edwards at the National Walking Horse Trainers Show on March 30, 1991, in Shelbyville, Tennessee; But, the Evidence Is Sufficient Neither to Inculpate Gary R. Edwards' Partners Nor to Support the Charge of Transporting While Sore.

Much more than a preponderance of the evidence supports the finding that Gary R. Edwards entered Time Around Town, while the horse was sore. I adopt Complainant's version of the facts set forth in this Decision and Order at section III.C.1., *supra*, because those facts are fully supported in the record, except that I neither agree that Gary R. Edwards' partners or Carl Edwards & Sons Stables are culpable, nor do I find that Time Around Town was transported while sore, in violation of section 5(1) of the HPA (15 U.S.C. § 1824(1)).

To summarize: two experienced and highly qualified USDA VMOs both found Time Around Town bilaterally and abnormally sensitive and displaying excessive bilateral scarring of the front pasterns, during a pre-entry examination at the National Walking Horse Trainers Show. They agreed to write up the horse

as sore when they both got bilateral, repeated, consistent pain responses to palpation of the horse's scarred front pasterns, using the time-tested procedures and techniques described in this Decision and Order at section III.C.1.a., *supra*. Both VMOs prepared and signed the SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077, and both prepared an affidavit shortly after the examination, while it was still fresh in their minds. Although neither VMO specifically remembered examining Time Around Town, both VMOs remembered working the National Walking Horse Trainers Show on March 30, 1991. Notwithstanding the lack of an independent recollection of examining Time Around Town, APHIS FORM 7077 and the two affidavits form a detailed factual basis for the VMOs' conclusion that the horse was sore.

The evidence in this proceeding allows Complainant to proceed on three separate theories of proving sored condition in Time Around Town: rebuttable presumption, *prima facie* case, and scar rule. Although any one of these would be sufficient to prove soreness, I find that Complainant has a preponderance of the evidence in each.

But, before addressing these theories, I will dispose of two parts of the Complaint with which I do not agree with Complainant: one is the inclusion of the Carl Edwards & Sons Stables and all partners in Carl Edwards & Sons Stables, as Respondents, and the other is the violation of transporting a sore horse.

In *In re Gary R. Edwards*, *supra*, I addressed the issue of the liability of the partnership and the partners for a violation by one of the partners. Therein, I decided that Respondent Gary R. Edwards had violated the HPA's prohibition against exhibiting a horse while the horse was sore; but, I also found that Gary R. Edwards' partners in Carl Edwards & Sons Stables, and the Stables, itself, could not be deemed to have also violated the HPA with Respondent Gary R. Edwards, because Complainant cited neither statutory nor case law to support this theory, but rather relied on the State of Georgia law of partnership. Although Respondent Gary R. Edwards is charged in the Complaint in this proceeding, *sub judice*, with entering, rather than exhibiting a sore horse, in both cases it is a distinction without a difference, since the issue in both cases is one of presumed guilt through association.

Respondent Gary R. Edwards argues and admits in his testimony, and the record fully supports the facts, that Gary R. Edwards and only Gary R. Edwards transported Time Around Town to the show, that only Gary R. Edwards trained this horse, and that only Gary R. Edwards presented the horse for inspection (Tr. 214-17). Complainant argues that Gary, Larry, and Etta Edwards, and Carl Edwards & Sons Stables are all general partners under the Georgia state law on partnership (Complainant's Proposed Findings of Fact and Conclusions of Law;

and Memorandum of Points and Authorities in Support Thereof at 19-20 (Jan. 27, 1995) (hereinafter Complainant's Proposed Findings of Fact)). Complainant may be correct on the state law of Georgia, but it is of no moment, because it is axiomatic that state law cannot control a federal regulatory statute. This argument is thus rejected both for the fact that state law does not control federal law, and for the reasons set forth in *In re Gary R. Edwards, supra.*

Next, the Complaint alleges that Respondents transported a horse while sore with reason to believe that the horse would be entered in a show while sore, in violation of 15 U.S.C. § 1824(1). I find that only Gary R. Edwards has properly been shown to be responsible for the sored condition of this horse. Since I also believe that the civil penalty as to this Respondent should not exceed $2,000, it is unnecessary to consider whether he committed a separate violation of the HPA (15 U.S.C. § 1824(1)) by transporting Time Around Town on or before March 30, 1991, in a sored condition, with reason to believe that the horse would be entered in a show while sore.[5]

Additionally, I take note of the great deal of conflicting expert testimony in this proceeding concerning the scar rule violation. While I conclude that the USDA VMOs are credible and correct in their observations of bilateral evidence of abuse indicative of soring on Time Around Town, this scar rule evidence is not of such overwhelming magnitude that it should be put forward to a reviewing court, to be examined in support of a transporting-while-sore violation.

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[5]This conclusion and the analysis preceding it are based upon guidance from the *Livolsi* decision, as follows:

> Since I believe that the civil penalty as to the respondent Morris should not exceed $1,000, it is unnecessary to consider whether he committed a separate violation of the Act (15 U.S.C. § 1824(1)) by transporting the horse on August 21, 1978, in a sored condition. Although none of the Department's veterinarians examined the horse on August 21, 1978, it would be permissible in appropriate circumstances to infer that a horse was sore on a date shortly prior to its examination, based upon all of the evidence in the case. Such an inference would be particularly appropriate if the veterinarians who examined the horse at the show testified that, in their judgment, the horse was sore on the earlier date. But even without such an expert opinion as to the condition of the horse when it was transported, it would be possible in appropriate circumstances to draw an inference from all of the facts in the case that the horse was sore when transported. But as stated above, there is no need to determine this issue here.

In re Peter Livolsi, 39 Agric. Dec. 1396, 1406 (1980), *aff'd per curiam*, 672 F.2d 903 (3d Cir. 1981) (Table).

a. **Complainant Raised the Rebuttable Presumption Under Section 6 of the HPA, But Respondents Did Not Rebut the Presumption of Soreness.**

Under section 6(d)(5) of the HPA (15 U.S.C. § 1825(d)(5)), as interpreted by *Landrum* (explained in this Decision and Order at section III.C.1.b., *supra*), once Complainant has introduced evidence of bilateral, abnormal sensitivity in both front feet (or both back feet) of the horse, Respondents must come forward with evidence to rebut the presumption. Complainant has raised the presumption by introducing evidence of bilateral, abnormal sensitivity, but Respondents have not come forward with evidence to rebut the presumption.

Complainant's case is based, *inter alia*, upon the testimony (Tr. 68, 72-75, 157-60), affidavits (CX 3, 4), and SUMMARY OF ALLEGED VIOLATIONS, APHIS FORM 7077 (CX 2) given by the VMOs, Drs. Hendricks and Zaidlicz, as detailed in this Decision and Order at section III.C.1.b., *supra*. This evidence raises the statutory presumption of soreness. Essentially, Complainant's evidence shows that Time Around Town exhibited bilateral pain responses to moderate palpation, but only on certain spots of his front feet, when both Dr. Hendricks and Dr. Zaidlicz inspected the horse. These painful areas, located on the front pasterns about the same distance from the coronary band, are diagrammed on APHIS FORM 7077 (CX 2). Dr. Zaidlicz knew of no other way than human intervention to account for this condition (Tr. 75). Dr. Hendricks testified that this condition was not naturally occurring (Tr. 160).

Respondents argue that Complainant, *inter alia*, did not properly raise the statutory presumption because the VMOs could not independently recollect the inspection of Time Around Town and were not able to be "rehabilitated" after seeing the documents (Decision and Order at section III.C.2.a., *supra*). I disagree. The Department's VMOs work at many horse shows every year and examine countless numbers of horses. I find the inability of the VMOs to remember a specific horse, years after inspecting the horse, does not make their findings, contemporaneously recorded in affidavits and on APHIS FORM 7077, less credible, reliable, or probative. Further, the Federal Rules of Evidence do not apply to these proceedings; and, even if such rules did apply, the VMOs' evidence would be properly and routinely admissible under well-settled exceptions to the Federal Rules of Evidence governing admissible hearsay.

Respondents point out that items 9 (who paid entry fee), 27 (who transported horse), and 28 (who entered horse) on APHIS FORM 7077 (CX 2) are not filled with names (see also Decision and Order at section III.C.2.b. for this same argument); but, there is no requirement that all spaces on the APHIS FORM 7077

must be completed. Further, this missing information is easily available in the record.

Although item 9 is blank, item 10 answers "yes" the question whether a "copy of the entry sheet [is] enclosed"; and, I find that the enclosed "Entry Blank" (CX 1) shows Paige Edwards signing for entry on behalf of the listed exhibitor, Respondent Carl Edwards & Sons Stable. The form shows fees paid with check numbers 4397 and 4481. However, merely signing an entry form, merely paying the entry fee, or even doing both, does not necessarily constitute entry. Yet, they are both considerations in determining entry.

Item 27 is blank, but Respondent Gary R. Edwards admits in his testimony that he transported Time Around Town to the show (Tr. 216). Moreover, Respondent Gary R. Edwards admits that he, alone, presented Time Around Town for pre-show inspection and was the only trainer of that horse (Tr. 214-15, 217).

Based upon this testimony, I find by a preponderance of the evidence that Respondent Gary R. Edwards transported Time Around Town to, and entered Time Around Town in, the National Walking Horse Trainers Show on March 30, 1991.

This conclusion stems from applying the *Elliott* principles to this proceeding, and the Court in that case was specific:

> We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a show would seem to encompass all the requirements--including inspection--and the time necessary to complete those requirements.

Elliott v. Administrator, *supra*, 990 F.2d at 145.

Respondents cite the *Martin* and *Bobo* cases as requiring "facts" to establish who entered Time Around Town, which "facts," Respondents argue, were not elicited at the hearing in this case; but, an examination of the pages cited by Respondents reveals that both cited cases relied on *Elliott*, as follows:

> The evidence clearly establishes that Respondent Bobo entered "Ultimate Beam" at the Fun Show. Mr. Bobo was responsible for nearly every step in the process which comprises entry, *In re Elliott*, 51 Agric. Dec. 334.,

> 342 (1992), *aff'd*, 990 F.2d 140 (4th Cir. 1993), [*cert. denied.*, 510 U.S. 867 (1993)], from signing the entry form and submitting the fee, to preparation of the horse and presenting him for pre-show inspection. In fact, Mr. Bobo admitted during his testimony that he entered the horse.
>
> . . . .
>
> Respondents claim that there is insufficient proof that Mr. Bobo entered "Ultimate Beam" in the Albertville Show. On the contrary, the evidence demonstrates that Mr. Bobo actively participated in the entry process from the time that he paid the entry fee for the horse and signed the class sheet, until he presented "Ultimate Beam" for pre-show inspection, after personally preparing the horse for performance.

In re William Earl Bobo, supra, 53 Agric. Dec. at 184, 186-87.

> Although Judy Martin denied during testimony that she entered "Pride's Dixie Queen" in the Celebration (Tr. 376), a preponderance of the evidence demonstrates that Ms. Martin entered, and Steve and Pat Wilson allowed the entry of, the horse. "Entering," within the meaning of the Act, is "a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited." *William Dwaine Elliott, et.al.*, 51 Agric. Dec. 334 (H.P.A. Dkt. No. 90-20, H.P.A. Dkt. No. 91-122) (May 14, 1992), *aff'd, Elliott v. U.S.D.A.*, [990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993)]. Ms. Martin's role in multiple steps of the entry process is established by uncontroverted evidence. Although Judy Martin denies that she personally filled out the entry form, her name was listed in the area in which the signature of the exhibitor or trainer is required. She admitted that she paid the entry fee and transported the horse to the show grounds. She was the custodian of the horse during its examination by the USDA veterinarians. In addition, Ms. Martin testified without contradiction that she and the Wilsons jointly decided to enter the horse in the show.

In re Judy Martin, 53 Agric. Dec. 212, 222 (1994), *rev'd per curiam*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24).

It is clear on this record that Gary R. Edwards personally did a number of the more important items identified as parts of the process of entry (e.g., training the horse, transporting the horse, presenting the horse for inspection), such that the

cases submitted by Respondents, *Bobo* and *Martin*, actually support a finding that Gary R. Edwards entered the horse as charged, and I so find. Moreover, there is nothing in Respondents' arguments about who entered the horse, which serves to rebut the presumption.

The remainder of Respondents' Brief is based upon testimony of seven principal witnesses. A close examination of these witnesses' testimony, as advanced by Respondents, does not reveal that any of the witnesses specifically attempted to rebut the presumption. Moreover, I find no testimony which would serve to rebut the presumption. I thus find that Complainant properly raised the presumption, but that Respondents did not rebut the presumption that Time Around Town was sore as alleged in the Complaint.

b. Complainant Both Makes and Proves the *Prima Facie* Case That Respondent Gary R. Edwards Entered Time Around Town While the Horse Was Sore.

Complainant both makes and proves the *prima facie* case by more than a preponderance of the evidence, which is all that is required,[6] that on March 30, 1991, Respondent Gary R. Edwards entered Time Around Town in the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore. I completely agree with Complainant's version of the facts regarding Respondent Gary R. Edwards' entry of Time Around Town while the horse was sore, which I summarized in this Decision and Order at section III.C.1., *supra.*

Respondents' arguments against a *prima facie* case are made throughout Respondents' Brief, as summarized in this Decision and Order at section III.C.2., *supra*, in that Respondents use the testimony of seven principal witnesses to make arguments. Also, Respondents' counsel makes statements in the nature of arguments in the first 7 pages of Respondents' Brief. However, these statements are not supported by record evidence, and thus are accorded little weight.

For instance, Respondents note that Complainant lumps Respondents together under the name "Edwardses," which Respondents aver has the tactical purposes of lowering the Complainant's burden of proof, thereby denying Respondents their constitutional right to a fair hearing (Respondents' Brief at 1). Respondents adduce no authority for this position and give no record evidence to support this concept. I find this argument without merit.

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[6]See note 3.

Respondents also state that there is a problem enforcing the HPA's requirement that a horse is sore when it experiences pain, caused by artificial means, while moving (Respondents' Brief at 2). This statement has no support from the record, the HPA, or case law, and is rejected.

Also, Respondents assert that they have been accused of scar rule violations, which accusations are unfounded, ruthless, and worthless, and without competent proof, because Respondents would never subject their horses to such abuse (Respondents' Brief at 3). This argument is rejected for lack of supporting evidence for the claim.

Respondents assert that Complainant cites Agriculture Decisions cases, which Respondents claim are not applicable to the facts of this case, and that Respondents have concentrated on the transcript and exhibits to defend themselves, rather than to distinguish the cases cited against them (Respondents' Brief at 3-4). Obviously, Respondents ignore at their peril case law cited against their position. Their underlying argument that the cited case law does not apply to the facts of this case is not persuasive, when Respondents do no more than baldly state that cited cases do not apply. Respondents must show which cases are inapposite and how.

Respondents further assert that Complainant made arguments from material which was not presented at the hearing: (1) books, articles, and newspaper stories and the statement that owners and trainers have sored horses for 40 years; (2) six articles and books on horses; another book not mentioned at the hearing; (3) the statement that the Edwardses and their witnesses have strong ties to the Walking Horse Industry, which opposes efforts to end soring; (4) the cases, other than this one, in which Drs. Miller and Baker have testified, which information was not presented at the hearing; and (5) that Complainant stated that "each is interested in the outcome of this case" which statement (presumably about the veterinarians) was not said at the hearing (Respondents' Brief at 4-5).

These objections are without merit. To the extent that Respondents were concerned that the material extraneous to the hearing would sway the ALJ, their fears were not realized, as the ALJ dismissed the Complaint. To the extent that I am even aware of this material, it forms no part of the basis for this Decision and Order.

As summarized in this Decision and Order at section III.C.2.c., *supra*, Respondents' arguments are contained in critiques of the testimony of seven principal witnesses. In arguing against the *prima facie* case, Respondents attack Dr. Zaidlicz's credibility and experience (Decision and Order at section III.C.2.c.(1), *supra*). Respondents make some very good arguments that Dr. Zaidlicz was not very experienced in HPA enforcement cases when he examined Time Around Town. Dr. Zaidlicz had only rejoined APHIS in January 1991, had

attended one approximately 3-day training course, and had examined horses at only one other show, before the March 30, 1991, National Walking Horse Trainers Show. Moreover, this was Dr. Zaidlicz's first scar rule case. To the extent that Dr. Zaidlicz was held out to be highly experienced in HPA enforcement at the time of the National Walking Horse Trainers Show, Respondents are correct that this is an overstatement.

However, Dr. Zaidlicz was, at the time of the National Walking Horse Trainers Show, a very experienced equine veterinarian, who had, since 1976, worked at racetracks, worked with wild horses, taught equine medicine, was a certified farrier, and taught shoeing, breaking, and training of wild horses (Decision and Order at section III.C.1.a., *supra*). Dr. Zaidlicz also had previously worked at USDA.

Respondents' valid points on Dr. Zaidlicz's lack of HPA enforcement experience go to the weight to be accorded to Dr. Zaidlicz's testimony, not to the credibility of that testimony. I accord weight to Dr. Zaidlicz's testimony because of the number of years of his equine experience, his 3-day training course, and his limited HPA enforcement experience prior to the National Walking Horse Trainers Show. Finally, on this point, due to the APHIS policy requiring two VMOs to reach agreement before writing a violation, Dr. Zaidlicz's expert opinion has the corroboration of Dr. Hendricks, whose vast experience in HPA enforcement is not in question. Consequently, I conclude that the fact that Dr. Zaidlicz is not "very experienced" in HPA enforcement matters, as overstated by Complainant, detracts slightly from the weight accorded Dr. Zaidlicz's testimony.

Respondents attack Dr. Zaidlicz's credibility for failing to answer satisfactorily several questions concerning the APHIS HPA enforcement training tape (RX 16). I reject this argument for several reasons. Dr. Zaidlicz responded that he could not diagnose a horse as sound or sore from a videotape, which is correct. *See In re William Earl Bobo*, *supra*, 53 Agric. Dec. at 188 (videotaped evidence and opinions based upon the videotape are of reduced value because a sore horse will not necessarily show distress or abnormal gait while in the ring; it is impossible to determine proper palpation pressure from a videotape due to palpation techniques like "feathering," which is such minimal pressure as not likely to evoke a response). Moreover, the condition of horses other than Time Around Town is irrelevant. Finally, there is no nexus between Dr. Zaidlicz's demurral to find the sore horse on the videotape, and Respondents' conclusion that Dr. Zaidlicz's refusal impeaches Dr. Zaidlicz's credibility.

Respondents argue that Dr. Zaidlicz's credibility is hurt by the fact that Dr. Zaidlicz believes that a sound horse will not respond to palpation from the fleshy part of the thumb, regardless of how much pressure is applied, which

automatically means that Dr. Zaidlicz believes that any horse that responds to any palpation at all must be sore. I believe Respondents make a false deduction. Dr. Zaidlicz did not testify to such a belief, and in fact, testified in great detail as to just how his examinations are conducted and as to what he believes constitutes evidence of soring. There is no evidence in the record to contradict Dr. Zaidlicz's direct testimony on how he conducts his own inspections. Respondents' argument, I find, is argumentative speculation.

The remainder of Respondents' arguments that relate to Dr. Zaidlicz concern the scar rule issue, and I address them in the next section.

The second principal witness is Dr. Hendricks, who Respondents argue is not credible (Decision and Order at section III.C.2.c.(2), *supra*). For instance, Respondents argue that Dr. Hendricks testified that he examines the horse by watching "the horse walk and move and turn," but that neither Dr. Hendricks' affidavit nor APHIS FORM 7077 contain a statement that either VMO actually watched Time Around Town walk, move, and turn (Respondents' Brief at 24). Presumably, Respondents' point is that this proves Dr. Hendricks not to be credible. However, in cross-examination testimony reproduced in Respondents' Brief at 24, Dr. Hendricks testifies that he watched the horse walk just prior to the DQP's examination. Therefore, Respondents themselves elicited testimony which contradicts their point. I find that this argument does not impeach Dr. Hendricks' credibility.

Respondents also assert that Dr. Hendricks did not respond to Dr. Baker's question: upon what had Dr. Hendricks based his diagnosis of this horse being sore? This exchange is irrelevant to whether Dr. Hendricks' testimony is credible. I find that nothing in Respondents' critique of Dr. Hendricks' testimony detracts from Complainant's *prima facie* case.

Respondents' remaining argument that relates to Dr. Hendricks concerns the scar rule and is addressed in the next section.

Respondents' arguments based upon the testimony of Respondent Gary R. Edwards do nothing to persuade me that Complainant has not made and proved a *prima facie* case. In fact, the only argument made is that it is important what Respondent Gary R. Edwards did when informed by the VMOs that his horse was in violation. However, an examination of the argument reveals only long, quoted passages from the transcript, with no argument attached. In fact, the only thing offered by Respondents, *vis a vis*, the "important" thing which Gary R. Edwards did when informed of a violation, was that he said that he "could not believe it." (Tr. 224.) Arguments based upon Gary R. Edwards' testimony do nothing to disprove Complainant's *prima facie* case.

The final four witnesses are Respondents' expert witness veterinarians, about each of whom Respondents argue were "credible and conducted a thorough

examination of Time Around Town." (Decision and Order at section III.C.2.c.(4)-(7), *supra*.) Without more, however, the fact that these veterinarians were credible and conducted thorough examinations does not help Respondents' case. For example, Respondents argue that Dr. Baker conducted a thorough examination of Time Around Town in the same warm-up area shortly after the government VMOs rejected the horse, but I find that Respondents make no further arguments, yet only reproduce portions of Dr. Baker's testimony. Generally, I find that the testimony is not helpful to Respondents' case.

Dr. Randall Baker examined Time Around Town later the same evening of the National Walking Horse Trainers Show, after the government VMOs' examinations, but as far as the *prima facie* case is concerned, Dr. Baker's testimony does nothing to refute it (see summary of Dr. Baker's testimony, as argued by Respondents, in this Decision and Order at section III.C.2.c.(4), *supra*). In fact, Respondents reproduce testimony containing only two salient points, other than those concerning the scar rule, which is addressed, *infra*. One point is that Dr. Baker detected movement on palpation of the pasterns, but that Dr. Baker found no reliable pattern; and the other is that Dr. Baker used the same pressure on digital palpation as he uses to determine lameness, and he found no sensitivity which he considered excessive in either front pastern. Both these points, conversely, also concede Complainant's crucial, primary point of Time Around Town's sensitivity to digital palpation.

In fact, when the Edwardses' four veterinary expert witnesses' testimony is examined in detail, it does not prove that Time Around Town was not sore. First, their examinations occurred too long after the USDA veterinarians had examined the horse and found evidence of soring. Dr. Hendricks and Dr. Zaidlicz examined the horse before 9:05 p.m. (CX 2). This time is accurate because APHIS investigator John Eades testified that after the VMOs examined the horse, he interviewed Gary Edwards at approximately 9.05 p.m., and he was certain of the time because he "looked at [his] watch." (Tr. 11, 14, 30.) Dr. Baker's examination occurred at least an hour later, because Dr. Baker's examination begins at 10:20 p.m., as recorded on the videotape (RX 11).

Dr. Cook's examination occurred "at approximately 11:00 p.m.," within 15 to 20 minutes of Dr. Baker's, and 2 hours after the USDA examinations (RX 9; Tr. 238-39). Dr. Miller's examination took place sometime thereafter, but there is no specific time in evidence (Tr. 239-40, 329). Dr. Humburg's examination took place in August 1994, more than 3 years after the USDA examinations (Tr. 389). Examinations conducted even 10 to 25 minutes after the horse was declared sore have been held to warrant greatly-reduced weight. *See, e.g., In re Richard L. Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (1982), *aff'd*, 715 F.2d

1508 (11th Cir. 1983), *reprinted in* 51 Agric. Dec. 295 (1992). Respondents' expert witness, Dr. Miller, agreed in the *McConnell* case, that topical anesthetics could easily be used to mask pain, which the Congress had also specifically noted in the House Report on the 1976 Amendments to the HPA, as follows:

> The Chief ALJ noted that Dr. Aiken's examination "took place approximately a half hour after the pre-show inspection; by which time the pain symptoms the horse had exhibited could have subsided or have been masked by the use of an anesthetic". . . . But, in any event, Dr. Hendricks testified that anesthesia could take effect in just a couple of minutes . . ., which could numb the pain responses so that no pain response, or only a weak pain response, could be detected. . . . Dr. Hendricks further testified that a topical anesthesia could be applied that could not be detected or tasted. . . . Respondent's expert, Dr. Miller, agreed that a topical anesthesia might not, or probably would not, be detected. . . . The House Report on the 1976 amendments to the Act noted that "sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H.R. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976)).

In re Jackie McConnell, supra, 52 Agric. Dec. at 1168. (Citations omitted.) *Accord In re William Earl Bobo, supra*, 53 Agric. Dec. at 185-86 n.2, *citing In re Pat Sparkman*, 50 Agric. Dec. at 610.

Moreover, none of Respondents' experts ever saw any USDA examinations of the horse (Tr. 326, 370-71, 345). Dr. Humburg, in particular, is not a percipient witness, because his examination is more than 3 years removed from the pertinent show, and his opinion that the horse was not sore on March 30, 1991, is based solely on a videotape of Dr. Baker's examination (Tr. 405-06). Since "videotaped evidence and the opinions based upon the videotape are of reduced value," *In re William Earl Bobo, supra*, 53 Agric. Dec. at 188, Dr. Humburg's testimony is entitled to no weight. Even Dr. Humburg admitted that he cannot tell whether a horse is sore without examining it himself (Tr. 405-06).

Second, all four of these veterinary witnesses misread the HPA as requiring multiple indicia of soreness, which are not required. *In re William Earl Bobo, supra*, 53 Agric. Dec. at 190-91. Dr. Cook testified incorrectly that the HPA requires that a horse have abnormalities in its "gait, palpation, locomotion and the horse as a physical horse" to be sore (Tr. 373). Moreover, Dr. Cook testified that a sore horse will not be "bright and alert," will have abnormal respiration, will have an abnormal stance, and will appear to be in distress and discomfort

(Tr. 372, 377). Dr. Baker testified that a sore horse would have a gait deficit, would be reluctant to start moving, and would exhibit heat (Tr. 278-79, 322).

Dr. Miller testified that a sore horse will have an abnormal gait, will have a stance not as comfortable looking as that of a sound horse, will not be aware of its surroundings, will not be as alert as a sound horse, and will have increased pulse, respiration, and temperature (Tr. 332-33, 343, 354). Dr. Humburg testified that a horse must have a gait deficit to be sore under the HPA (Tr. 406). However, he also admitted that he is not an expert in the detection of soring under the HPA and does not know what level of pain the HPA requires for a horse to be sore (Tr. 398-99).

However, it is well settled that the HPA does not require multiple indicia of soreness:

> Nevertheless, Respondents contend that, in addition to indications of pain, a horse must exhibit gait deficit or lameness to be classified as sore. . . . This argument is not consistent with the Act, which does not require multiple indicia of soreness, *In re Edwards*, 49 Agric. Dec. 188, 195 (1990), *[aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992)], and does not require lameness in order to prove soring.

In re William Earl Bobo, *supra*, 53 Agric. Dec. at 190-91.

Third, in addition to their ignorance of the HPA, none of these witnesses is as qualified to detect soring as Dr. Zaidlicz and Dr. Hendricks. Dr. Miller examines fewer than 100 horses a year for soreness (Tr. 344-45). Dr. Cook said that she had examined "several hundred" horses for compliance with the HPA (Tr. 375). Dr. Baker could only say that he has examined "several" horses for compliance with the HPA (Tr. 298). Dr. Humburg lacks any relevant or recent experience (Tr. 415).

In fact, these witnesses' examinations are not even designed to detect soreness in horses, as each veterinarian testified that they perform lameness examinations to detect soreness (Tr. 294-95, 341-43, 374-75, 414-15). Dr. Baker and Dr. Miller testified that they use varying degrees of pressure. Dr. Baker admitted that he "wasn't applying consistent pressure racking across the pastern" (Tr. 289-90, 321-22). Dr. Miller uses a "varying degree of pressure" (Tr. 335). USDA veterinarians do not use a varying degree of pressure (Tr. 116-17, 146-47, 158). Dr. Zaidlicz had the opportunity to critique private veterinarian, Dr. Baker's, technique by commenting on the videotape. The VMO found Dr. Baker's examination "poor" because Dr. Baker appeared to "feather" the pastern rather

than palpate it--the horse responded anyway--and Dr. Baker failed to return to the areas of the horse's pasterns that elicited a response (Tr. 125-26, 135).

Fourth, the witnesses contradicted each other. For example, Dr. Baker testified that Time Around Town weighed between 1,100 and 1,200 pounds, and he "doubted" that he could stop it from putting its foot down (Tr. 302-03). Dr. Cook, on the other hand, testified that she could make "any horse" move (Tr. 376-77). The witnesses testified that during the various examinations, the horse simply "did not move."[7] They also testified that it did move.[8] Respondents' videotape reveals substantial movement during the Baker examination.[9]

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[7]RX 9 (Dr. Cook wrote that "[e]xamination of the forelimbs with digital palpation produced no area of sensitivity"); RX 10 (Dr. Miller "found no demonstrable pain response"); Tr. 219-20 (horse did not move during Mr. Thomas' first examination); Tr. 271-72 (horse did not move during Dr. Miller's palpation); Tr. 272 (Mr. Buck did not see horse move "in any appreciable fashion" during Drs. Cook's, Miller's, and Baker's examinations); Tr. 335-36 (Dr. Miller did not find any areas of sensitivity); Tr. 365-66 (Dr. Cook got no reaction during her palpation); Tr. 368-69 (horse never jerked his foot during Dr. Cook's examination).

[8]RX 8 (Dr. Baker wrote, "On digital palpation of the pastern, . . . the animal made some slight movements"); Tr. 220-21 (horse "may have moved a ½ to a ½ an inch" during Dr. Hendricks' examination); Tr. 221-23 (horse "moved his foot just a little bit" during Dr. Zaidlicz's examination); Tr. 223-24 (during Mr. Thomas' second examination, horse did not show any significant movement); Tr. 238-39 (there was "minimal movement" during Dr. Cook's examination); Tr. 241 (horse acted the same way during Dr. Cook's examination as it had with Drs. Miller and Baker); Tr. 246-47 (horse did the same thing during Dr. Cook's examination that it had done in all of the previous examinations); Tr. 247-48 (horse did the same thing during Drs. Baker and Hendricks examinations); Tr. 248 (horse did just about same thing during Dr. Cook's examination as during Dr. Hendricks'); Tr. 248, 259-60 (horse did relatively the same thing during Dr. Miller's examination as during Dr. Hendricks', but it "may have been a little less" and in Gary Edwards' view it "wasn't just very much at all"); Tr. 275 ("horse would move sometimes on digital palpation but he was moving at various points on the foot and with various degrees of digital pressure" during Dr. Baker's examination); Tr. 349-51 (Dr. Miller got responses on both feet and thinks they were on the front).

[9]RX 11; Tr. 125 (Dr. Zaidlicz: "If you pay attention to it, you see about two or three withdrawals on that first leg"); Tr. 135 (Dr. Zaidlicz: "I think on that film you saw responses all the way around on both of those pasterns"); Tr. 290 (Dr. Baker: "When we were looking at this video, the horse did move his left leg somewhat. I wouldn't call it a jerk and he certainly did not do it enough to remove the foot from me. I think that was about the extent of the movement the horse made during the palpation. . . . [I]t was the right limb"); Tr. 314 (Dr. Baker: "Well, I, I saw the movement [on the left foot], but it was ever so slight back and forth. . . . There are some slight movements there. Again, I, watching this I can't tell you that that's me moving the horse's foot or the horse's foot moving my hand. I, but there is some slight movement there"); Tr. 315-17 (Dr. Baker: horse "moved his [right] leg forward and I brought it back to me. . . . It was in the posterior area of the pastern" and on the front "I see the hair moving as it comes up from under my thumb. Slight movement there. . . . With that slight a movement I don't know if it was me moving or the horse moving but there was a slight movement there"); Tr. 358-60 (Dr. Miller saw movement on the medial

The testimony of Respondents' veterinary witnesses that the horse was not sore is entitled to little weight given the time of their examinations, their misreading of the HPA, their limited experience and expertise, their contradictory statements, and their lack of impartiality.

c. Complainant Has Shown By a Preponderance of the Evidence That Time Around Town Did Not Meet Scar Rule Criteria.

The VMOs testified, and documents were introduced, to prove the scarring observed by Drs. Hendricks and Zaidlicz. Respondents produced four expert witnesses, videotapes, and photographs, to prove no scarring. In this regard, Complainant is vastly aided by the standard of evidence in administrative cases--the preponderance of the evidence standard.[10] That is to say, Complainant needs merely to show that it is more likely than not that Complainant's version of the facts is true. Or, put another way, Complainant need only have 50 percent plus any scintilla of evidence beyond that 50 percent to prevail. Complainant surpasses this standard in proving that Time Around Town did not meet scar rule criteria on March 30, 1991.

The other important constant in this analysis is the regulation containing the scar rule criteria, which does not even contain the word "scar." Rather, the criteria in 9 C.F.R. § 11.3(a) specify three things from which a qualified horse's forepasterns must be bilaterally free: granulomas; pathological evidence of inflammation; and evidence of abuse indicative of soring including, but not limited to, excessive loss of hair. The posterior surfaces of the pasterns may have thickened epithelial tissue, if there is no other evidence of inflammation or irritation, moisture, edema, or proliferating granuloma tissue (9 C.F.R. § 11.3(b)). Thus, a horse may not meet the scar rule criteria by exhibiting any number of conditions, in addition to having scar tissue.

Moreover, the regulation is clear that evidence of abuse indicative of soring covers loss of hair and includes focal lesions that are formed as a result of

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and lateral areas of the right foot); Tr. 378 (Dr. Cook: horse "shows some very small motion on his left fro[nt] foot particularly when he first picks it up. He shows one larger motion on his right front foot"); Tr. 395-97 (Dr. Humburg: horse responded on lateral aspect of right foot); *Compare* Tr. 278 (Dr. Baker: horse "didn't move" his left foot on videotape); Tr. 396-97: (Dr. Humburg saw no movement on the left foot).

[10]See note 3.

inflammatory reactions, such as edema, moisture, irritation, and proliferating granuloma tissue. I find this analysis relevant in examining Respondents' arguments regarding the scarring, which are focused almost exclusively on visible scars. The law is clear that actual scars are not needed to prove the scar rule.

Respondents argue that Dr. Zaidlicz has no experience in scar rule cases, because Dr. Zaidlicz admitted that this is his first scar rule case. I find that Respondents' argument really goes to Dr. Zaidlicz's credibility, even though the argument is couched in terms of experience. The fact that this is Dr. Zaidlicz's first scar rule proceeding does not automatically mean that he has no credibility. His testimony is examined and weighed according to the facts presented. His colleague, Dr. Hendricks, has great experience and concurred with Dr. Zaidlicz's testimony on the location of the hair loss and scars on Time Around Town. Moreover, other than pointing out Dr. Zaidlicz's lack of experience, Respondents do not present any other evidence to persuade me that lack of scar-rule-case experience means an otherwise capable VMO should be considered incompetent to find scars or other evidence of abuse indicative of soring on a horse. Consequently, I find that Dr. Zaidlicz's lack of experience in scar rule cases detracts only slightly from the weight of his testimony on the scar rule violation.

Respondents also attack Dr. Zaidlicz's credibility because he mistakenly testified that the scar rule's "bilateral" requirement is an agency policy, rather than part of the regulation. The fact remains that Dr. Zaidlicz was enforcing the scar rule correctly. I find Dr. Zaidlicz's mistaken testimony to be *de minimis*, and since it did not affect the proper outcome, the error does very little to hurt Dr. Zaidlicz's credibility.

Respondents argue that it is "important" that Drs. Hendricks and Zaidlicz hold conflicting views on the efficacy of surgical removal of scars. Dr. Zaidlicz testified that "a small scar could be removed surgically with no remaining signs." (Tr. 89.) Dr. Hendricks testified "no" when he was asked if he was aware of any medical technique available to veterinarians today to make these scars disappear (Tr. 167). But, Respondents do not state just how this testimony is important; for example, they do not state that Time Around Town actually underwent restorative surgery.

Respondents aver that their expert witness, Dr. Humburg, takes the same medical position as Dr. Hendricks that surgical scar repair is detectable (Tr. 386, 388). However, I find that the VMOs' testimony is not inconsistent with the scar rule or the HPA, is not relevant to the condition of Time Around Town, and does not detract from the credibility of the VMOs.

Finally, the supplementary information in the final rulemaking document in which the scar rule was originally promulgated (44 Fed. Reg. 25,172 (1979)) provides that a horse initially failing the scar rule criteria can be "restored." *See*

In re F. Dale Rowland, supra, 52 Agric. Dec. at 1125. Moreover, the case law is clear that averred discrepancies in testimony between VMOs, like the one argued here between Drs. Hendricks' and Zaidlicz's seemingly-opposite views of detectable surgery, have been found by the Judicial Officer to lack substantive value. *In re Eddie C. Tuck, supra*, 53 Agric. Dec. at 300.

Respondents argue that Dr. Zaidlicz testified that he (Zaidlicz) palpated the scars found on Time Around Town and that the scars were sensitive. However, Respondents then argue that Dr. Hendricks testified that he (Hendricks) palpated the scars, but found no sensitivity. This argument has no merit because nothing in the scar rule regulation requires a finding of sensitivity in the scars or that there even be scars.

However, even if Respondents' argument was relevant, which it is not, the record does not support Respondents' argument. It is true that Dr. Hendricks was asked if he palpated the scars and if he found them sensitive, to which he answered that the scars were not sensitive to his palpations (Tr. 167-68). However, Respondents mischaracterize Dr. Zaidlicz's testimony on this issue, because Dr. Zaidlicz did not answer the same questions directly. I make no determination whether Dr. Zaidlicz meant to evade the question, or was merely answering the question he thought he heard, but Dr. Zaidlicz's testimony is that he palpated the entire pastern area where the scars were located, and the entire area was sensitive, as follows:

[BY MR. PRIAMOS:]

Q. . . . Did you palpate those scars?

[BY DR. ZAIDLICZ:]

A. Yes.

Q. And did the horse -- *was the horse sore in relationship to those scars*?

A. Yeah.

. . . .

Q. The horse was sensitive where you touched on those scars?

. . . .

DR. ZAIDLICZ: Yeah, *we palpated the anterior portion of the -- both feet and they were sensitive.* They responded painfully to our palpation.

. . . .

Q. You're saying that that horse was sensitive on the two X areas marked plus across the middle [in the illustration in CX 2]?

A. *What that's saying is that the whole anterior lateral and medial positions on both those front feet were sensitive. All the way around that horse's pastern was sensitive.*

Q. *And only in the scratched area is where the scars were?*

A. *No.* That's, like I say, that's just a qualitative thing. We just put it -- denote it's on the interior portion. It's not directly there, it's not exactly that relationship. It's just a note as to where it was and if you read the affidavit it probably gives a little further description of where they were.

. . . .

BY MR. PRIAMOS:

Q. The question is, doesn't your affidavit [CX 4] refer back to the two drawings on the front feet?

A. It does, and the fact is there's one element here that I'm just reading since I didn't have it before and I don't recollect this horse. We're saying that in fact where these two X's are is where we -- I detected pain and I didn't say in here it's particular over the anterior portion.

Q. You didn't say it?

A. I didn't say it. *I said the anterior lateral, anterior medial, posterior lateral and posterior medial surfaces of the pastern. Exactly where your X's are.*

Q. Okay, but then read the next sentence,

"The horse also exhibited granulation tissue scars bilaterally on the anterior lateral surfaces of both forepasterns in violation of the Scar Rule as shown on [APHIS} Form 7077."

A. Right.

Q. So doesn't that come back to say from your affidavit that you're relying upon these drawings to show a court where the scars were on the horse?

A. Exactly.

Q. Okay. Now, if this is exactly what's happening, you don't show on the drawing where the scars were or how many scars there were. You're just showing a scratched area that could be the whole front of the horse's foot.

. . . .

DR. ZAIDLICZ: Well, it's the same as we placed an X. We don't -- we don't place 25 X's on the side of a foot, we place one if it's on the lateral side. It's the same process. We have to make notes and these notes are qualitative notes. They're field notes to try to have two supporting documents.

Tr. 96-100 (emphasis added).

Respondents characterize Dr. Zaidlicz's testimony as "mindboggling," "appalling," and "disgusting," but I do not agree with these characterizations. Rather, I find Dr. Zaidlicz's testimony credible and probative.

Respondents argue that Dr. Hendricks' testimony regarding the scar rule is not credible, but is outrageous. I reject Respondents' argument.

As described in this Decision and Order at section III.C.2.c.(2), *supra*, Respondents reproduce large portions of Dr. Hendricks' testimony from the

transcript (Tr. 162-70, 172-78, 187-88) covering, *inter alia*, the scar rule, Time Around Town's examination under scar rule criteria, size and length of scars, hair loss, and sensitivity of scars.

Respondents note in Gary Edwards' testimony that Gary and Larry Edwards have shown close to 15,000 horses since passage of the HPA, and state: "IMAGINE THESE MEN BRINGING A HORSE TO INSPECTION THAT HAD BILATERAL ¼ TO ½ INCH TALL SCARS!" (Respondents' Brief at 26). To the contrary, Gary Edwards testified at the hearing that Time Around Town had a scar (Gary Edwards called it a "wire cut") ¼-to-½-inch long, "from a younger age" before Respondents got the horse, and well before the time of the violation, *sub judice* (Tr. 230-31, 252-53). Therefore, Gary Edwards' own testimony is that he personally brought Time Around Town to the inspection, knowing of the ¼-to-½-inch long scar.

Respondents argue that Respondents' witnesses, Gary Edwards, Dr. Baker, Dr. Miller, Dr. Cook, and Dr. Humburg did not find any granulomas on Time Around Town. This argument has very little merit for a number of reasons. First, Gary Edwards testified that Time Around Town came to him already exhibiting a scar on the left pastern, and Dr. Humburg testified that he found scars on the left pastern of Time Around Town in August 1994 (Tr. 389-90). Thus, this argument is not accurate from the start, even though I hasten to add that Dr. Humburg's examination of a horse approximately 3½ years after the violation is of extremely marginal significance, and mentioned only in the context of Respondents' contradictory assertion that Dr. Humburg found no scars.

Second, the argument misstates the scar rule, because a scar rule violation is not based upon scarring, *per se*, but, rather, is based upon a finding of "bilateral evidence of abuse indicative of soring." Thus, when Gary Edwards and Drs. Cook, Miller, and Humburg testified that Time Around Town was in compliance with the scar rule on March 30, 1991, they erroneously believed that the scar rule requires lesions or loss of hair (Tr. 229-30, 357-58, 376, 401-02).

Moreover, the videotape (RX 11) which shows Dr. Baker examining Time Around Town makes Complainant's scar rule case.[11]

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[11]Reliance upon videotapes for evidence in HPA cases is "of reduced value." *See In re William Earl Bobo, supra*, 53 Agric. Dec. at 188. The reduced value of videotapes is especially true in HPA cases where the taped evidence is of a veterinarian palpating a horse. There is no way for certain to ascertain, for instance, if a veterinarian is properly palpating the horse by looking at the film of the veterinarian's hands on the feet of the horse. However, and this is the situation herein, one can look at the videotape of the horse's pasterns and determine for oneself whether there is something visible to the naked eye, perhaps a scar or loss of hair, without having to depend upon a veterinary expert witness.

I observe that at "10:23 PM" on the writing on the video screen, as Dr. Baker elevates the horse's right leg and begins to palpate the pastern, it is apparent that there is a mark about 2 inches long on the right pastern of this horse, which mark is about 2 inches above the coronary band on the anterior surface. It could be a scar, thinning hair, paint, or a multitude of other things not really ascertainable by just looking at the tape. However, I find that it is not necessary precisely to identify the mark, because the Department's expert witnesses have already testified about it under oath, and I find that the videotape corroborates Drs. Zaidlicz's and Hendricks' testimony, affidavits, and APHIS FORM 7077, that the mark on Time Around Town's right leg is a scar. (As detailed above, it does not have to be a scar, but could be loss of hair, edema, inflammation, or any bilateral evidence of abuse indicative of soring, and still violate the scar rule.)

Respondents' witnesses corroborate the existence of the mark. Respondents' expert witnesses describe the mark variously as shadow, reflecting light, tufts of hair, but the fact remains that there is easily seen a mark on the horse's right pastern. Dr. Cook testified that this part of the videotape showed "shadow," "tufts of hair," and "reflections of light" (Tr. 379-82). Dr. Baker testified that his observation of the videotape was that there might be "some hair loss there" (Tr. 282), but later testified that it was the "light," and that it was a shadow from "that hair blocking light" (Tr. 320). Dr. Miller testified that he could see a "variation in color" in the right pastern of the horse on the videotape, played for him at the trial, that he did not see on the night he examined Time Around Town (Tr. 360-61).

This videotaped mark does considerable damage to Respondents' experts' credibility. Their speculation that the easily-seen mark is shadow, light, or a white spot, is not expert veterinary testimony, but rather is testimony which properly should be given by a photographic or videotape expert. None of these veterinarians was qualified at the hearing to testify in a learned way about the effect of light falling upon horse fur. Thus, Respondents' experts' testimony about the mark on the right pastern of Time Around Town in RX 11, at 10:23 p.m., is given very little weight.

There are several references in the transcript to RX 12, which is a sheaf of 16, approximately 8x10-inch, color photographs of Time Around Town, a number of which are pictures of the horse's pasterns taken at different angles. The record also contains a document captioned "RX 12 1-25," which legend is handwritten on a photocopy of a June 4, 1991, note to Mr. Priamos from "Paige," who has been identified herein as Gary Edwards' wife. The 25 photographs, numbered 1-25, therein mostly are duplicates of the larger 16 color photographs.

Unfortunately, the poor visual quality of these photographs makes it impossible to determine the condition of the horse's pasterns. However, even if the pictures were crystal clear, they would be of limited value, because they were admittedly taken on May 29, 1991, many weeks after the March 30, 1991, examination by USDA VMOs, and under conditions completely controlled by Respondents. Therefore, I find that the photographs in RX 12 have extremely limited probative value.

Respondent Gary Edwards' testimony contains several items worth attention on the scar rule issue. First, the assertion that Gary Edwards only became aware of an alleged scar rule violation from APHIS investigator Lynwood Suber on May 29, 1991, is of no consequence, even if true (which I do not find). Respondents were duly informed of the charges against them in the Complaint filed July 30, 1993. Moreover, to the extent that Respondents' argument might convey the point that they are somehow denied due process by their ignorance of the preliminary findings of the APHIS investigation on March 30, 1991, which formed the basis of the July 30, 1993, Complaint, their argument is totally rejected. Respondents have not argued that they were denied procedural due process, and there is nothing in this record to support such a finding.

Second, the assertions that Time Around Town has been shown and has passed other inspections are of no consequence, either. There are a number of reasons why a scarred horse could escape detection, and although I make no effort to catalogue them, the easiest would probably be that the scars were camouflaged. Another would be that a DQP erroneously passed a scarred horse, but the horse did not place high enough to merit APHIS inspection. Moreover, this record does not definitively establish whether a horse that has been scarred can be surgically restored beyond detection, although the supplementary information applicable to the scar rule (44 Fed. Reg. 25,172 (1979)) and case law, *supra,* are clear that restoration is possible.

Respondents, as noted in this Decision and Order at section III.C.2.c.(4), *supra,* reproduce portions of Dr. Randall Baker's direct testimony on the scar rule issue, without making any arguments on the testimony. Nonetheless, I find Dr. Baker's scar rule testimony contradictory, because he testifies both that there were no scars or hair loss on Time Around Town, but then concedes that there might be hair loss--and this testimony is in the context of his opinion that granulomas do not have hair follicles (Tr. 279-85). The contradiction lies in Dr. Baker's concession of hair loss, but at the same time, steadfastly denying that there were granulomas on the horse. Dr. Baker equates hair loss with granulomas, concedes hair loss, but denies granulomas exist on Time Around Town.

Compounding this discrepancy is Dr. Baker's testimony on cross-examination that his understanding is that the minimum requirement of the scar rule is "[i]t

doesn't require a granuloma it requires raised tissue bilaterally." (Tr. 310-11.) Dr. Baker admitted that he did not consider himself an expert in the HPA, but that he thought himself able to determine if a horse was in compliance with the HPA (Tr. 299). However, this testimony reveals a limited understanding of the scar rule, and I find that Dr. Baker's testimony on the scar rule deserves little weight.

Dr. Miller testified that he found no hair loss, no scars, and no granulomas when he examined Time Around Town's front pasterns, after the horse was turned down on March 30, 1991 (Tr. 336-37). Dr. Miller's affidavit also states that he found no inflammation, but that he found the hair smooth and the skin free of scar tissue (RX 10). Dr. Cook's affidavit states that she found "no areas of granulation (scar) tissue" on either forelimb (RX 9); and she testified that she found no hair loss, no scars, and no granulomas on the horse (Tr. 366-67). But, Dr. Cook also erroneously testified that the scar rule requires loss of hair (Tr. 376).

Drs. Miller's and Cook's testimony concerning the scar rule is accorded reduced weight because their testimony and affidavits reveal that they have a limited understanding of scar rule criteria. Both private veterinarians focused on scars and hair loss as necessary for a violation. Dr. Miller did properly rule out inflammation, but neither addressed the central scar rule criterion: bilateral evidence of abuse indicative of soring.

Dr. Humburg's examination occurred almost 3½ years after the violation, which gives any evidence from Dr. Humburg an extremely limited value. Nevertheless, Dr. Humburg testifies that he disagrees with the USDA VMOs that Time Around Town was in violation of the scar rule on March 30, 1991. Initially, Dr. Humburg finds that the left pastern has hairless areas--evidence of abuse indicative of soring--and speculates that the right pastern could not have been in violation some 3 years earlier. Dr. Humburg does not believe that a scar can be removed, which opinion, of course, places Dr. Humburg in direct contradiction to the supplementary information in the final rulemaking document in which the scar rule was originally promulgated (44 Fed. Reg. 25,172 (1979)) and the case law.

I have carefully reviewed Dr. Humburg's testimony, and although it is detailed and sometimes persuasive, it is just too remote to be of much value. Dr. Humburg's testimony, that his examination of a horse almost 3½ years after the violation would yield the condition of that horse on the earlier date, is not convincing. Respondents' argument, then, is that the USDA VMOs who actually examined the horse on March 30, 1991, lied that the horse was scarred, and that the proof that the horse was not scarred is that Dr. Humburg opines that the

condition of the horse almost 3½ years later is such that the horse could not have been scarred on March 30, 1991. I find that Dr. Humburg's testimony deserves little weight, which weight is greatly insufficient to overcome the expert testimony of the VMOs.

In summary, I have carefully examined the record and I find that Time Around Town did not meet the scar rule criteria on March 30, 1991. The scar rule carries an irrebuttable presumption that a qualified horse exhibiting the required indicia, bilateral evidence of abuse indicative of soring, is considered sore.

In what apparently is a case of first impression, Respondents attempt to refute the direct testimony of USDA VMOs that the VMOs saw scar tissue (granulomas), loss of hair, and other bilateral evidence of abuse indicative of soring, by putting on several veterinary experts to testify that they did not see the scars. However, when it comes down to a contest of credibility between the USDA VMOs and the private veterinarians, I find that the record is convincing that the VMOs are the more credible. This credibility, combined with the mere preponderance of the evidence standard, are sufficient to find that Time Around Town did not meet the scar rule criteria.

IV. THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER IS REVERSED AND VACATED.

A. Introduction.

The ALJ in this case completely disagrees with the jurisprudence and *stare decisis* of HPA enforcement. However, with the exception of one 2-1 majority decision in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1993), neither the Department nor the reviewing courts agree with the ALJ's viewpoint.

Nonetheless, this ALJ has espoused his erroneous viewpoint in his HPA Initial Decisions for a number of years. This case is no exception, in that the ALJ includes views which have been repeatedly and routinely rejected by the Judicial Officer. My approach herein is to reference the ALJ's erroneous views and the Judicial Officer's refutation.

B. The ALJ's Erroneous Analysis of HPA Enforcement, Reproduced Virtually Verbatim From the ALJ's Initial Decision in *Bennett* Is Effectively Refuted by the Judicial Officer's Views As Set Forth in the Decision and Order in *Bennett*.

First, the ALJ's erroneous views appear in the "Discussion" portion of the ALJ's Initial Decision in *In re Kim Bennett*, slip op. at 13-28 (Feb. 28, 1995) (attached as Appendix A). Although the Judicial Officer reluctantly agreed with the ALJ that the Complaint therein be dismissed, the Judicial Officer nevertheless "disagree[d] with practically everything stated in [the ALJ's] 47-page Initial Decision and Order." *In re Kim Bennett*, 55 Agric. Dec. 176, 177 (1996).

Second, the ALJ's "Discussion" from *Bennett* is also reproduced virtually verbatim as the major portion of the ALJ's "Discussion" section in a prior prosecution of Carl Edwards & Sons Stables, Larry E. Edwards, and Gary R. Edwards, *sub judice*, *In re Gary R. Edwards*, *supra* (Third Initial Decision and Order, "Discussion," slip op. at 9-21 (Aug. 11, 1995) (attached as Appendix B)).

Third, the ALJ inserts, virtually verbatim, most of this erroneous "Discussion" from *Bennett* in his Initial Decision in this proceeding, *i.e.*, *In re Carl Edwards & Sons Stables* (Initial Decision and Order at 11-22 (Nov. 24, 1995).

I find that the ALJ's erroneous views lifted from his Initial Decision and Order in *Bennett* are effectively refuted by the former Judicial Officer *Bennett* responses, which responses I hereby adopt.

Therefore, in response to the erroneous views of the ALJ, and based on *Bennett*, I once again reject the following erroneous views, *inter alia*, that palpation alone is not a reliable method of detecting soreness in horses; that the *Young* decision was correctly decided; that notice and comment rulemaking in accordance with the APA is required for the palpation technique; that the Ames study remains relevant; that the Auburn study remains relevant; that the Atlanta Protocol is relevant; that a scientific basis for palpation must be shown; that APHIS' VMOs' jobs depend on their using palpation alone to prove soreness; that thermovision as a diagnostic technique to support palpation was dropped by the Department without proper explanation to the public; that the Fiscal Years 1993 and 1994 Appropriations Act for USDA show Congress' disapproval of the use of palpation alone as a means of proving soreness; that the position of the Judicial Officer within USDA is "fragile"; and that the Judicial Officer lacks independence. The reasons for rejecting these erroneous views are detailed in *Bennett, supra*, 55 Agric. Dec. at 180-244.

C. The Next Part of the ALJ's Discussion (pp. 23, 26-27), Attacking the Department's Position That Palpation Alone Is Sufficient to Detect Soring, Is Almost Identical to the Analysis in *Gary R. Edwards* on the Same Points, Which Arguments Are Effectively Refuted in That Case.

An examination of that part of the ALJ's "Discussion" in this case that attacks the Department's position that palpation alone is sufficient to detect soring (see Initial Decision and Order at 23, 26-27) reveals that the analysis there displayed is virtually identical to the analysis in the ALJ's Third Initial Decision and Order in *In re Gary R. Edwards, supra*, slip op. at 21-23. I find the only substantial item in the ALJ's "Discussion" in either proceeding is the *Young* case, which is addressed in great detail in the former Judicial Officer's *Bennett* opinion. Imbedded within *Young*, the ALJ has found the word "scientific," which has occasioned the ALJ's continuing criticism that palpation, as the sole method of detecting soreness, does not have a necessary, scientific basis.

The former Judicial Officer addressed and rejected the ALJ's erroneous views on a required "scientific" basis for palpation in *Bennett*. I also rejected them in *In re Gary R. Edwards, supra*, slip op. at 61-62, 79-88; and I find that my conclusions in *Gary R. Edwards* are equally applicable to the case, *sub judice*, because the ALJ espouses the exact same views with only slightly different facts existing between the two cases. Thus, the sections of *In re Gary R. Edwards, supra*, (Decision and Order at sections II.C.3.c (7), III.B.1.b., and III.B.2.c.), rejecting the scientific basis argument, are equally applicable to this case.

The ALJ cites a number of cases in support of his scientific basis requirement for palpation evidence (Initial Decision and Order at 26-27). However, my reading of these cases does not reveal how they might contribute to an analysis that concludes that palpation must have a scientific basis.

In fact, the first case, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*. 509 U.S. 579, 590 n.9 (1993), is called "but instructive" by the ALJ because the ALJ admits that the Federal Rules of Evidence, which govern *Daubert*, do not apply to the Department's disciplinary proceeding under the Rules of Practice. Nonetheless, the ALJ proceeds with several other cases like *Daubert*, which also do not apply, for the same reason that these cases are Federal Rules of Evidence cases. I find that *Daubert* (Bendectin infant-poisoning); *Frye v. United States*, 293 F. 1013, 1014 (App. D.C. 1923) (1923 case rejecting admissibility of proto-polygraph instrument); *United States v. Bonds*, 12 F.3d 540, 558 (6th Cir. 1993) (based on *Frye*, DNA testing in criminal trial); and *Berry v. City of Detroit*, 25 F.3d 1342, 1348-54 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995) (expert testimony that lack of training and discipline in policemen caused fatal shooting by policeman) are inapposite. The other two cases, *Woolsey v. NTSB*, 993 F.2d 516, 519-20 (5th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994), and *American Horse Protection Ass'n v. Lyng*, 681 F. Supp. 949, 956 (D.D.C. 1988), do not even address the ALJ's scientific basis point. Thus, the ALJ's scientific basis for palpation dictum is once again rejected.

D. The ALJ's Remaining Erroneous Views on, *inter alia*, Past Recollection Recorded/Hearsay; Assigning Great Credibility to Respondents' Expert Witnesses; and Assigning No Credibility to the USDA Expert Witnesses, Differ in No Significant Way From Recent Cases Where the ALJ's Erroneous Views on These issues Were Rejected.

An examination of pages 23 to 26 of the ALJ's Initial Decision reveals the ALJ's views on this proceeding's specific witnesses and exhibits. The ALJ finds: that the VMOs reported their palpation examination findings in CX 2, 3, and 4; that the VMOs, however, could not specifically recall their examinations, so that these documents are considered hearsay; that hearsay is admissible in federal administrative hearings and can be substantial evidence if it is reliable, probative, and meets the test of fundamental fairness; that other "parol evidence" by Drs. Baker, Cook, Miller, and Humburg, in their interpretations of RX 11, 12, and 13, does not "invigorate" the reliability of CX 2, 3, and 4, which permits the ALJ to conclude that there were no scars or granulation tissue on both pasterns of the horse on March 30, 1991; that Dr. Humburg found no "anomaly" or lesion on the right pastern of the horse in 1994, thereby "validating" absence of bilateral scars in 1991, because scars are difficult to remove; that "damaged vascular tissue" will not support hair; that the VMOs reported bilateral scarring on CX 2, 3, and 4, but that "bilateral scarring was not present"; that the VMOs also reported reactions to their palpations which indicated soreness; that these VMO statements are not considered trustworthy because the VMOs reported non-existent scars, thereby establishing impaired ability to see, hear, and accurately record facts; that "[s]ince scarring did not exist, pain on palpation is doubted"; and that the ALJ's doubts about the VMOs' testimony are "heightened" by Respondents' expert witnesses' (Drs. Baker, Cook, and Miller) testimony that their quickly-subsequent examinations revealed no repeatable responses to repeated palpations.

The ALJ's Finding of Fact 14 is that Respondents' expert witnesses are assigned great credibility, but that the Department's expert witnesses are assigned no credibility. The ALJ's stated finding is that the VMOs had no refreshable recollections of their examinations of Time Around Town, which renders CX 2, 3, and 4 hearsay documents.

Except for a couple of minor factual accuracies, the ALJ's analysis of the evidence in this proceeding and Finding of Fact 14 are completely erroneous. It is factually correct that the VMOs prepared the appropriate documents (CX 2, 3, and 4) shortly after their examinations of Time Around Town, while the facts were still fresh in their minds. Further, the ALJ's description of the use of

hearsay in federal administrative hearings is legally correct. However, the remainder of the analysis is rejected for the reasons given in *In re Gary R. Edwards*, *supra*, slip op. at 78-79, 88-91.

Although Drs. Baker, Miller, and Humburg are specifically named in *In re Gary R. Edwards*, *supra*, the issues resolved therein also apply to Dr. Cook. For instance, these private doctors are not experts in enforcing the HPA, and they all testified herein that they require additional factors not in the HPA, such as gait dysfunction, lameness, or inflammation to diagnose what they call "soreness," but this I find is not equal to legal soreness. Moreover, these private doctors' examinations occurred too long after the USDA examination for any relevance to the violation.

Moreover, the record neither supports the ALJ's findings that Drs. Zaidlicz and Hendricks possessed impaired ability to see, hear, and accurately record facts, based upon these VMOs supposedly finding non-existent scars, nor supports the ALJ's finding that, because the VMOs found what the ALJ considered to be non-existent scars, the VMOs are not credible witnesses.

E. The ALJ's Analysis of the Evidence of the Six Veterinary Experts, Which Appears in Findings of Fact 8-13, Is Rejected for the Reasons Already Stated in Section III.

The ALJ's analysis of the conflicting expert testimony of the six veterinary expert witnesses herein appears in Findings of Fact 8 (Drs. Zaidlicz and Hendricks); 9 (Dr. Randall Baker); 10 (Dr. Ray Miller); 11 (Dr. Charlene Cook); and 13 (Dr. Jay Humburg). My reasons for rejecting the ALJ's analysis and Findings of Fact on the expert witnesses' evidence are set forth in this Decision and Order at section III.

In Finding of Fact 12, the ALJ states, *inter alia*, that "[t]he palpation of the pasterns of a horse experiencing flexor tendinitis will result in a display of pain. (Tr. 371[.])" This conclusory finding is erroneously based upon an ambiguous witness statement. When asked on cross-examination whether repeated pain on palpation means a horse is sore, Dr. Cook volunteered that she could make a horse with flexor tendonitis show soreness. The ALJ erroneously extrapolated that offhand statement into a universal statement about flexor tendonitis, which the context of Dr. Cook's testimony does not at all support, as follows:

[BY MS. CARROLL:]

Q. Um, if a horse exhibits repeated pain on digital palpation of specific areas of its pastern, would you say that that's consistent with soring?

[BY DR. COOK:]

A. No. I can take a horse who has flexor tendonitis and palpate his pasterns and he will show soreness.

Q. So it's inconsistent with soreness?

A. Not necessarily. You need to consider the whole exam of the horse.

Q. Uh uh. How about a horse that doesn't have tendonitis?

A. I would want to consider a total exam of this horse looking at that horse in motion, standing there physically and the results of digital palpation.

Q. Now if you eliminated medical uh, causes of pain responses upon digital palpation that were repeated and in specific areas would that be consistent with soreness to you?

A. Only if all of the results of the other things coincided.

Tr. 371.

Therefore, the ALJ's Finding of Fact 12, based upon expert testimony, that a horse with flexor tendonitis can be made to appear sore by palpation only, is inaccurate. Since the expert did not testify to this fact, which is clear from the transcript, the ALJ's Finding of Fact 12 is rejected.

V. SANCTION.

The evidence in the instant case supports the conclusion that Respondent Gary R. Edwards violated section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)) by entering a horse known as "Time Around Town" in the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 30, 1991, while the horse was sore. A $2,000 civil penalty will be assessed against Respondent Gary R. Edwards and a 5-year disqualification period will also be imposed.

These sanctions are reasonable, supported by the evidence, consistent with the HPA and this Department's sanction policy, and designed to achieve the remedial purposes of the HPA.

The seriousness of soring horses has been recognized by Congress. The legislative history of the HPA Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved

> artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.
>
> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

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

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

Section 6(b)(1) of the HPA requires that the Secretary consider the following factors to determine the amount of the civil penalty:

> [T]he nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect

on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the HPA (15 U.S.C. § 1825(b)(1)) provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." In most cases, the maximum civil penalty of $2,000 per violation is warranted. *In re Gary R. Edwards, supra*, slip op. at 94; *In re John T. Gray, supra*, slip op. at 42; *In re Mike Thomas*, 55 Agric. Dec. ____, slip op. at 53 (July 15, 1996); *In re C.M. Oppenheimer, supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong, supra*, 53 Agric. Dec. at 1323; *In re Linda Wagner, supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott, supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper, supra*, 42 Agric. Dec. 62.

Respondent Gary R. Edwards violated section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)) by entering Time Around Town while the horse was sore. The nature, extent, and gravity of the violation are revealed by Dr. Hendricks' and Dr. Zaidlicz's descriptions of Time Around Town's responses to palpation in their testimony, affidavits, and APHIS FORM 7077. Dr. Hendricks reported definite and repeated bilateral pain responses to moderate palpation, which caused the horse to jerk his foot to remove it from Dr. Hendricks' grip, to flex his abdominal muscles, and to jerk his head upward each time the sensitive places were palpated (CX 3). Dr. Zaidlicz likewise reported bilateral, repeated pain responses upon moderate to light palpation, which caused the horse to pull its head up, to pull the affected limbs back, to tense abdominal muscles, and to shift weight to the rear (CX 4). Both VMOs also found excessive granulomas, or scars, on Time Around Town's pasterns, which information they recorded in their affidavits, and which information they also placed on APHIS FORM 7077, along with the bilateral sensitivity information (CX 2, 3, 4). Dr. Zaidlicz testified that this horse would be in pain while moving, especially when the action devices (chains) hit the painful areas (Tr. 74-75). Dr. Hendricks testified to precisely the same thing (Tr. 159-60). I find that, under these circumstances, the nature, extent, and gravity of Respondent Gary R. Edwards' violation of the HPA are sufficient to warrant the assessment of a civil penalty of $2,000.

The record also establishes Respondent Gary R. Edwards' culpability. Both VMOs testified they completed APHIS FORM 7077 to show, and their affidavits state, that Time Around Town did not meet the scar rule criteria, was bilaterally sensitive in both front pasterns, and was likely to experience pain while moving (CX 2, 3, 4). Respondents admit that Gary R. Edwards was the trainer of Time Around Town and entered him in the horse show (Tr. 213-14, 217). Persons who

enter for the purpose of exhibiting, or who exhibit horses in a horse show or horse exhibition, and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the HPA, when exhibited. *See In re Gary R. Edwards*, *supra*, slip op. at 95, and *In re John T. Gray*, *supra*, slip op. at 44 (owners who allow entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore within the meaning of the HPA, when entered); *In re Mike Thomas*, *supra*, slip op. at 54 (Respondent is an absolute guarantor that his use of action devices during training will not cause the horse to be sored); *In re Keith Becknell*, 54 Agric. Dec. 335, 340 (1995) (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sored).

Although Respondent Gary R. Edwards may not have intended to "sore" Time Around Town, intent is of no consequence under the HPA and regulations issued under the Act. The HPA provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the HPA Amendments of 1976. When first enacted in 1970 until the enactment of the HPA Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait," and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the HPA Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th Cong., 1st Sess. 3, 4 (1975). As specifically stated:

> The legislation makes the following substantive modifications in the existing law governing this program:
>
> 1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696.

Respondent Gary R. Edwards, at the time of the hearing, had been training and exhibiting Tennessee Walking Horses his entire adult life as a full-time occupation, since 1964 (Tr. 212-13). Despite Gary R. Edwards' experience as a trainer of Tennessee Walking Horses, he entered Time Around Town while the horse was sore and breached his guaranty that Time Around Town would not be sore when he sought to enter him in the National Walking Horse Trainers Show. I find that, under these circumstances, Gary R. Edwards' degree of culpability is sufficient to warrant the assessment of a civil penalty of $2,000.

Further, the record establishes that Respondent Gary R. Edwards has the ability to pay a civil penalty of $2,000 and that the assessment of a $2,000 civil penalty would not affect his ability to continue to do business. Respondent Gary R. Edwards testified at the hearing that he is a general partner in Carl Edwards & Sons Stables, with his brother Larry E. Edwards and his mother Etta Edwards, and that they have shown approximately 600 horses a year, or close to 5,000 horses since 1992 (Tr. 212-13). Respondent Gary R. Edwards has prior violations for entering horses while sore, for which he was assessed a $2,000 civil penalty and disqualified for 2 years, but which did not prevent him from continuing in business. *In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992). Most recently, Gary R. Edwards was found to have violated the HPA, was assessed a civil penalty of $2,000, and was disqualified for 5 years in *In re Gary R. Edwards*, *supra*. Moreover, prior to that, Gary R. Edwards entered into two consent decisions pursuant to which he paid $1,000 in each case. *In re R.F. Burgin, Jr.*, 43 Agric. Dec. 378, 379 (1984); *In re Gary R. Edwards*, 41 Agric. Dec. 1951 (1982). These penalties did not prevent Gary R. Edwards from continuing in business.

The administrative officials charged with responsibility for achieving the congressional purpose of the HPA recommend a $2,000 civil penalty against Respondent Gary R. Edwards (Complainant's Appeal at 50). An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of $2,000 per violation is warranted.

Section 6(c) of the HPA (15 U.S.C. § 1825(c)) provides that anyone assessed a civil penalty under the HPA may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the HPA or the regulations issued under the HPA and for a period of not less than 5 years for any subsequent violation of the HPA or the regulations issued under the HPA. Respondent Gary R. Edwards is subject to the 5-year disqualification,

based upon his prior violations of the HPA. *See In re Larry E. Edwards*, *supra*, and *In re Gary R. Edwards*, *supra*.

The purpose of the HPA is to prevent the cruel practice of soring horses. Congress amended the HPA in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the HPA by those persons who had the economic means to pay civil penalties as a cost of doing business. *See* H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

Section 6(c) of the HPA (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any pertinent civil penalty. Section 6(b)(1) of the HPA (15 U.S.C. § 1825(b)(1)) requires that the Secretary consider the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in determining the amount of the civil penalty to be assessed, but the HPA contains no such requirement with respect to the imposition of a disqualification period (15 U.S.C. § 1825(c)). *See In re John T. Gray*, *supra*, slip op. at 47; *In re Mike Thomas*, *supra*, slip op. at 57; *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the HPA).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the HPA, and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every HPA case, including those cases in which the Respondent is found to have violated the HPA for the first time. *In re John T. Gray*, *supra*, (Respondent Gary Edward Cole assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the HPA); *In re Mike Thomas*, *supra* (Respondent assessed a civil penalty and disqualified for 1 year for first violation of the HPA); *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), 53 Agric. Dec. 1357 (1994) (Respondent assessed a $2,000 civil penalty and disqualified for 1 year for first violation of the HPA); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995) (Respondent Crawford assessed a civil penalty

of $2,000 and disqualified for 1 year for first violation of the HPA); *In re Linda Wagner*, *supra* (Respondents assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the HPA); *In re John Allan Callaway*, *supra*, (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the HPA); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of $2,000 and disqualified for 1 year for first violation of the HPA). However, Respondent Gary R. Edwards is a repeat offender.

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the HPA, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

There is a possibility that the circumstances in a partioular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for a second violation of the HPA, in addition to the assessment of a civil penalty, is warranted.

Section 6(c) of the HPA provides, in relevant part, that:

> [A]ny person who . . . is subject to a final order under [15 U.S.C. § 1825(b)] assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction.

15 U.S.C. § 1825(c).

Complainant, one of the administrative officials charged with the responsibility for achieving the congressional purpose of the HPA, requested that the Order issued in this proceeding include a provision disqualifying Respondent Gary R. Edwards for 5 years (Complainant's Appeal at 49) from:

> (1) showing, exhibiting or entering any horse, or otherwise participating in any horse show or exhibition, and (2) judging or managing any horse show, horse exhibition, horse sale or auction.

Complaint at 4.

For the foregoing reasons the following Order should be issued.

VI. ORDER.

1. Respondent Gary R. Edwards is assessed a civil penalty of $2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent Gary R. Edwards.

2. Respondent Gary R. Edwards is disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The 5-year disqualification period shall run consecutively with the disqualification period imposed upon Gary R. Edwards in *In re Gary R. Edwards, supra*. The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent Gary R. Edwards.

APPENDIX A

Excerpt from ALJ's Initial Decision and Order in *In re Kim Bennett*, slip op. at 13-28 (Feb. 28, 1995).

Discussion
Notice and Rule Making Process

"Soring" the activity declared illegal by the Act, has been described by the Department as follows:

> The practice known as "soring" is the injuring of show horses to improve their performance in the show ring. The pain caused by soring accentuates the gait of show horses. Soring can be accomplished in a variety of ways, including: (1) The application of irritating solutions to the horse's limbs; (2) the fastening of chains or similar equipment (commonly called "action devices") to the horse's limbs and forefeet; (3) the use of pads to elevate the horse's foot and to manipulate the angle of the horse's foot; (4) the trimming of a horse's hoof and the shoeing of its foot so as to cause pressure or

irritation on the sole of the foot (commonly called "pressure shoeing"); and (5) the insertion of an object between a pad and the sole of the foot to cause discomfort.

In 1970, Congress passed the Act to eliminate the practice of soring, by forbidding the showing or selling of sored horses. Exercising our rulemaking power under 15 U.S.C. 1824 and 1828, we issued regulations that prohibit soring devices and soring methods.[9]

In 1978, following the 1976 amendments to the Act which brought the DQP program to the service of the Department,[10] the Department recounted that prior to 1970 and immediately thereafter:

> . . . . Soring was flagrant and obviously visible to the naked eye. However, the horse with bloody legs and open sores on the pasterns is a thing of the past. Soring today is devious and is seldom evident to the untrained or inexperienced observer. Consequently, the Department feels that any DQP candidate must be familiar with and reasonably knowledgeable about horses in order to be considered for any DQP training program. Further, since the practice of soring involves the hoof, the skin, and the connective tissue under the skin of the feet and legs, the veins and arteries of the feet and legs, and sometimes the muscles and bones in the feet and legs, the Department believes it is vitally necessary for a DQP candidate to have basic knowledge about the anatomy and physiology of the limbs in order to recognize, understand, properly document, and recall for purposes of evidence, if necessary, the effect of soring on living tissue as well as the lesions and symptoms relating to soring on any particular horse. Further, the Department believes every DQP candidate must also have a basic knowledge of the history of soring, the methods of soring, and the various inspection techniques and procedures necessary to detect and diagnose soring. . . .[11]

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[9]53 Fed. Reg. 14,778 (April 26, 1988). [All citations to the Federal Register herein, unless otherwise noted, relate to the Department's efforts to enforce the Horse Protection Act.]

[10]15 U.S.C.A. § 1823(c) (West 1982 & Supp. 1994).

[11]43 Fed. Reg. 18,522 (April 28, 1978).

"Soring" as the Department notes may be detected by a variety of inspection techniques and procedures.[12] This principle has been confirmed by evidence expressed in this case, for the deputy administrator of the organization responsible for the enforcement of the Act, the Animal and Plant Health Inspection Service[13] (also sometimes known as "APHIS") has written:

> ". . . . All APHIS veterinarians involved in horse protection are carefully instructed on the clinical signs exhibited by a sore horse. The use of palpation is only one means of making a determination. Several clinical considerations are reviewed in taking action on an alleged sore horse."[14]

APHIS' protocol which captures evidence of soring is derived from the Act, which provides for inspections,[15] and which provides for the implementation of the Act by the issuance of regulations.[16] The regulation which discloses the dispute in this matter centers on the Department's inspection procedures which at the date of the alleged soring, March 30, 1991, were defined as:

> . . . "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment,

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[12]*infra, n.* 17.

[13]36 Fed. Reg. 20,707 (October 28, 1971).

[14]RX 14, a letter from Dr. Arnoldi to Dr. Miller dated May 29, 1991. Dr. Arnoldi was a policy enunciator for APHIS. (RX 6)

[15]15 U.S.C.A. § 1823(e) (West 1988 and Supp. 1994).

[16]15 U.S.C.A. § 1828 (West 1988 & Supp. 1994).

substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.[17]

The process or protocol of palpation to be followed by the Department's investigating veterinarians has never been described in the Department's regulations or rationale in support thereof. However, palpation to be followed in the DQP program has been described as follows:

> (2) The DQP shall digitally palpate the front limbs of the horse from knee to hoof, with particular emphasis on the pasterns and fetlocks. The DQP shall examine the posterior surface of the pastern by picking up the foot and examining the posterior (flexor) surface. The DQP shall apply digital pressure to the pocket (sulcus), including the bulbs of the heel, and continue the palpation to the medial and lateral surfaces of the pastern, being careful to observe for responses to pain in the horse. While continuing to hold onto the pastern, the DQP shall extend the foot and leg of the horse to examine the front (extensor) surfaces, including the coronary band. The DQP shall examine in a like manner the rear limbs of all horses inspected after showing, and may examine the rear limbs of any horses examined preshow when he deems it necessary. While carrying out the procedures set forth in this paragraph, the DQP shall also inspect the horse to determine whether the provisions of § 11.3 of this part are being complied with, and particularly whether there is any evidence of inflammation, edema, or proliferating granuloma tissue.[18]

The Department's definition of "inspection," an aspect of its regulations, and APHIS' statement of enforcement policy, (RX 14) have been eradicated by the rule hereinafter described, despite the fact that in its history of enforcement of the

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[17]44 Fed. Reg. 1562 (January 5, 1979); (paragraph designations were removed at 53 Fed. Reg. 14,782 (April 26, 1988)) The Department's original definition was published at 37 Fed. Reg. 2427 (February 1, 1972) as follows:

> (p) "Inspection" of a horse means an examination of the horse by use of whatever means are reasonably deemed necessary by the inspector to determine whether the horse is sored. This may include, but is not limited to, visual examination, touching, use of any diagnostic device or instrument, and requiring the removal of any shoes, pads, and other equipment from the horse.

[18]55 Fed. Reg. 41,993 (October 17, 1990) (final rule). See also 55 Fed. Reg. 11,386 (March 28, 1990) (proposed rule).

Act, the Department has followed,[19] the notice and rule making procedures required by the Administrative Procedure Act,[20] eight times in the expression of substantive final rules or regulations and four times dealing with interim rules. But, notice and rule making have never been followed to address the reliability of palpation as the sole method to detect soring. Instead, the Department has avoided the scrutiny of the public's participation, advancing a rule by its Secretary's *alter ego, World Wide Citrus, et al.*, 50 Agric. Dec. 319 (90 AMA Dkt. Nos. F&V 907-18, 907-17) (May 9, 1991), which rule states: ". . . I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore . . . ." *Eddie C. Tuck et al.*, 53 Agric. Dec. 261, 292 (HPA Dkt. No. 91-115) (June 10, 1994); that ". . . palpation by government veterinarians, without other evidence is sufficient to support a finding that a horse is sore." *Cecil Jordan, et al.*, 52 Agric. Dec. 1214, 1226 (HPA Dkt. No. 91-23) (November 19, 1993) *appeal docketed*, No. 93-1852 (D.C. Cir. 1993); "It is well established that bilateral reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus support a finding of a violation of the Act, *Lloyd R. Smith, et al.*, 51 Agric. Dec. 327, 330-331 (HPA Dkt. No. 91-24) (February 20, 1992), and, ". . . ample precedent exists for finding that a horse was sore, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision or other evidence." *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 612 (HPA Dkt. No. 88-58) (January 24, 1991). This rule appears to be based on the opinions of the Government veterinarians, whose exclusive and durable employments depend on their enforcement of the Act, and the number of times that they may have examined walking horses. *William Earl Bobo, et al.*, 53 Agric. Dec. 176, 200-201 (HPA Dkt. No. 91-202) (January 12, 1994), appeal docketed, No. 94-3311 (6th Cir. 1994). And it is distinct from, and not to be confused with, characterizations dealing with the Department's rulings on the sufficiency of evidence. These rulings on evidence, conclude that exhibits such as CX 1, 2 and 3 in this case, prepared by Government veterinarians, who almost universally have no recall of their examinations and hence avoid questions of what they saw and did, must be considered reliable and probative, *Cecil Jordan, et al.*, 51 Agric. Dec. 1229, 1230 (HPA Dkt. No. 91-23) (Remand Order October 22,

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[19]The formation of regulations intended to facilitate the enforcement of the Horse Protection Act was initially addressed at 36 Fed. Reg. 12,586 (July 1, 1971).

[20]5 U.S.C.A. § 553 (West 1977 & Supp. 1994) and 5 U.S.C.A. § 551(4), (5) (West 1977 & Supp. 1994) as such define rule and rule making.

1992) and that any deviations which might bring question to the affiants' abilities to observe and record events are *de minimis*. *Eddie C. Tuck, et al.*, 53 Agric. Dec. at 307.

The rule that proclaimed the reliability of palpation to detect soring is disputed, respondents here asserting that palpation is not reliable. Respondents cite the opinions of the veterinary profession's leading practitioners (RX 10, dated August 7, 1991) who wrote:

> (B) It must be recognized that reaction to palpation is not necessarily synonymous with soreness or pain. It should be further noted that digital palpation, in and of itself, is not a reliable diagnosis of soring. The DQP should recognize that horses have different tolerances for pain, and that reactions to palpation will vary in individual horses. This reaction may be in response to a reflex or learned behavior as well as pain. (Emphasis in original)

Respondents also cite a May 1, 1991 letter written by Dr. Miller to support the contention that reliance should not be placed solely upon palpation to detect soring. Dr. Miller's words were: (RX 13)

> . . . . Digital palpation is a diagnostic tool, and should not be the complete basis for a diagnosis.
>
> * * *
>
> . . . . I can tell you that I can make any horse move his foot by digital palpation . . . .

Respondents further cite the testimony of Dr. O'Brien who was of the opinion that the practice of soring cannot be detected solely by digital palpation (Tr. 753) and of Dr. Johnson, who was of the opinion that a sored horse would manifest reactions other than those that might be obtained merely by palpation. (Tr. 553-554) Additionally, testimony was presented by Dr. Proctor who was of the opinion that palpation alone is not sufficient to detect soring. (Tr. 487-489, 495, 513) The rule which has not been visited by public contribution, is held central

to the Department's cost-conscious enforcement activities, for the Department[21] has recognized that if it:

". . . fails to bring actions for soring where the only evidence of soring was based on digital palpation, after the USDA veterinarians had looked at, but found nothing abnormal in the horse's way of going, etc., that would completely destroy effective enforcement under the Horse Protection Act, and would totally defeat the congressional purpose in passing the Act. Furthermore, if more than pain revealed by digital palpation was required, that would be contrary to the express definition of 'sore' in the Act, as explained above."

Bill Young, et al., 53 Agric. Dec. ______, slip op. at 58 (HPA Dkt. No. 91-203) (August 3, 1994) *appeal docketed*, No. 94-40818 (5th Cir. 1994). However, this rule[22] must be formulated by processes mandated by the Administrative Procedure Act. 5 U.S.C.A. § 553 (West 1977 & Supp. 1994)

The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the

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[21]The following statutory language is found in Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992), an Appropriations Act for APHIS, which in part provided:

. . . . That none of these funds shall be used to pay the salary of any Department veterinarian or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

Thereafter, a report of the next Congress, H.R. Conf. Rep. No. 212, 103d Cong., 1st Sess. at 22-23 (1993) recorded that the:

. . . conferees agree that these additional funds should be used to purchase thermograph machines and to provide additional training and evaluation. Neither these machines nor digital palpation should be used as the sole means to determine whether soring has occurred, but they should be used as additional diagnostic tools.

[22]The Department is well-versed in the formulation of science-based enforcement protocols based upon the Administrative Procedure Act. See Final Rule, Official Brucellosis Tests, 59 Fed. Reg. 31,922-31,923 (June 21, 1994).

inherently arbitrary nature of unpublished *ad hoc* determinations. *Morton v. Ruiz,* 415 U.S. 199, 232, 94 S. Ct. 1055, 39 L.Ed.2d 270 (1974)

Here the issue[23] is whether a rule has been generated, not, how it is to be interpreted, an issue continuously roiling the courts. *See* several of note: *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339 (6th Cir. 1994), *Bullwinkel v. F.A.A.*, 23 F.3d 167 (7th Cir. 1994).

The palpation rule, "palpation alone is sufficiently reliable to evidence soring," is more than ". . . a policy statement of the Department"; more than ". . . an indication of an agency's current position on a particular regulatory issue," for by adopting this rule the agency has intended to bind itself to a particular legal position, *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) and it has adopted a substantive rule, the formulation of which rather must be shared with the public by the notice and rule making process. *Public Citizen, Inc. v. U.S. NRC,* 940 F.2d 679, 681-682 (D.C. Cir. 1991), which quotes *Vietnam Veterans v. Secretary of the Navy,* 843 F.2d 528, 538 (D.C. Cir. 1988). These decisions follow the guidance found in *N.L.R.B. v. Wyman-Gordon Company,* 394 U.S. 759, 764, 89 S. Ct. 1426, 1429, 22 L.Ed.2d 709, 714 (1969), which directs that:

> . . . . The rule-making provisions of that Act [The Administrative Procedure Act], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H.R.Rep. No. 1980, 79th Cong., 2d Sess., 21-26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13-16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. [Parenthetical note added][24]

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[23]This issue has been raised by the content of respondents evidence and by the brief filed September 28, 1994. Even if not artfully named, it is appropriate that it be addressed, as a first order of business. *Liquid Carbonic Industries Corp. v. F.E.R.C.*, 29 F.3d 697, 701 (D.C. Cir. 1994)

[24]The citations to legislative history here refer to considerations of bills leading to the Administrative Procedure Act. It may be of some assistance to consider Justice Scalia's concurring observations expressed in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 203, 221, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988):

> . . . And just as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), suggested the obverse: that adjudication could not be purely prospective, since otherwise it would constitute

The *Wyman-Gordon Company* case, 89 S. Ct. at 1428 melds the definitions of 5 U.S.C.A. § 551(4)-(5) (West 1979 & Supp. 1994) to assert that "rule making" is ". . . an agency statement of general or particular applicability and future effect. . . ." The palpation rule is indeed a statement of intended future effect, for it has been, and will be, the crux of all enforcement actions taken by the Department. The intractability of this policy has been continuous for ". . . it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act," *Bill Young, et. al.*, 53 Agric. Dec. ___, slip op. at 57, persistent for "[V]irtually all respondents in these types of cases complain that USDA's palpation evidence consists of subjective conclusions to determine whether horses are sore," *Bill Young, et al.*, 53 Agric. Dec. ___ slip op. at 36, and unyielding, being further displayed in the Department's order in *William Earl Bobo et al.*, 53 Agric. Dec. 210, 211 (HPA Dkt. No. 91-202) (Denial of Reconsideration February 28, 1994), which reveals:

> On January 31, 1994, Respondents filed a Petition for Reconsideration of the Decision and Order previously filed herein primarily on the grounds that the American Association of Equine Practitioners has adopted a resolution stating that "digital palpation . . . may not be a sufficient basis of and by itself to conclude that the animal is in pain or otherwise in violation of the Horse Protection Act" (Resolution at 1). However, as stated in my decision in this case, notwithstanding the views of some persons that digital palpation is not by itself appropriate for determining whether a horse was sore, "[b]ased upon my examination of the record in this case, in addition to my examination of the records in 55 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act [footnote omitted]" (Decision at 35-36). The Resolution referred to by Respondents does not cause me to change my views, in this respect. (Emphasis added)

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rulemaking. Both the plurality opinion, joined by four of the Justices, and the dissenting opinions of Justices Douglas and Harlan expressed the view that a rule of law announced in an adjudication, but with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved by following the prescribed rulemaking procedures . . . . Side by side these two cases, *Chenery and Wyman-Gordon*, set forth quite nicely the "dichotomy between rulemaking and adjudication" upon which "the entire [APA] is based." AG's Manual 14.

"Palpation reveals sensitivity to touch," *Fleming v. United States Dept. of Agriculture*, 713 F.2d 179, 185 (6th Cir. 1983) But, palpation is a subjective procedure, for ". . . a degree of discretion must be left to the inspector in detecting symptoms of soring." 55 Fed. Reg. 41,990 (October 17, 1990), ". . . *[l]ight* digital palpation will not bring up a pain response in a sound horse." *Billy Gray*, 52 Agric. Dec. 1044, 1077 (HPA Dkt. No. 90-28) (July 23, 1993), *aff'd* 39 F.3d 670 (6th Cir. 1994), and it can be too hard: (Tr. 262) it has to be just right. (Tr. 290) There are no Department guidelines which must be followed by the investigating veterinarians, *Eddie C. Tuck, et al.*, 53 Agric. Dec. at 301. Further, conclusions that soring may be reliably detected only by palpation is a change from previous examination techniques in which thermovision equipment was utilized, *Fleming v. United States Dept. of Agriculture, id.* 713 F.2d at 185. *Larry E. Edwards, et al.*, 49 Agric. Dec. 188, 204 (HPA Dkt. No. 88-2) (June 29, 1990), aff'd, 943 F.2d 1318 (11th Cir. 1991), reh'g.denied, 946 F.2d 1549, cert. denied, ___ U.S. ___, 112 S. Ct. 1475, 117 L.Ed.2d 619 (1992), a change which has not been explained, except for the proclamation that the studies which described the efficacy of these techniques, the Auburn University School of Veterinary Medicine12[25] and the Ames study,[26] are outdated, irrelevant and no longer valid.[27] *Bill Young, et al.*, 53 Agric. Dec. ___ slip op. at 41, 48.

Analysis of this issue would not be completed without reference to the exception provided to the requirements that agencies pursue notice and rule making. This exception applies ". . . to interpretative rules, general statements of policy or rules of agency organization, procedure, or practice; . . ." 5 U.S.C.A. § 553(b)(3)(A) (West 1977 & Supp. 1994). It is not applicable here, for the Department is observed to have ". . . cabin[ed] its discretion." *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d at 1234. As has been noted, the rule is rigid and immutable, being universally affixed to all matters involving enforcement of the Act, even in cases which might reflect the Department's withdrawal from

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[25]Purohit, Ram C. "Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors (Summary of the Research from September, 1978 to December, 1982)." School of Veterinary Medicine, Auburn University. 53 Fed. Reg. 14,779 (April 26, 1988).

[26]H.A. Nelson, D.V.M. and D.L. Osheim, B.A., Soring in Tennessee Walking Horse: Detection by Thermography, National Veterinary Services Laboratories, Ames, Iowa (August, 1975), 54 Fed. Reg. 7177 (February 17, 1989).

[27]APHIS received an increase of appropriations, H.R. Conf. Rep. No. 212, 103d Cong., 1st Sess. at 22-23 (1993), which ". . . should be used to purchase thermography machines and to provide additional training and evaluation."

adversarial efforts.[28] The Department has used litigation to announce its policy, but the Department applies the rule to citizens who were not present and had no knowledge of its prospective formation or standing to participate in its formulation.[29] Fairness and precedent will not support this effort. *N.L.R.B. v. Wyman-Gordon Company, id.* 89 S. Ct. at 1429, for the Department has created a substantive rule, characterized by its direct, binding and regulatory impact on the general public. *Nat. Ass'n of Reg. Util. Com'rs v. Dept. of Energy*, 851 F.2d 1424 1431 (D.C. Cir. 1988), *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1320-1321 (D.C. Cir. 1988), *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). Trainers and owners of walking horses, have been presented with the certain obligations of the palpation rule, which if applied to the facts of this case, are not prospective, flexible or tentative, for these industry participants would be confronted with an unexplained conclusion, an ungrounded action, *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 94-95, 63 S. Ct. 454, 462, 87 L.Ed. 626 (1943), *cf. Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-539 (D.C. Cir. 1986). (Decisive weight given to agency's choice of words: "will" indicates a substantive rule; "may" describes a non-binding policy.) By asserting the rule, the Department has here avoided the obligation to present evidence and reasoning which might support the conclusion sought by the rule. *Pacific Gas & Electric Co. v. Federal Power Com'n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Indeed, the evidence submitted by the Department's counsel reveals a reliance on the rule, for no facts were advanced into the record which might sustain the conclusion that the rule is reliable. Since there has been no rule making process, these respondents have had no opportunity to participate in a legislative activity. If these respondents, and others, had wished to comment on the palpation rule during a litigation in which they were non-parties, they would have no standing and no voice. If these respondents, and others, wish to comment on the palpation rule during this present litigation, they are silenced, for the existence of the rule is an immovable stop to the possible consideration of the palpation technique as being unreliable.

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[28]The case of *Kim Bennett, et al.*, 52 Agric. Dec. 1205 (HPA Dkt. No. 91-127) (October 28, 1993) is an example of such an action.

[29]There is no present attempt to determine if Mr. Kim Bennett who was previously a respondent in a HPA case or if Mr. David Broderick who was engaged as counsel to Mr. Bennett, in that case. *Kim Bennett, id.* 52 Agric. Dec. at 1205, should by virtue of that experience, be considered as having had notice and an opportunity to participate in the establishment of the palpation rule, as the rule was established well prior to the occurrence of the acts alleged in that case. *Edward Whaley and Wink Groover*, 35 Agric. Dec. 1519, 1523 n. 5 (HPA Dkt. Nos. 25, 28) (September 22, 1976).

There is no doubt that the problem is vexing for the Department has attempted to serve two divergent constituencies; one, which pursued the enactment of the Act; the other, an industry of horse users. The Department's reaction to these two groups is evident even in this uncomplicated case, for the Department invited the Executive Director of the American Horse Protection Association, Inc.[30] to attend and participate in a 1992 training session conducted for Department employees engaged in the enforcement of the Act (RX 6), but did not extend the same courtesy to representatives of the National Horse Show Commission, Inc.[31] (Tr. 725)

The American Horse Protection Association, Inc. has pursued three Secretaries of Agriculture in an attempt to assure acceptable levels of enforcement of the HPA. In *American Horse Protection Ass'n v. Block,* No. 84-3298 (D.D.C., October 30, 1985), motions for summary judgment were granted to Secretary Block.. But, in *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir 1987) such judgment was vacated for it was determined that the Secretary's efforts to obtain a compromise between those who favored the use of no -- or light-training implements and those who preferred the use of sturdier devices, should not be encouraged and that Secretary Lyng had not presented a reasonable explanation of his failure to grant the rule making petition of the petitioner-plaintiff Association. Thereafter, upon action on the remand, *American Horse Protection Ass'n v. Lyng,* 681 F. Supp. 949 (D.D.C. 1988), it was determined that the Secretary had acted arbitrarily in denying an amendment to its regulations by the rule making process and thereafter declared specific regulations invalid. However, in *American Horse Protection Ass'n v. Yeutter,* 917 F.2d 594 (D.C. Cir. 1990) (mem. op.), the matter was reversed and remanded, for the Secretary's regulations were determined as having been obtained and supported by a sufficient rule making process.[32]

While the Circuit Court of Appeals for the District of Columbia has twice noted that ". . . the Act was clearly not a compromise between proponents and opponents of soring . . . ." *American Horse Protection Ass'n v. Lyng,* 812 F.2d

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[30]According to an exhibit, "The American Horse Protection Association, Inc., Washington, D.C. is the only national non-profit organization dedicated exclusively to the welfare of all equines, both wild and domestic." It was established in 1966. (CX 6, p. 2)

[31]Licensees of this group, headquartered in Shelbyville, Tennessee perform eighty percent of the examinations performed by DQPs in cooperative enforcement of the HPA. (Tr. 707)

[32]This process was described at 54 Fed. Reg. 7177 (February 17, 1989). The sufficiency of this process was established by the studies identified herein at nn. 24 and 25.

at 6, *American Horse Protection Ass'n v. Yeutter,* 917 F.2d at 597, the regulations by which the Department enforces the Act were, in fact, partially obtained by agreement,[33] which compromise has been an attempt to serve distinct constituencies, ". . . the affected industry"[34] and "an interested party with divergent views." Nevertheless, the Department continues to focus on the cruel and inhumane practices which Congress declared to be illegal. But these respondents, and others, are entitled to the justifications, *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d at 1236, required for judicial review, vested either by the substantial evidence rule expressed at 5 U.S.C.A. § 706(2)(E) (West 1977 & Supp. 1994) or by the measure of prohibited arbitrary, capricious or abuse of discretion constructions expressed at 5 U.S.C. § 706(2)(A) (West 1977 & Supp. 1994). With the adoption of the Department's palpation rule, they have neither, for the Department has failed fidelity to the Administrative Procedure Act at 5 U.S.C.A. § 553(c) (West 1977 & Supp. 1994).

APPENDIX B

Excerpt from ALJ's Third Initial Decision and Order in *In re Gary R. Edwards*, slip op. at 9-21 (Aug. 11, 1995).

Discussion

The following analysis of the Horse Protection Act,[8] and the Department's regulations relating to that Act, were recently discussed in *Kim Bennett, et al.*,

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[33]43 Fed. Reg. 18,516 (April 28, 1978); 53 Fed. Reg. 15,640 (May 2, 1988); 53 Fed Reg 28367 (July 28, 1988); 54 Fed. Reg. 7175 (February 17, 1989).

[34]The Department has encouraged the horse industry to pursue self regulation, without being overly restrictive. 44 Fed. Reg. 1560 (January 15, 1979), 44 Fed. Reg. 25,173 (April 27, 1979).

[8]This Act has not been consistently enforced. "No Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985 through June 28, 1990." *Gary R. Edwards, et al.*, 54 Agric. Dec. ____, ____ slip op. at 18 (HPA Dkt. No. 91-113) (June 9, 1995) (second remand order).

The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as Administrator of the Packers and Stockyards Act regulatory program). *Keith Becknell*, 54 Agric. Dec. ____, ____ slip op. at 2, n. (HPA Dkt. No. 92-3) (June 1, 1995).

H.P.A. Dkt. No. 93-6, Initial Decision February 28, 1995, which discussion is hereinafter partly displayed and incorporated herein, as follows:

Notice and Rule Making Process

"Soring" the activity declared illegal by the Act, has been described by the Department as follows:

> The practice known as "soring" is the injuring of show horses to improve their performance in the show ring. The pain caused by soring accentuates the gait of show horses. Soring can be accomplished in a variety of ways, including: (1) The application of irritating solutions to the horse's limbs; (2) the fastening of chains or similar equipment (commonly called "action devices") to the horse's limbs and forefeet; (3) the use of pads to elevate the horse's foot and to manipulate the angle of the horse's foot; (4) the trimming of a horse's hoof and the shoeing of its foot so as to cause pressure or irritation on the sole of the foot (commonly called "pressure shoeing"); and (5) the insertion of an object between a pad and the sole of the foot to cause discomfort.
>
> In 1970, Congress passed the Act to eliminate the practice of soring, by forbidding the showing or selling of sored horses. Exercising our rulemaking power under 15 U.S.C. 1824 and 1828, we issued regulations that prohibit soring devices and soring methods.[9]

In 1978, following the 1976 amendments to the Act which brought the DQP program to the service of the Department,[10] the Department recounted that prior to 1970 and immediately thereafter:

> . . . . Soring was flagrant and obviously visible to the naked eye. However, the horse with bloody legs and open sores on the pasterns is a thing of the past. Soring today is devious and is

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[9]53 Fed. Reg. 14,778 (April 26, 1988). [All citations to the Federal Register herein, unless otherwise noted, relate to the Department's efforts to enforce the Horse Protection Act.]

[10]15 U.S.C.A. § 1823(c) (West 1982 & Supp. 1994).

seldom evident to the untrained or inexperienced observer. Consequently, the Department feels that any DQP candidate must be familiar with and reasonably knowledgeable about horses in order to be considered for any DQP training program. Further, since the practice of soring involves the hoof, the skin, and the connective tissue under the skin of the feet and legs, the veins and arteries of the feet and legs, and sometimes the muscles and bones in the feet and legs, the Department believes it is vitally necessary for a DQP candidate to have basic knowledge about the anatomy and physiology of the limbs in order to recognize, understand, properly document, and recall for purposes of evidence, if necessary, the effect of soring on living tissue as well as the lesions and symptoms relating to soring on any particular horse. Further, the Department believes every DQP candidate must also have a basic knowledge of the history of soring, the methods of soring, and the various inspection techniques and procedures necessary to detect and diagnose soring. . . .[11]

"Soring" as the Department notes may be detected by a variety of inspection techniques and procedures.[12]

* * *

APHIS' protocol which captures evidence of soring is derived from the Act, which provides for inspections,[15] and which provides for the implementation of the Act by the issuance of regulations.[16] The regulation which discloses the dispute in this matter centers on the Department's inspection procedures which at the date of the alleged soring, March 30, 1991, were defined as:

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[11]43 Fed. Reg. 18,522 (April 28, 1978).

[12]*infra, n.* 17.

[15]15 U.S.C.A. § 1823(e) (West 1988 and Supp. 1994).

[16]15 U.S.C.A. § 1828 (West 1988 & Supp. 1994).

> . . . "Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.[17]

The process or protocol of palpation to be followed by the Department's investigating veterinarians has never been described in the Department's regulations or rationale in support thereof. However, palpation to be followed in the DQP program has been described as follows:

> (2) The DQP shall digitally palpate the front limbs of the horse from knee to hoof, with particular emphasis on the pasterns and fetlocks. The DQP shall examine the posterior surface of the pastern by picking up the foot and examining the posterior (flexor) surface. The DQP shall apply digital pressure to the pocket (sulcus), including the bulbs of the heel, and continue the palpation to the medial and lateral surfaces of the pastern, being careful to observe for responses to pain in the horse. While continuing to hold onto the pastern, the DQP shall extend the foot and leg of the horse to examine the front (extensor) surfaces, including the coronary band. The DQP shall examine in a like manner the rear

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[17] 44 Fed. Reg. 1562 (January 5, 1979); (paragraph designations were removed at 53 Fed. Reg. 14,782 (April 26, 1988)) The Department's original definition was published at 37 Fed. Reg. 2427 (February 1, 1972) as follows:

> (p) "Inspection" of a horse means an examination of the horse by use of whatever means are reasonably deemed necessary by the inspector to determine whether the horse is sored. This may include, but is not limited to, visual examination, touching, use of any diagnostic device or instrument, and requiring the removal of any shoes, pads, and other equipment from the horse.

> limbs of all horses inspected after showing, and may examine the rear limbs of any horses examined preshow when he deems it necessary. While carrying out the procedures set forth in this paragraph, the DQP shall also inspect the horse to determine whether the provisions of § 11.3 of this part are being complied with, and particularly whether there is any evidence of inflammation, edema, or proliferating granuloma tissue.[18]

The Department's definition of "inspection," an aspect of its regulations, and * * * have been eradicated by the rule hereinafter described, despite the fact that in its history of enforcement of the Act, the Department has followed,[19] the notice and rule making procedures required by the Administrative Procedure Act,[20] eight times in the expression of substantive final rules or regulations and four times dealing with interim rules. But, notice and rule making have never been followed to address the reliability of palpation as the sole method to detect soring. Instead, the Department has avoided the scrutiny of the public's participation, advancing a rule by its Secretary's *alter ego, World Wide Citrus, et al.*, 50 Agric. Dec. 319 (90 AMA Dkt. Nos. F&V 907-18, 907-17) (May 9, 1991), which rule states: ". . . I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore . . . ." *Eddie C. Tuck et al.*, 53 Agric. Dec. 261, 292 (HPA Dkt. No. 91-115) (June 10, 1994); that ". . . palpation by government veterinarians, without other evidence is sufficient to support a finding that a horse is sore." *Cecil Jordan, et al.*, 52 Agric. Dec. 1214, 1226 (HPA Dkt. No. 91-23) (November 19, 1993) *appeal docketed*, No. 93-1852 (D.C. Cir. 1993); "It is well established that bilateral reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus support a finding of a violation of the Act, *Lloyd R. Smith, et al.*, 51 Agric. Dec. 327, 330-331 (HPA Dkt. No. 91-24) (February 20, 1992),

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[18]55 Fed. Reg. 41,993 (October 17, 1990) (final rule). See also 55 Fed. Reg. 11,386 (March 28, 1990) (proposed rule).

[19]The formation of regulations intended to facilitate the enforcement of the Horse Protection Act was initially addressed at 36 Fed. Reg. 12,586 (July 1, 1971).

[20]5 U.S.C.A. § 553 (West 1977 & Supp. 1994) and 5 U.S.C.A. § 551(4), (5) (West 1977 & Supp. 1994) as such define rule and rule making.

and, ". . . ample precedent exists for finding that a horse was sore, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision or other evidence." *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 612 (HPA Dkt. No. 88-58) (January 24, 1991). This rule appears to be based on the opinions of the Government veterinarians, whose exclusive and durable employments depend on their enforcement of the Act, and the number of times that they may have examined walking horses. *William Earl Bobo, et al.*, 53 Agric. Dec. 176, 200-201 (HPA Dkt. No. 91-202) (January 12, 1994), appeal docketed, No. 94-3311 (6th Cir. 1994). And it is distinct from, and not to be confused with, characterizations dealing with the Department's rulings on the sufficiency of evidence. These rulings on evidence, conclude that exhibits such as CX 1, 2 and 3 in this case, prepared by Government veterinarians, who almost universally have no recall of their examinations and hence avoid questions of what they saw and did, must be considered reliable and probative, *Cecil Jordan, et al.*, 51 Agric. Dec. 1229, 1230 (HPA Dkt. No. 91-23) (Remand Order October 22, 1992) and that any deviations which might bring question to the affiants' abilities to observe and record events are *de minimis*. *Eddie C. Tuck, et al.*, 53 Agric. Dec. at 307.

The rule that proclaimed the reliability of palpation to detect soring is disputed, respondents here asserting that palpation is not reliable. * * *

* * *

The rule which has not been visited by public contribution, is held central to the Department's cost-conscious enforcement activities, for the Department[21] has recognized that if it:

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[21]The following statutory language is found in Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992), an Appropriations Act for APHIS, which in part provided:

> . . . . That none of these funds shall be used to pay the salary of any Department veterinarian or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

Thereafter, a report of the next Congress, H.R. Conf. Rep. No. 212, 103d Cong., 1st Sess. at 22-23 (1993) recorded that the:

". . . fails to bring actions for soring where the only evidence of soring was based on digital palpation, after the USDA veterinarians had looked at, but found nothing abnormal in the horse's way of going, etc., that would completely destroy effective enforcement under the Horse Protection Act, and would totally defeat the congressional purpose in passing the Act. Furthermore, if more than pain revealed by digital palpation was required, that would be contrary to the express definition of `sore' in the Act, as explained above."

Bill Young, et al., 53 Agric. Dec. _____, slip op. at 58 (HPA Dkt. No. 91-203) (August 3, 1994) *appeal docketed,* No. 94-40818 (5th Cir. 1994). However, this rule[22] must be formulated by processes mandated by the Administrative Procedure Act. 5 U.S.C.A. § 553 (West 1977 & Supp. 1974)

The Administrative Procedure Act was adopted to provide, *inter alia,* that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations. *Morton v. Ruiz,* 415 U.S. 199, 232, 94 S. Ct. 1055, 39 L.Ed.2d 270 (1994)

Here the issue[23] is whether a rule has been generated, not, how it is to be interpreted, an issue continuously roiling the courts. *See* several of note: *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), *Lansing Dairy, Inc. v. Espy,* 39

. . . conferees agree that these additional funds should be used to purchase thermograph machines and to provide additional training and evaluation. Neither these machines nor digital palpation should be used as the sole means to determine whether soring has occurred, but they should be used as additional diagnostic tools.

[22]The Department is well-versed in the formulation of science-based enforcement protocols based upon the Administrative Procedure Act. See Final Rule, Official Brucellosis Tests, 59 Fed. Reg. 31,922-31,923 (June 21, 1994).

[23]This issue has been raised by the content of respondents evidence and by the brief filed September 28, 1994. Even if not artfully named, it is appropriate that it be addressed, as a first order of business. *Liquid Carbonic Industries Corp. v. F.E.R.C.,* 29 F.3d 697, 701 (D.C. Cir. 1994)

F.3d 1339 (6th Cir. 1994), *Bullwinkel v. F.A.A.*, 23 F.3d 167 (7th Cir. 1994).

The palpation rule, "palpation alone is sufficiently reliable to evidence soring," is more than ". . . a policy statement of the Department"; more than ". . . an indication of an agency's current position on a particular regulatory issue," for by adopting this rule the agency has intended to bind itself to a particular legal position, *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) and it has adopted a substantive rule, the formulation of which rather must be shared with the public by the notice and rule making process. *Public Citizen, Inc. v. U.S. NRC*, 940 F.2d 679, 681-682 (D.C. Cir. 1991), which quotes *Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988). These decisions follow the guidance found in *N.L.R.B. v. Wyman-Gordon Company*,394 U.S. 759, 764, 89 S. Ct. 1426, 1429, 22 L.Ed.2d 709, 714 (1969), which directs that:

> . . . . The rule-making provisions of that Act [The Administrative Procedure Act], which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. See H.R.Rep. No. 1980, 79th Cong., 2d Sess., 21-26 (1946); S. Rep. No. 752, 79th Cong., 1st Sess., 13-16 (1945). They may not be avoided by the process of making rules in the course of adjudicatory proceedings. [Parenthetical note added][24]

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[24]The citations to legislative history here refer to considerations of bills leading to the Administrative Procedure Act. It may be of some assistance to consider Justice Scalia's concurring observations expressed in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 203, 221, 109 S. Ct. 468, 102 L.Ed.2d 493 (1988):

> . . . And just as *Chenery* suggested that rulemaking was prospective, the opinions in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), suggested the obverse: that adjudication could not be purely prospective, since otherwise it would constitute rulemaking. Both the plurality opinion, joined by four of the Justices, and the dissenting opinions of Justices Douglas and Harlan expressed the view that a rule of law announced in an adjudication, but with exclusively prospective effect, could not be accepted as binding (without new analysis) in subsequent adjudications, since it would constitute rulemaking and as such could only be achieved by following the prescribed rulemaking procedures . . . . Side by side these two cases, *Chenery and Wyman-Gordon*, set forth quite nicely the "dichotomy between rulemaking and adjudication" upon which "the entire [APA] is based." AG's Manual 14.

The *Wyman-Gordon Company* case, 89 S. Ct. at 1428 melds the definitions of 5 U.S.C.A. § 551(4)-(5) (West 1979 & Supp. 1994) to assert that "rule making" is ". . . an agency statement of general or particular applicability and future effect. . . ." The palpation rule is indeed a statement of intended future effect, for it has been, and will be, the crux of all enforcement actions taken by the Department. The intractability of this policy has been continuous for ". . . it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act," *Bill Young, et. al.*, 53 Agric. Dec. ___, slip op. at 57, persistent for "[V]irtually all respondents in these types of cases complain that USDA's palpation evidence consists of subjective conclusions to determine whether horses are sore," *Bill Young, et al.*, 53 Agric. Dec. ___, slip op. at 36, and unyielding, being further displayed in the Department's order in *William Earl Bobo et al.*, 53 Agric. Dec. 210, 211 (HPA Dkt. No. 91-202) (Denial of Reconsideration February 28, 1994), which reveals:

> On January 31, 1994, Respondents filed a Petition for Reconsideration of the Decision and Order previously filed herein primarily on the grounds that the American Association of Equine Practitioners has adopted a resolution stating that "digital palpation . . . may not be a sufficient basis of and by itself to conclude that the animal is in pain or otherwise in violation of the Horse Protection Act" (Resolution at 1). However, as stated in my decision in this case, notwithstanding the views of some persons that digital palpation is not by itself appropriate for determining whether a horse was sore, "[b]ased upon my examination of the record in this case, in addition to my examination of the records in 55 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act [footnote omitted]" (Decision at 35-36). The Resolution referred to by Respondents does not cause me to change my views, in this respect. (Emphasis added)

"Palpation reveals sensitivity to touch," *Fleming v. United States Dept. of Agriculture*, 713 F.2d 179, 185 (6th Cir. 1983) But, palpation is a subjective procedure, for ". . . a degree of discretion must be left to the inspector in detecting symptoms of soring." 55 Fed. Reg. 41,990

(October 17, 1990), ". . . *[l]ight* digital palpation will not bring up a pain response in a sound horse." *Billy Gray*, 52 Agric. Dec. 1044, 1077 (HPA Dkt. No. 90-28) (July 23, 1993), *aff'd* 39 F.3d 670 (6th Cir. 1994), * * * There are no Department guidelines which must be followed by the investigating veterinarians, *Eddie C. Tuck, et al.*, 53 Agric. Dec. at 301. Further, conclusions that soring may be reliably detected only by palpation is a change from previous examination techniques in which thermovision equipment was utilized, *Fleming v. United States Dept. of Agriculture, id.* 713 F.2d at 185. *Larry E. Edwards, et al.*, 49 Agric. Dec. 188, 204 (HPA Dkt. No. 88-2) (June 29, 1990), aff'd, 943 F.2d 1318 (11th Cir. 1991), reh'g denied, 946 F.2d 1549, cert. denied, ___ U.S. ___, 112 S. Ct. 1475, 117 L.Ed.2d 619 (1992), a change which has not been explained, except for the proclamation that the studies which described the efficacy of these techniques, the Auburn University School of Veterinary Medicine[25] and the Ames study,[26] are outdated, irrelevant and no longer valid.[27] *Bill Young, et al.*, 53 Agric. Dec. ___ slip op. at 41, 48.

Analysis of this issue would not be completed without reference to the exception provided to the requirements that agencies pursue notice and rule making. This exception applies ". . . to interpretative rules, general statements of policy or rules of agency organization, procedure, or practice; . . ." 5 U.S.C.A. § 553(b)(3)(A) (West 1977 & Supp. 1994). It is not applicable here, for the Department is observed to have ". . . cabin[ed] its discretion." *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d at 1234. As has been noted, the rule is rigid and immutable, being universally affixed to all matters involving enforcement of the Act, even in cases which might reflect the Department's withdrawal from adversarial

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[25]Purohit, Ram C. "Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors (Summary of the Research from September, 1978 to December, 1982)." School of Veterinary Medicine, Auburn University. 53 Fed. Reg. 14,779 (April 26, 1988).

[26]H.A. Nelson, D.V.M. and D.L. Osheim, B.A., Soring in Tennessee Walking Horse: Detection by Thermography, National Veterinary Services Laboratories, Ames, Iowa (August, 1975), 54 Fed. Reg. 7177 (February 17, 1989).

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[29]* * *

There is no doubt that the problem is vexing for the Department has attempted to serve two divergent constituencies; one, which pursued the enactment of the Act; the other, an industry of horse users. The Department's reaction to these two groups is evident even in this uncomplicated case, * * *

The American Horse Protection Association, Inc. has pursued three Secretaries of Agriculture in an attempt to assure acceptable levels of enforcement of the HPA. In *American Horse Protection Ass'n v. Block*, No. 84-3298 (D.D.C., October 30, 1985), motions for summary judgment were granted to Secretary Block. But, in *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir 1987) such judgment was vacated for it was determined that the Secretary's efforts to obtain a compromise between those who favored the use of no -- or light-training implements and those who preferred the use of sturdier devices, should not be encouraged and that Secretary Lyng had not presented a reasonable explanation of his failure to grant the rule making petition of the petitioner-plaintiff Association. Thereafter, upon action on the remand, *American Horse Protection Ass'n v. Lyng*, 681 F. Supp. 949 (D.D.C. 1988), it was determined that the Secretary had acted arbitrarily in denying an amendment to its regulations by the rule making process and thereafter declared specific regulations invalid. However, in *American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594 (D.C. Cir. 1990) (mem. op.), the matter was reversed and remanded, for the Secretary's regulations were determined as having been obtained and supported by a sufficient rule making process.[32]

While the Circuit Court of Appeals for the District of Columbia has twice noted that ". . . the Act was clearly not a compromise between proponents and opponents of soring . . . ." *American Horse Protection Ass'n v. Lyng*, 812 F.2d at 6, *American Horse Protection Ass'n v. Yeutter*, 917 F.2d at 597, the regulations by which the Department enforces the Act were, in fact, partially obtained by agreement,[33] which compromise has

[32]This process was described at 54 Fed. Reg. 7177 (February 17, 1989). The sufficiency of this process was established by the studies identified herein at nn. 24 and 25.

[33]43 Fed. Reg. 18,516 (April 28, 1978); 53 Fed. Reg. 15,640 (May 2, 1988); 53 Fed Reg 28367 (July 28, 1988); 54 Fed. Reg. 7175 (February 17, 1989).

been an attempt to serve distinct constituencies, ". . . the affected industry"[34] and "an interested party with divergent views." Nevertheless, the Department continues to focus on the cruel and inhumane practices which Congress declared to be illegal. But these respondents, and others, are entitled to the justifications, *U.S. Telephone Ass'n v. F.C.C.*, 28 F.3d at 1236, required for judicial review, vested either by the substantial evidence rule expressed at 5 U.S.C.A. § 706(2)(E) (West 1977 & Supp. 1994) or by the measure of prohibited arbitrary, capricious or abuse of discretion constructions expressed at 5 U.S.C. § 706(2)(A) (West 1977 & Supp. 1994). With the adoption of the Department's palpation rule, they have neither, for the Department has failed fidelity to the Administrative Procedure Act at 5 U.S.C.A. § 553(c) (West 1977 & Supp. 1994).

In re: DAVID HUBBARD AND CONLEY DOCKERY.
HPA Docket No. 96-0001.
Decision and Order as to David Hubbard filed March 25, 1997.

Default — Admissions — Civil penalty — Disqualification — Failure to file timely answer.

The Judicial Officer affirmed the Default Decision by Judge Hunt (ALJ), except that the Judicial Officer increased the assessed civil penalty from $2,000 to $4,000 and increased the period of disqualification from 1 year to 6 years. Respondent's failure to file a timely Answer is deemed an admission of two violations of 15 U.S.C. § 1824(2)(B) alleged in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). However, there is no evidence in the record as to the device used by Respondent to sore one of the horses, and Respondent neither has admitted nor is deemed to have admitted allegations in Complainant's motion for a default decision. The record does not reveal any basis for an exception from the usual practice of imposing the maximum civil penalty of $2,000 for each violation, a 1-year disqualification period for the first violation of the HPA, and a 5-year disqualification for the second violation of the HPA.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) instituted this disciplinary administrative proceeding

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[34]The Department has encouraged the horse industry to pursue self regulation, without being overly restrictive. 44 Fed. Reg. 1560 (January 15, 1979), 44 Fed. Reg. 25,173 (April 27, 1979).

under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) (hereinafterthe Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on June 18, 1996.

The Complaint alleges, *inter alia*, that: (1) on May 8, 1992, David Hubbard (hereinafter Respondent Hubbard) entered, for the purpose of showing or exhibiting, a horse known as "Doc's Double Copy" as Entry No. 669, in Class No. 49,,at the Crumley House Charity Horse Show at Gray, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Complaint ¶ II(A)); and (2) on July 31, 1993, Respondent Hubbard entered, for the purpose of showing or exhibiting, a horse known as "Stock's Classy Lady" as Entry No. 30, in Class No. 15, at the Tazewell County Horse Show at Tazewell, Virginia, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Complaint ¶ III).

Respondent Hubbard was served with the Complaint on June 25, 1996. Respondent Hubbard failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on December 6, 1996, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt (hereinafter ALJ) issued a Decision and Order as to David Hubbard Upon Admission of Facts by Reason of Default (hereinafter Default Decision) in which the ALJ: (1) found that Respondent Hubbard violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), as alleged in the Complaint; (2) assessed a civil penalty of $2,000 against Respondent Hubbard; and (3) disqualified Respondent Hubbard for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction (Default Decision at 1-3).

On February 11, 1997, Complainant appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[1] Respondent Hubbard did not file a reply to Complainant's Appeal Petition and Brief in Support Thereof (hereinafter Complainant's Appeal Petition) within 20 days after it was served on Respondent Hubbard, as required by section 1.146(b)

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

of the Rules of Practice (7 C.F.R. § 1.146(b)), and on March 13, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the Default Decision as the final Decision and Order, with the exception of the sanction imposed by the ALJ. Additions or changes to the Default Decision are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Applicable Statutory Provisions

15 U.S.C.:

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2).

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. . . .

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil

penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(b)(1), (c).

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

. . . .

Copies of the Complaint and the Rules of Practice . . . were served on Respondent [Hubbard] by the Hearing Clerk by certified mail on June 25, 1996. Respondent [Hubbard] was informed in the accompanying letter of service that he had 20 days from the date of receipt of the Complaint to file an Answer and that failure to answer any allegation in the Complaint would constitute an admission of that allegation. Thus, Respondent [Hubbard] had until July 15, 1996, to file an Answer. Respondent [Hubbard], however, did not file an Answer with the Hearing Clerk until July 19, 1996. Respondent [Hubbard's] Answer was therefore not timely filed.

Complainant [filed a Motion for Adoption of Proposed Decision and Order as to Respondent David Hubbard (hereinafter Complainant's Motion for Default Decision) on November 1, 1996.] Respondent [Hubbard is deemed to have admitted the allegations in the Complaint by his] failure to file an Answer within the time prescribed in the Rules of Practice . . . . Complainant's Motion [for Default Decision] is granted and Respondent [Hubbard's] admissions are hereby adopted and set forth [in this Decision and Order] as Findings of Fact.

. . . .

Findings of Fact

1. Respondent David Hubbard is an individual whose mailing address is [redacted] Tennessee [redacted]

2. Respondent David Hubbard, at all times material herein, was the trainer of the horse known as "Doc's Double Copy" and entered this horse as Entry No. 669, [in] Class No. 49, on May 8, 1992, at the Crumley [House] Charity Horse Show at Gray, Tennessee, while the horse was sore.

3. Respondent David Hubbard, at all times material herein, was the trainer of the horse known as "Stock's Classy Lady" and entered this horse as Entry No. 30, [in] Class No. 15, on July 31, 1993, at the Tazewell County Horse Show at Tazewell, Virginia, while the horse was sore.

Conclusions [of Law]

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact [in this Decision and Order], Respondent [Hubbard] has violated section 5(2)(B) of the [Horse Protection] Act, 15 U.S.C. § 1824(2)(B).

[Discussion]

In its [Motion for Default Decision], Complainant contends that [one of the two violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), which Respondent Hubbard is deemed to have admitted,] "involved extreme cruelty in that a hex nut and bolt were inserted inside the shoes of both front feet of 'Stock's Classy Lady' entered at the Tazewell County . . . Horse Show by the [R]espondent." Complainant seeks Respondent [Hubbard's] permanent disqualification because of the alleged nature of the violation.

Respondent [Hubbard's] failure to file a timely Answer constitutes an admission only of the allegations in the Complaint. The Complaint, in turn, alleges only that Respondent [Hubbard] entered Stock's Classy Lady in the show "while the horse was sore." [(Complaint ¶ III.)] There is no allegation in the Complaint . . . showing how [Stock's Classy Lady] had been sored or that [Stock's Classy Lady] had been sored in the manner [alleged] by Complainant [in Complainant's Motion for Default Decision].

In these circumstances, the finding [with respect to Stock's Classy Lady] is only that Respondent[, at all times material herein, was the trainer of the horse known as "Stock's Classy Lady" and] entered Stock's Classy Lady [as Entry No. 30, in Class No. 15, on July 31, 1993, at the Tazewell County Horse Show at Tazewell, Virginia,] while [the horse] was sore, as alleged in the Complaint (Complaint ¶ III).

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant requests that I modify the sanctions imposed by the ALJ (Complainant's Appeal Petition at 7).

Complainant recommended that the ALJ impose a $4,000 civil penalty against Respondent Hubbard and permanently disqualify Respondent Hubbard from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, as follows:

> The [R]espondent admitted two violations of the [Horse Protection] Act. Moreover, one of the violations involved extreme cruelty in that a hex nut and bolt were inserted inside the shoes of both front feet of "Stock's Classy Lady" entered at the Tazewell County Classic Horse Show by the Respondent. The nut and bolt caused the horse pain while walking. A civil penalty of $4,000 and a permanent disqualification is appropriate and necessary in this case.

Complainant's Motion for Default Decision at 2.

The ALJ found that Respondent Hubbard is deemed, by his failure to file a timely Answer, to have admitted that he violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on two occasions, as alleged in the Complaint (Complaint ¶¶ II, III). The ALJ also found that "[t]here is no allegation in the [C]omplaint, or elsewhere in the file, showing how [Stock's Classy Lady] had been sored or that [she] had been sored in the manner described by [C]omplainant." (Default Decision at 3.) Based on his finding that Respondent Hubbard is deemed to have admitted two violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), the ALJ imposed the following sanction against Respondent Hubbard:

> <u>Order</u>
>
> 1. Respondent David Hubbard is assessed a civil penalty of $2,000.
>
> 2. Respondent David Hubbard is disqualified for one year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction.

Default Decision at 3.

I agree with the ALJ that Respondent Hubbard is deemed to have admitted that he violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B))

on two occasions, as alleged in the Complaint. I also agree with the ALJ that Complainant did not allege in the Complaint that Respondent Hubbard's soring of Stock's Classy Lady involved extreme cruelty in that a hex nut and bolt were inserted inside the shoes of both front feet of Stock's Classy Lady and that, therefore, Respondent Hubbard is not deemed to have admitted that he used a hex nut and bolt to sore Stock's Classy Lady.

I disagree with the ALJ's determination that Complainant has not alleged Respondent Hubbard's use of a hex nut and bolt to sore Stock's Classy Lady "elsewhere in the file." Complainant alleges Respondent Hubbard's use of a hex nut and bolt in Complainant's Motion for Default Decision. However, Respondent Hubbard is not deemed to have admitted the allegation regarding the use of a hex nut and bolt in Complainant's Motion for Default Decision and there is no evidence in this record that Respondent Hubbard in fact used a hex nut and bolt to sore Stock's Classy Lady, as alleged in Complainant's Motion for Default Decision. Therefore, Complainant's allegation regarding Respondent Hubbard's use of a hex nut and bolt forms no part of the basis of this Decision and Order.

Instead, I am modifying the sanction imposed by the ALJ based on Respondent Hubbard's admission to two violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), the sanction provisions in the Horse Protection Act, and the Department's sanction policy.

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

> The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.
>
> The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as

oil or mustard, to the p[a]stern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec.

476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." In most cases, the maximum civil penalty of $2,000 per violation is warranted.[2]

The administrative officials charged with the responsibility for achieving the congressional purpose have recommended that Respondent Hubbard be assessed a civil penalty of $2,000 for each of the two violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) which Respondent Hubbard is deemed to have admitted violating by Respondent Hubbard's failure to file a timely answer. An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of $2,000 per violation is warranted.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that anyone assessed a civil penalty under the Horse Protection Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year

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[2]*In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. ___, slip op. at 77 (Mar. 13, 1997); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. ___, slip op. at 94 (Nov. 5, 1996), *appeal docketed*, No. 96-9472 (11th Cir. Dec. 18, 1996); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. ___, slip op. at 42 (Aug. 19, 1996); *In re Mike Thomas*, 55 Agric. Dec. ___, slip op. at 53 (July 15, 1996); *In re C.M. Oppenheimer* (Decision as to C.M Oppenheimer), 54 Agric. Dec. 221, 319 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1323 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 317 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 317 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 350-51 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20, 62 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

for the first violation of the Horse Protection Act or the regulations issued under the Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act or the regulations issued under the Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who had the economic means to pay civil penalties as a cost of doing business. *See* H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any pertinent civil penalty. While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[3]

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

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[3]*In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. ___, slip op. at 83 (Mar. 13, 1997); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. ___, slip op. at 99 (Nov. 5, 1996), *appeal docketed*, No. 96-9472 (11th Cir. Dec. 18, 1996); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. ___, slip op. at 48 (Aug. 19, 1996); *In re Mike Thomas*, 55 Agric. Dec. ___, slip op. at 57-58 (July 15, 1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum 1-year disqualification period for the first violation of the Horse Protection Act and the minimum 5-year disqualification period for any subsequent violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

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

Order

1. Respondent David Hubbard is assessed a civil penalty of $4,000 which shall be paid by a certified check or money order made payable to the Treasurer of the United States and forwarded to: Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days after the date of service of this Order on Respondent Hubbard.

2. Respondent David Hubbard is disqualified for 6 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, and until Respondent Hubbard has paid the civil penalty assessed in this Order. When Respondent Hubbard demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 6 years as provided in this Order and paid the civil penalty assessed in this Order, a supplemental Order will be issued in this proceeding upon motion of Complainant, terminating the disqualification of Respondent Hubbard imposed by this Order.

The disqualification provision of this Order shall become effective on the 30th day after service of this Order on Respondent Hubbard.

NATIONAL DAIRY PROMOTION AND REVIEW BOARD

DEPARTMENTAL DECISION

In re: ANN M. VENEMAN, SECRETARY OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, AND THE CALIFORNIA MILK PRODUCERS ADVISORY BOARD, AN INSTRUMENTALITYOF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, AND FRANK HILARIDES, A CALIFORNIA DAIRY FARMER.
NDPRB Docket No. 95-0001.
Decision and Order filed May 6, 1997.

Dairy Order — Burden of proof — Standing — Authority of board to establish corporation — Delegation of authority — Sense of the congress provisions — Freedom of Information Act — Notice and comment rulemaking — Conflict of interest — Limitation on administrative expenses — Federal Advisory Committee Act — Mental processes privilege.

The Judicial Officer affirmed Chief Judge Palmer's (Chief ALJ) Initial Decision and Order denying a Petition filed under the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4538) (Dairy Act) by the Secretary of the California Department of Food and Agriculture (CDFA); the California Milk Producers Advisory Board (CMAB), a qualified state dairy product promotion, research, or nutrition education program; and a dairy farmer. The burden of proof in a proceeding under 7 U.S.C. § 4509(a) rests with Petitioners, and Petitioners have not met their burden of proof. The Judicial Officer found that any person subject to an order may institute a petition under 7 U.S.C. § 4509(a), but that the Secretary of CDFA and CMAB are not subject to the Dairy Order, and that, therefore, both the Secretary of CDFA and CMAB lack standing. Neither the National Dairy Promotion and Research Board's (NDB) agreement with United Dairy Industry Association (UDIA) to form Dairy Management, Inc. (DMI), a private not-for-profit corporation in which the staffs of UDIA and NDB are merged, nor the operation of DMI violate the Dairy Act, the Dairy Order, the Freedom of Information Act, 31 U.S.C. § 9102, or the Federal Advisory Committee Act. Further, the formation of DMI need not be preceded by a notice-and-comment rulemaking proceeding under the Administrative Procedure Act (5 U.S.C. § 553), and members of NDB who participated in the decision to form DMI did not violate either the conflict-of-interest provisions in the Dairy Order or 18 U.S.C. § 208(a). The formation of DMI is not an invalid delegation of NDB's authority, and there is no evidence that NDB failed to review its charter and activities to ensure that its has not inappropriately delegated its responsibilities and duties to another organization in violation section 1999S(b) of the Food, Agriculture, Conservation and Trade Act of 1990. The Chief ALJ properly sustained objections to Petitioners' questions probing the mental processes of a government witness.

Colleen Carroll, for Respondent.
William A. Wineberg, San Francisco, California, for Petitioners.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Henry J. Voss, former Secretary of the Department of Food and Agriculture of the State of California, and the California Milk Producers Advisory Board (hereinafter CMAB) instituted this proceeding under the Dairy Production Stabilization Act of 1983, as amended (7 U.S.C. §§ 4501-4538) (hereinafter the Dairy Production Stabilization Act); the Dairy Promotion Program (7 C.F.R. §§ 1150.101-.278)(hereinafter the Dairy Order); and the Rules of Practice Governing Proceedings on Petitions To Modify or Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) (hereinafter Rules of Practice), by filing a Petition on April 6, 1995.*

The Petition alleges, *inter alia*, that: (1) the National Dairy Promotion and Research Board (hereinafter NDB), an instrumentality of the federal government, improperly delegated its administrative authority to Dairy Management, Inc. (hereinafter DMI), a private, not-for-profit District of Columbia corporation that is currently performing planning, implementation, and administrative functions for NDB and the United Dairy Industry Association (hereinafter UDIA), a private not-for-profit Illinois corporation (Petition ¶¶ 4, 7-9, 19); (2) the formation of DMI confers an unfair advantage to UDIA over dairy farmers that are members of organizations, such as CMAB, that are not affiliated with UDIA (Petition ¶¶ 16, 20); (3) the establishment of DMI is not authorized by the Dairy Production Stabilization Act or the Dairy Order (Petition ¶¶ 17, 19, 21-27);** (4) the establishment of DMI unlawfully circumvented the Freedom of Information Act

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*On June 1, 1995, Henry J. Voss, CMAB, and Frank Hilarides filed First Amendment to Administrative Petition To Modify or Be Exempted From the Provisions of the Dairy Promotion and Research Order (7 C.F.R. § 1150.101 *et seq.*), which, *inter alia*, adds Frank Hilarides as a Petitioner in this proceeding. On September 7, 1995, Ann M. Veneman, CMAB, and Frank Hilarides filed Second Amendment to Administrative Petition To Modify or Be Exempted From the Provisions of the Dairy Promotion and Research Order (7 C.F.R. § 1150.101 *et seq.*), which, *inter alia*, substitutes Ann M. Veneman, the current Secretary of the Department of Food and Agriculture of the State of California (hereinafter Secretary of CDFA), for Henry J. Voss, the former Secretary of the Department of Food and Agriculture of the State of California, in this proceeding. On September 13, 1995, Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued an Order changing the caption of this proceeding from "Henry J. Voss, Secretary of the Department of Food and Agriculture of the State of California, and the California Milk Producers Advisory Board, an instrumentality of the California Department of Food and Agriculture" to "Ann M. Veneman, Secretary of the Department of Food and Agriculture of the State of California, and the California Milk Producers Advisory Board, an instrumentality of the California Department of Food and Agriculture, [and] Frank Hilarides, a California dairy farmer" (hereinafter Petitioners).

**Petitioners now assert, but did not allege in their Petition, that DMI was also established in violation of 31 U.S.C. § 9102 (Trial Brief of Petitioners in Support of Administrative Petition To Modify or Be Exempted From the Provisions of the Dairy Promotion and Research Order (7 C.F.R. § 1150.101 *et seq.*) at 8) (hereinafter Petitioners' Trial Brief).

(Petition ¶ 30); (5) DMI was established in violation of the notice and comment rulemaking provisions of the Administrative Procedure Act (Petition ¶¶ 28-29); (6) DMI was established in violation of conflict-of-interest requirements (Petition ¶¶ 11-12, 18-20); and (7) the establishment of DMI resulted in NDB incurring administrative expenses that exceed 5% of NDB's projected revenue for 1995 in violation of the Dairy Order (Petition ¶ 10). Petitioners seek: (1) an order declaring the operations of DMI unlawful and prohibiting the transfer of funds from NDB to DMI until the Dairy Production Stabilization Act or the Dairy Order or both the Act and the Order are amended to authorize DMI activities (Petition ¶ 31a); (2) return of all money spent on DMI activities which have been funded by assessments paid by California dairy farmers (Petition ¶ 31b); (3) a transfer of all assessments collected by NDB from dairy farmers in California in the future to CMAB for so long as NDB operates in conjunction with UDIA through DMI (Petition ¶ 31c); (4) an exemption from the Dairy Order for all California dairy farmers (Petition ¶ 31d); and (5) a prohibition on the transfer of assessments collected from California dairy farmers to DMI until this proceeding is finally resolved (Petition ¶ 31e).

On June 5, 1995, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (hereinafter Respondent), filed an Answer to the First Amended Petition (hereinafter Answer) which admits that: (1) CMAB is a qualified state or regional dairy production, promotion, research, or nutrition education program (Answer ¶ 2); (2) NDB was established pursuant to the Dairy Production Stabilization Act and the Dairy Order (Answer ¶ 4); (3) NDB entered into an agreement with UDIA (Answer ¶ 5); (4) DMI is governed by a board of directors and that NDB selects 10 members of DMI's board of directors and UDIA selects 10 members of DMI's board of directors (Answer ¶ 6); (5) pursuant to an agreement between NDB and UDIA, the administrative staffs of NDB and UDIA were merged (Answer ¶ 7); (6) NDB entered into an agreement with DMI on December 30, 1994, which was approved by the Acting Director of the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture (Answer ¶ 12); (7) dairy farmers in Washington, Oregon, and Wisconsin are not affiliated with UDIA and produce approximately 35% of the nation's fluid milk (Answer ¶ 16); and (8) three directors of NDB are also directors of UDIA and DMI (Answer ¶ 18). Moreover, the Answer alleges that: (1) each action alleged in the Petition to be in violation of law is in accordance with the Dairy Production Stabilization Act and the Dairy Order and that the Dairy Production Stabilization Act and Dairy Order, as interpreted by Respondent and NDB, are in accordance with law and binding on Petitioners (Answer ¶ 25); and (2) neither the Petition nor

any allegation contained in the Petition states facts sufficient to constitute a cause of action (Answer ¶ 26).

On September 6, 1995, Respondent filed Respondent's Opening Trial Brief; on September 7, 1995, Petitioners filed Petitioners' Trial Brief; on September 12, 1995, Respondent filed Notice of Correction and Amendment of Respondent's Opening Trial Brief; and on September 14, 1995, Petitioners filed Petitioners' Response to Notice of Correction and Amendment of Respondent's Opening Trial Brief.

On September 18, 19, and 20, 1995, the Chief ALJ conducted an oral hearing in Washington, D.C. Mr. William Wineberg of Wineberg, Simmonds & Narita, San Francisco, California, represented Petitioners,*** and Ms. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On November 14, 1995, Petitioners filed Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioner's [sic] Brief in Support of Proposed Findings of Fact and Conclusions of Law (hereinafter Petitioners' Brief); on January 17, 1996, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law and Brief in Support Thereof (hereinafter Respondent's Brief); and on February 6, 1996, Petitioners filed Petitioners' Reply to Respondent's Proposed Findings of Fact and Conclusions of Law (hereinafter Petitioners' Reply Brief).

On March 22, 1996, the Chief ALJ issued an Initial Decision and Order dismissing Petitioners' Petition (Initial Decision and Order at 47). On April 26, 1996, Petitioners appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).**** On July 15, 1996, Respondent filed Respondent's Response to Petitioners' Appeal of Decision and Order, and on July 16, 1996, the case was referred to the Judicial Officer for decision.

Petitioners in this proceeding, instituted under section 118 of the Dairy Production Stabilization Act (7 U.S.C. § 4509), have the burden of proving that the challenged provisions of the Dairy Order or the challenged obligations imposed in

***Ms. Stephanie L. Milani of Wineberg, Simmonds & Narita, San Francisco, California, assisted Mr. Wineberg.

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

connection with the Dairy Order are not in accordance with law.[*****] Based upon a careful consideration of the record, I find that Petitioners have not met their burden of proof, and except for the Chief ALJ's ruling on Respondent's Motion Challenging Standing of CMAB and the Secretary of CDFA (Initial Decision and Order at 4-6), the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Petitioners' exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."[******]

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

. . . . [Footnote 1 omitted.]

Findings of Facts

1. Petitioner Frank Hilarides is a California dairy farmer who pays assessments under the [Dairy] Order to NDB. Mr. Hilarides is also the chairman of the board of CMAB (Tr. Vol. I at 81-82).

2. Petitioner . . . CMAB is an instrumentality of the Department of Food and Agriculture [of the State of California. CMAB's members include] all California dairy farmers who are required to pay assessments to NDB. Petitioner CMAB is a qualified state . . . dairy product promotion, research, or nutrition education

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[*****]*In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1042 (1995).

[******]The hearing in this proceeding was conducted on September 18, 19, and 20, 1995. The portion of the transcript that relates to that segment of the hearing conducted on September 18, 1995, is in a single volume containing pages numbered 3 through 203. The portion of the transcript that relates to that segment of the hearing conducted on September 19, 1995, is in a single volume containing pages numbered 3 through 169. The portion of the transcript that relates to that segment of the hearing conducted on September 20, 1995, is in a single volume containing pages numbered 3 through 117. References in this Decision and Order to *Tr. Vol. I* are to the volume of the transcript that relates to the September 18, 1995, segment of the hearing; references in this Decision and Order to *Tr. Vol. II* are to the volume of the transcript that relates to the September 19, 1995, segment of the hearing; and references in this Decision and Order to *Tr. Vol. III* are to the volume of the transcript that relates to the September 20, 1995, segment of the hearing.

program (Answer ¶ 2; Tr. Vol. III at 74-75). CMAB was formed in 1969 (Tr. Vol. I at 82).

3. Petitioner Ann M. Veneman is the Secretary of CDFA, who has administrative responsibility for CMAB and is, under California law, a necessary party in any legal proceeding initiated on behalf of CMAB (Tr. [Vol. I at 18]; Cal. Agric. Code, citations in Petitioners' Brief at 51).

4. NDB is a national organization established under the [Dairy Production Stabilization] Act and the [Dairy] Order which consists of 36 members, representing 13 geographic regions on a representational basis specified in the [Dairy] Order. Five members come from the State of California which [is] . . . one of the 13 [geographic] regions [specified in the Dairy Order]. The Secretary [of the United States Department of Agriculture (hereinafter Secretary of Agriculture)] appoints the members from milk producers nominated by organizations certified by the Secretary [of Agriculture] as eligible to represent milk producers. The members serve for no more than two consecutive 3-year terms. Any producer nominated to serve on NDB is required to file with the Secretary [of Agriculture] a written agreement to disclose any relationship with any organization that operates a qualified state or regional program or has a contractual relationship with NDB; and to withdraw from participation in deliberations, decision-making, or voting on matters where there is such a relationship. The members of NDB serve without compensation, but are reimbursed for necessary and reasonable expenses, including a per diem allowance[, as recommended by NDB and approved by the Secretary of Agriculture]. 7 C.F.R. §§ 1150.131-.135, .138, .270.

5. The [Dairy Order lists the] powers of NDB, as follows:

§ 1150.139 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules and regulations to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;

(h) To recommend to the Secretary amendments to this subpart; and

(i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

7 C.F.R. § 1150.139.

6. The [Dairy Order lists the] duties of NDB, as follows:

§ 1150.140 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairman and such other officers as may be necessary;

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;

(d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to § 1150.153, and to recommend to the Secretary whether such request should be granted;

(e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;

(f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;

(g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(m) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

7 C.F.R. § 1150.140.

7. Pursuant to the [Dairy Production Stabilization] Act and the [Dairy] Order, each person making payment to a producer for milk produced in the United States and marketed for commercial use is required to collect an assessment of 15 cents per hundredweight on the milk handled for the producer which is then remitted to NDB. However, a producer who is participating in qualified state or regional

programs receives a credit of up to 10 cents per hundredweight for contributions to such programs. 7 C.F.R. § 1150.152.

8. CMAB conducts a qualified state program; and therefore, California dairy farmers . . . pay 10 cents per hundredweight to CMAB and 5 cents per hundredweight to NDB (Petition [¶¶ 2, 15; Tr. Vol. I at 14-15, 107-08]).

9. UDIA is an Illinois not-for-profit membership corporation whose members are state and regional organizations that conduct dairy promotion and research programs for the purpose of increasing consumption of dairy products (CX 1; RX 12).

10. California was a member of UDIA until 1969 when it formed CMAB, its own promotion organization (Tr. Vol. I at [86]-87). California has joined with the states of Oregon, Washington, and Wisconsin to form an association known as "COWW" (Tr. Vol. I at 92[-93]). These states, together with Louisiana, are the only ones whose milk producers are [not members of] UDIA (Tr. [Vol. I at 143,] Vol. II at [27-28, 48-]49). The combined milk production of these states is approximately 35% of the total national milk production (Tr. Vol. II at 62[, Vol. III at 77, 83]). In addition to the five producers from California [that are members of NDB], six NDB members come from Wisconsin, and one [member] represents Washington and Oregon with the result that 12 of NDB's 36 members are not members of organizations from states [that are members of] UDIA (7 C.F.R. § 1150.131(a)(1), (2), (6)).

11. Prior to 1995, UDIA had a paid staff that also served the American Dairy Association and the National Dairy Council with the latter two organizations reimbursing UDIA for these staff services through the payment of the dues assessed them (Tr. Vol. I at 128).

12. The American Dairy Association and the National Dairy Council are both members of UDIA (Tr. Vol. I at 127).

13. The American Dairy Association consists of regional organizations which qualify under the [Dairy] Order for the 10 cents credit for contributions by its members; and therefore, its dairy farmer members actually pay 10 cents per hundredweight to the American Dairy Association and pay 5 cents per hundredweight to NDB (Tr. Vol. I at 125).

14. On April 27, 1994, NDB and UDIA entered into a written agreement to form a not-for-profit corporation to be known as Dairy Management, Inc. The purposes of DMI [are] specified in the agreement . . . (CX 1; RX 12), as follows:

(1) To implement joint programs and projects between NDB and UDIA;

(2) To provide funding, management, staff and other resources, and to plan, develop, and implement programs authorized under federal and state dairy check-off programs;

(3) To provide resources for program evaluation and market research to NDB and UDIA;

(4) To manage benefit programs for employees of DMI, NDB, UDIA, and related organizations;

(5) To implement specific NDB and UDIA funded programs; and

(6) To carry out the administrative, financial and management functions of NDB and UDIA and DMI.

15. The agreement for DMI's formation provide[s] that it would be governed by a 20-member board; 10 of whom would be selected to represent the interests of NDB and 10 [of whom] would be selected to represent the interests of UDIA (CX 1; RX 12).

16. [Members] of NDB who were also directors of UDIA or affiliated with UDIA member organizations voted on the agreement for DMI's formation (Respondent's Brief at 43).

17. [UDIA and NDB entered into] the agreement for DMI's formation . . . subject to [approval] by the United States Department of Agriculture [(hereinafter USDA)] (CX 1; RX 12).

18. The agreement for DMI's formation was approved by Silvio Capponi, Jr., Acting Director of the Dairy Division, Agricultural Marketing Service, USDA, on June 8, 1994, and became effective on that date (CX 1; RX 12).

19. On December 30, 1994, NDB and DMI entered into an agreement covering the services DMI performs for NDB [(CX 2).] Cynthia Carson, the [chief executive officer] of NDB, executed the agreement, and Ms. Carson later became employed by DMI [(Tr. Vol. I at 162).] This agreement was approved by Aggie J. Thompson, Acting Director of the Dairy Division, Agricultural Marketing Service, USDA, and became effective January 1, 1995, through December 31, 1995. Under this agreement, NDB retained its responsibilities to oversee the collection of assessments; to oversee compliance activities to ensure the payment of such assessments; and . . . [to carry] out its obligations pursuant to the [Dairy Production Stabilization] Act. DMI agreed to provide the administrative staff support for implementing assessment collection procedures, documenting the

collection of assessments, and implementing a compliance program approved by NDB. DMI further agreed to provide financial management and accounting services with a monthly analysis of NDB budgets to ensure that [NDB budgets] are not exceeded. [The agreement requires that, on the request of NDB,] DMI's staff be responsible for planning and coordinating meeting schedules, travel, lodging, and other services [necessary to facilitate] NDB meetings. DMI agreed to develop programs and strategies, based upon a 5-year plan determining market priorities, that allow NDB and UDIA to meet their objectives and goals. DMI became responsible for managing the implementation of programs approved by NDB and agreed to furnish NDB with reports on its activities (CX 2).

20. USDA, through its Agricultural Marketing Service (hereinafter AMS), exercises oversight in respect to commodity promotion, research, and consumer information programs. . . .

21. AMS has promulgated "Guidelines for AMS Oversight of Commodity Research and Promotion Programs" (CX 46). The Guidelines are intended "to provide guidance to boards on allocation of funds among programs commensurate with legislative authority." (CX 46 [at 3].) [The Guidelines] address: budget approval; contract approval; contract compliance; accountability for financial and program progress; refunds; prohibitions against influencing legislation and/or government policy; limitations on referendum activities; the manner in which AMS reviews and approves all plans, projects, and advertising of commodity boards; the availability of legal counsel through the Office of the General Counsel; requisite annual financial audits by certified public accountants; the periodic review of board operations to ensure adequate records are maintained; requirements for notification of all board and committee meetings and conference calls to facilitate AMS attendance; limitations on board administrative expenses; nominations for board membership; debt management; and working relationships with other government agencies (CX 46).

22. The Dairy Division of AMS implements its oversight with respect to NDB by attending [NDB's] meetings and reviewing [NDB's] contracts, program proposals, and proposed expenditures; and by preparing an annual report to Congress which outlines the plans and projects undertaken by NDB and discloses a certified public accountant's review of [NDB's] revenues and expenditures (Tr. Vol. III at 64).

23. The Dairy Division of AMS has available to it, in addition to its own resources: the attorneys within the . . . Office of the General Counsel[, USDA,] who provide legal advice; the certified public accountants within the . . . Office of Compliance[, USDA,] who conduct investigations; and the investigators within the . . . Office of the Inspector General[, USDA,] who periodically review the activities

of AMS and the activities of the programs [AMS] administers (Tr. Vol. III at 65-66).

24. The three persons who were most actively involved in DMI's formation were called as witnesses by Petitioners. They are: Herman N. Brubaker, chairman of DMI, who has also been the chairman of UDIA since 1989 and has been, since 1981, the chairman of his state and regional promotional program operated by the American Dairy Association, Dairy Council, Region Mideast (Tr. Vol. I at 123-25); Cynthia Carson, who is currently employed by DMI and functions as its general manager and who formerly was the chief executive officer in charge of NDB's administrative staff from January 1989 until December 31, 1994 (Tr. Vol. I at 162-63, 175); and Thomas Gallagher, chief executive officer of DMI, who . . . was the chief executive officer of UDIA from 1991 until December 31, 1994 (Tr. Vol. II at 92).

25. Herman N. Brubaker testified that he participated in the negotiations that resulted in DMI's formation and signed the agreement between UDIA and NDB as the chairman of UDIA; Robert Giacomini, chairman of NDB, was the other signatory (Tr. Vol. I at 128-29). The concept [of merging the staffs of NDB and UDIA] was . . . [discussed] in January 1994, at a Lincolnshire, Illinois, joint planning conference between the staffs of NDB and UDIA. [At the conference,] Mr. Brubaker and Mr. Giacomini . . . [discussed the formation of a single staff in order to eliminate the redundancy of having two staffs performing similar functions] (Tr. Vol. I at 130). On the day following that conversation, Mr. Brubaker and Mr. Giacomini talked to the . . . chief executive officers for [NDB and UDIA] and asked them [if they thought there was any possibility that NDB's staff and UDIA's staff could be merged into a single staff. Each chief executive officer took the possible merger under advisement. Subsequently, other officers of NDB and UDIA were informed of the proposed merger and formed an interim board to prepare for a merger to begin January 1, 1995] (Tr. Vol. I at 132).

. . . .

The decision to establish DMI was made in March of 1994, and an announcement on behalf of both organizations, explaining the reasons for DMI's establishment, was released on March 17, 1994 (Tr. Vol. I at 133; CX 26).

26. Cynthia Carson testified that as [chief executive officer] of NDB she managed a staff of around 34 people who managed programs on behalf of NDB by, in most cases, working with contractors (Tr. Vol. I at 163). [Ms. Carson] was present during Mr. Brubaker's testimony and her recollection of the events prior to DMI's formation accorded with his testimony (Tr. Vol. I at 163).

> As I recall, just to be specific, that in January of 1994, Mr. Brubaker and Mr. Giacomini spoke with Tom Gallagher and myself, both the CEOs of those organizations, asked us if we . . . would be willing to consider the idea. We were set forth to do that. We brought it back to them, and then from that point, brought in the officers of both boards and from there took to those boards in March of 1994.

Tr. Vol. I at 164.

The . . . staffs of [NDB and UDIA] made an oral presentation of the concept [of the merger of NDB and UDIA staffs] at an executive session of NDB held in Salt Lake City on March 16 and 17, 1994 (Tr. Vol. I at 165-66; CX 25). A motion was made at the executive session meeting to accept the recommendation as presented . . . to consolidate staffing functions with UDIA (CX 25). The motion was approved by secret ballot vote of 27 to 7 (CX 25). At this meeting, Ms. Carson was the person "who made a formal presentation on the consolidation of staffing between UDIA and the National Dairy Board, and the proposal to create Dairy Management, Incorporated, as a management administrative function to have the staff for the two organizations." (Tr. Vol. I at 167.) [Ms. Carson] did not recall, one way or the other, if any [member] of NDB disqualified himself from voting on the motion (Tr. Vol. I at 167-68). An organizing committee representing [NDB and UDIA] and consisting of Mr. Brubaker, Mr. Kirkpatrick, Mr. Thornton, Mr. Giacomini, Mrs. Hemauer, and Mr. Bob Gaebe was then established, which negotiated the terms of the April 27, 1994, agreement to form DMI (Tr. Vol. I at 168-69).

27. Thomas Gallagher testified that the staffs of UDIA and NDB started working together in 1992 to put together a 1993 national media buy for which each organization contributed $10 million (Tr. Vol. II at 129). At that time, each organization:

> . . . had its own staff doing the same sorts of things in advertising, public relations, and . . . since the joint media buy to the boards appeared to be such a good idea, the next step was to get us down from three commercials with not enough money going at them and two agencies with more than enough money going at them down to one agency.
>
> So, what we did was the two boards established a producer committee of both boards and they went through an agency review and got us down between NDB and UDIA to one agency which saved overhead that was paid agencies and got us down ultimately to one commercial and one strategy.

. . . .

. . . [T]he intention of that was to cut down on duplication of advertising efforts and it should also be mentioned that during that same period of time, we were instructed at both staff levels of UDIA and NDB by the boards to develop a joint business plan. And that I recall occurred in March 1993 and so, the two staffs, on that instruction from the boards, retained a strategic planner between the two organizations.

And it was through that strategic planning process with that one strategic planner between the two staffs, between the two boards, that we developed a joint business plan and ultimately lead [sic] to the producers in the meeting that Herman mentioned in Lincolnshire in January 1994. Herman Brubaker, where it was evident that there was duplication on both -- on the staff parts in the areas we just talked about, advertising. Two advertising heads would stand up. Two market research heads would stand up. Two public relations heads would stand up, et cetera.

Tr. Vol. II at 129-31.

28. Subsequent to the NDB meeting in Salt Lake City on March 16-17, 1994, Al Sherman who was the [NDB] member for the states of Washington and Oregon, by letter dated March 21, 1994, gave [Petitioner Hilarides his] first notice that DMI was being formed (Tr. Vol. I at 89; CX 27). . . .

29. Three letters were sent to the Secretary of Agriculture . . . objecting to DMI's formation and demanding its invalidation. [Mr. Henry J. Voss, then Secretary of CDFA, sent a letter dated May 13, 1994, on behalf of CMAB (CX 29, 52); Mr. Theodore R. Kulongoski, Attorney General, State of Oregon, and Mr. Bruce Andrews, Director, Oregon Department of Agriculture, State of Oregon, sent a letter dated July 11, 1994 (CX 51); and Mr. Voss sent a second letter dated October 11, 1994 (CX 70).]

30. The Secretary [of Agriculture] rejected each demand for invalidation.

(a) In his response dated July 25, 1994 (CX 56), to the [May 13, 1994,] letter [from the] . . . Department of Food and Agriculture [of the State of California], the Secretary [of Agriculture] stated that the joint venture was being undertaken to reduce administrative costs, improve joint planning, and increase the coordination and effectiveness of the promotion plan. The Secretary [of Agriculture] next denied that DMI constituted a merger of NDB and UDIA stating that it was "simply a merger of their separate administrative and support staffs into a single staff that will serve both organizations." [The Secretary of Agriculture] further stated that

"[t]he . . . Order provides the National Dairy Board with ample authority to establish its staffing needs and to design an organizational structure that will be efficient and cost effective." [The Secretary of Agriculture] gave his assurance that "Dairy Management, Inc., will be subject to Department of Agriculture (USDA) oversight to ensure that all statutory, regulatory and USDA policy requirements are met." The letter to which [the Secretary of Agriculture] was responding had questioned the validity of NDB's passage of the motion to enter into a joint venture with UDIA due to a conflict of interest in that 24 of [NDB's members] were members of [organizations belonging to] UDIA. In response to this contention, the Secretary [of Agriculture] stated:

> We do not believe that this effort to create a new, more efficient support staff presents a conflict of interest issue under the terms of the statute or order. The Order and National Dairy Board (Board) policy regarding conflict of interest issues is intended to address conflicts or potential conflicts involving the expenditure of Board funds for research and promotion programs and activities. The decision to create Dairy Management, Inc., was not a contractual issue of this type, but rather a decision to create a more efficient staff to support National Dairy Board activities and to facilitate coordination of Board and UDIA activities. The agreement does not include authority for the expenditure of funds. Each respective Board must approve the outlays of its funds to the joint venture. It was appropriate, indeed essential, that all the Board members should participate in the discussion and decisions pertaining to the establishment of this new staff structure.

In conclusion, the Secretary [of Agriculture] stated:

> The National Dairy Checkoff Program will remain unchanged with financial resources being used in the manner directed by the National Dairy Board with the approval of USDA. The Board will retain full responsibility for the review and approval of annual plans and budgets. The Board's accountability for results remains unaltered.

(b) On September 28, 1994, the Secretary [of Agriculture] similarly replied to [the July 11, 1994,] letter from the Attorney General of the State of Oregon [and the Director of the Oregon Department of Agriculture] (CX 66).

(c) On December 2, 1994, the Secretary [of Agriculture] responded to [the October 11, 1994,] letter [from] the California Department of Food and Agriculture

demanding the invalidation of DMI. The Secretary [of Agriculture's] reply (CX 72) addressed various points that are the subject of the instant proceeding:

> This is in response to your letter dated October 11, 1994, regarding the National Dairy Promotion and Research Board's (NDB's) participation in Dairy Management, Inc. (DMI). As I indicated in my letter of July 25, 1994, the Department of Agriculture (USDA) has monitored and reviewed the formation of DMI. USDA has concluded that: (1) the formation of DMI is not prohibited either by the Dairy and Tobacco Adjustment Act of 1983 (Act) authorizing NDB or the Dairy Promotion and Research Order (Order) implementing the program; (2) the provisions of the agreement between NDB and the United Dairy Industry Association (UDIA) are fully consistent with the statutory authority of NDB; and (3) the States that are not members of UDIA (including California) are fully protected and will not have their programs or participation in national programs negatively impacted.
>
> Under the structure established for DMI, the California Milk Advisory Board and other State promotion organizations will continue to be able to deal directly with NDB, as well as with DMI. In addition to programs effected with NDB assessment dollars through DMI, NDB has the ability to conduct its own programs which are not part of the unified programs with UDIA. While NDB is authorized to conduct its own projects outside of the joint UDIA-NDB effort, in doing so NDB will probably utilize the staff of DMI since that staff is NDB's staff with regard to all programs implemented by NDB.
>
> The remainder of this letter addresses the specific, numbered points contained in your letter.
>
> 1. Statutory authority. USDA did review with NDB the DMI structure, including the incorporation of DMI. There is nothing in the Act that prohibits NDB from such activity. The contract between NDB and UDIA leading to the creation of DMI was approved by USDA after a thorough review to make certain that NDB was not inappropriately delegating authority to a private entity. Moreover, one of the specific duties of the NDB is to encourage coordination of programs of promotion, research, and nutrition education designed to strengthen the industry's position in the

marketplace [7 CFR § 1150.140(n)], which is central to the reasons for establishing DMI in the first place.

2. UDIA "Control". NDB and UDIA, and any other dairy organizations that wish to participate, have agreed to engage in joint planning, budgeting, and implementation in order to better coordinate the use of research and promotion resources. Since the planning function will be a "bottom-up" exercise, all organizations with an interest in the use of assessment dollars, whether or not they are UDIA members, will have the opportunity to participate in the process.

3. Geographic Representation; USDA Oversight. There appears to be two points in this paragraph. First, you note that DMI does not have any requirement for geographic representation on the DMI Board. While this is so, we are not sure why this presents a problem, in view of the requirements for approval of plans and budgets by the NDB and the Secretary. The NDB regional representation has not been affected by DMI and remains as authorized in the legislation.

With respect to oversight by USDA, we do not see this as changing the procedures that have been in practice for years. NDB is responsible for establishing objectives and priorities, is responsible for approving plans and budgets to achieve the objectives, and is accountable for results. USDA will continue to oversee all plans and budgets considered by NDB; its approval will still be required for adoption of all plans and budgets. USDA will monitor DMI activities to implement plans and budgets, much like we monitor NDB activities currently. By reviewing the coordinated annual plan, USDA will be in an even stronger oversight position, because it will be able to assess the plans and budgets for use of not only the "nickel" that has gone to NDB, but also a large portion of the "dime." USDA representatives have attended and will continue to attend the DMI Board meetings.

4. Contract approval; Audits. USDA will continue to approve NDB contracts and will review all DMI contracts; this requirement has not been eliminated by the DMI agreement and bylaws. As with any other contractor, DMI's handling of funds provided by NDB will be subject to audit by the Secretary, notwithstanding anything directly contained or not contained in the DMI agreement or bylaws. USDA retains the right and

responsibility to audit the handling of every assessment dollar received and paid out by NDB as required in the Act and the Order.

5. Conflicts of Interest. The concern you express appears to be that the membership and voting structure of the DMI Board gives UDIA effective control of NDB's funds, and that the overlapping memberships of DMI Board members present irreconcilable conflicts. USDA believes that two critical factors negate this concern: (1) the NDB portion of the Budget -- and therefore the overall DMI budget -- must be approved by the NDB Board, acting independently of the DMI Board or the UDIA Board, and (2) USDA must approve the Annual Plan and Annual Budget to the extent that NDB funds are committed through its contract with DMI. Thus, even if DMI Board members may serve in dual roles, their decisions are in no way final, and are subject to a careful plan of checks, balances, and approvals.

Your letter also expresses concern that California assessments will be used to support expenses of UDIA. We do not perceive this to be the case. California dairy farmer assessments paid to NDB will be used to effect plans and projects approved by NDB and the Secretary of Agriculture.

6. Process of Formation of DMI. USDA does not consider the creation of DMI to be "a major functional and structural change" as you suggest. We view this as a planning and budgeting strategy, in which NDB retains full authority and USDA retains full oversight. NDB will retain all of its statutory functions, and will continue to be responsible to the Secretary for the handling and expenditure of all assessment dollars. NDB was within the terms of the Act and the Order in deciding to contract for the administration and execution of its plans and projects.

7. Patents. The Order provides that any patents or other intellectual property "developed through the use of [assessment] funds . . . shall be the property of the U.S. government as represented by the Board. . . ." [7 C.F.R. § 1150.183]. Such property thus will be available under the plans and projects of DMI, as approved by NDB and USDA, to members and non-members of UDIA alike. Similarly, the Order provides for handling of such property in the case of dissolution.

I appreciate the concerns raised by you, Mr. Secretary, and trust that the foregoing will satisfactorily address the questions you raise. If you have

any further questions on this issue, please contact Lon Hatamiya (202-720-5115), Administrator of the Agricultural Marketing Service, which has the oversight responsibility of NDB.

31. . . . [The budget for NDB for 1995 was approved by NDB . . . at January 1995 and May 1995 . . . meetings, approved by the USDA on June 13, 1995 (RX 47), and reported to Congress by USDA on July 1, 1995 (RX 48). NDB's approved budget states that NDB's 1995 revenue from assessments is $77,400,000 and NDB's 1995 administrative expense is $2,616,000 (RX 48 at 8)].

32. [NDB's approved budget reveals that the administrative expenses incurred by NDB for 1995 are 3.37984496124% of revenue. USDA's July 1, 1995, report to Congress states that "[t]he Dairy Board's administrative budget continued to be within the five-percent-of-revenue limitation required by the [Dairy] Order" (RX 48 at 8).] NDB's contribution to DMI's core costs for 1995 will not exceed 5% of NDB's projected revenue (RX 47 at 3, 48 at 8 and appendix D).

33. Since DMI's formation, DMI has held the assessments collected on behalf of NDB separate and apart from the DMI budget and DMI accounts and has only expended [money] budgeted for and approved by NDB (Tr. Vol. I at 194).

34. The . . . restrictions the USDA [imposed on] expenditures for meals, travel, hotels, and similar [items] by the staff that was directly employed by NDB now apply unchanged to such expenditures by the DMI staff (Tr. Vol. I at 198).

35. UDIA may not access or use any of the assessments collected for NDB by DMI in that:

> . . . [T]he National Dairy Board is really in full charge of and is responsible and accountable for the nickel and that it is through the planning process and through the budget approval and the plan approval which is the National Dairy Board's responsibility for the nickel and in that plan then, if it calls for the United Dairy Industry Association, either as an entity or as a state regional or whatever to carry out a part of the plan, then they have that authority to carry that out as per contract or per an agreement.
>
> So, that's the only way in which the United Dairy Industry Association has any responsibility or any opportunity to access the nickel.

Tr. Vol. II at 18-19.

36. USDA reviews DMI contracts and activities:

. . . USDA is present by the way at all DMI board meetings and activities in terms of board activities. And then a contract is reviewed by USDA and immediately sent to USDA for their review.

. . . .

. . . They are involved with the contract process from beginning to end. I can cite a couple of examples where I do know that further information has been requested for information regarding a DMI contract where USDA has suggested changes in language and that has occurred in the past. So the process is very similar to that which was National Dairy Board and they are actively involved from the beginning to the end.

As I recall, I believe in the bylaws and in the agreements that it clearly states that DMI will make all information available to USDA.

Tr. Vol. II at 20.

37. On April 25, 1995, the Administrator of AMS, USDA, in light of the concerns expressed on behalf of the dairy promotion organizations of California, Oregon, Washington, and Wisconsin, requested the Office of the Inspector General[, USDA,] to audit DMI (RX 45), stating "[i]n order to assure producers that NDB funds are being properly administered and that USDA is providing adequate oversight, we request that an audit of DMI and the tracking of NDB funds be conducted during 1996."

38. USDA, as required by law, submits annual reports to Congress on the National Dairy Promotion and Research Program (RX 48).

39. Proposals have been made to COWW for DMI to perform services for the state and regional promotional organizations that are not affiliated with UDIA on an equivalent basis to those performed for UDIA, but none of the proposals have been found acceptable by COWW or its constituent organizations (Tr. Vol. II at 68-69; RX 24). As explained by Ms. Carson:

Counselor, it goes well beyond that. California, Oregon, Washington and Wisconsin have been invited to be ex officio members of DMI, to participate in every single one of their board meetings. They have been invited to every planning meeting of DMI and they have been invited to participate in every one of the programs at the same cost or no cost, whatever the agreement is with the UDIA members. So, it goes way beyond the concept of individual programs.

Tr. Vol. II at 69.

Conclusions [of Law]

1. The formation of DMI was a lawful exercise of the authority conferred upon NDB and the Secretary of Agriculture by the [Dairy Production Stabilization] Act and the [Dairy] Order.
2. The formation of DMI did not violate 31 U.S.C. § 9102.
3. The formation of DMI did not constitute an invalid and improper delegation of administrative authority.
4. The formation of DMI did not constitute an unlawful circumvention of the requirements of the Freedom of Information Act.
5. The formation of DMI did not require compliance with the notice and comment provisions of the Administrative Procedure Act.
6. The formation of DMI is not invalid under conflict-of-interest laws.
7. NDB's 1995 contribution to DMI's "core or administrative costs" did not violate 7 C.F.R. § 1150.151.

Discussion

1. The formation of DMI was a lawful exercise of the authority conferred upon NDB and the Secretary [of Agriculture] by the [Dairy Production Stabilization] Act and the [Dairy] Order.

The [Dairy Production Stabilization] Act provides for the establishment of NDB pursuant to an Order issued by the Secretary [of Agriculture and empowers] NDB to "administer the order in accordance with its terms and provisions . . ." and ". . . with the approval of the Secretary [of Agriculture, to] enter into agreements for the development and conduct of the activities authorized under the order. . . ." 7 U.S.C. § 4504(b), (c)(2), (f).

In accordance with these Congressional directives, the [Dairy] Order issued by the Secretary [of Agriculture], specifie[s] NDB's authority to "administer the provisions of [the Order]" and "[w]ith the approval of the Secretary [of Agriculture], to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities authorized under §§ 1150.139 and 1150.161. . . ." 7 C.F.R. §§ 1150.139(b), .140(i).

Petitioners contend that these provisions of the [Dairy Production Stabilization] Act and the [Dairy] Order are insufficient authority for the agreement that the Secretary [of Agriculture] approved between NDB and UDIA to establish DMI for

performance of administrative functions subject to . . . supervision [by NDB and UDIA] and the Secretary [of Agriculture's] oversight.

Petitioners argue that NDB may do nothing that is not expressly authorized by the [Dairy Production Stabilization] Act because it is written in restrictive terms. And even though NDB may contract with UDIA and similar organizations for specific "plans or projects," the [Dairy Production Stabilization] Act does not specifically authorize contracts for administrative activities or staffing by NDB and for that reason the agreement with UDIA to form DMI is invalid.

This argument relies upon the principle of *expressio unius est exclusio alterius*, which the Ninth Circuit had occasion to apply and explain in *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992):

> Most strongly put, the *expressio unius*, or *inclusio unius*, principle is that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270, 20 L.Ed. 570 (1871). This is a rule of interpretation, not a rule of law. The maxim is "a product of logic and common sense," properly applied only when it makes sense as a matter of legislative purpose. *Alcaraz v. Block*, 746 F.2d 593, 607-608 (9th Cir. 1984).

. . . [A]pplying the maxim to preclude NDB from implementing a less expensive and less redundant method of administering the [Dairy] Order does not make sense as a matter of legislative purpose.

Moreover, when the Secretary [of Agriculture] issued the [Dairy] Order in 1984, he interpreted the [Dairy Production Stabilization] Act as conferring power to enter into any contract or agreement with an organization such as UDIA "for the development and conduct of activities authorized under §§ 1150.139 and 1150.161. . . ." 7 C.F.R. § 1150.140(i). Whereas section 1150.161 pertains to "plans and [projects]," section 1150.139 expressly includes NDB's power "[t]o administer the provisions of this subpart. . . ." 7 C.F.R. § 1150.139(b).

In a variation of the *expressio unius* argument, Petitioners state that the [Dairy Production Stabilization] Act fails to contain essential language found in the Beef Research and Information Act, 7 U.S.C. §§ 2901-2911, and the Soybean Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6301-6311, which Petitioners assert were the apparent models for the Dairy [Production Stabilization] Act.

The language, which Petitioners urge as essential and as having been deliberately omitted from the Dairy [Production Stabilization] Act, consists of

specific provisions for establishing industry operating committees as adjuncts to industry boards.

This argument confuses the nature of DMI. It is not an industry operating committee of the type described in the Beef Research and Information Act or the Soybean Promotion, Research, and Consumer Information Act. . . . Moreover, even if the language of the [Dairy Production Stabilization] Act differs in some respects from the statutes that Petitioners assert were its legislative "models," the legislation for soybean promotion was not enacted until 1990, 7 years after enactment of the [Dairy Production Stabilization] Act [of] 1983; and the legislation for beef promotion, which [was] originally [enacted] in 1976, encountered referendum difficulties which were not resolved until after its provisions, including those for its operating committee, were changed in 1985 to apparently make them more acceptable to the beef industry. . . .

The question of whether NDB could, with the Secretary [of Agriculture's] approval, contract with UDIA for the establishment of a common staff for the performance of its administrative duties, cannot be resolved on the basis that legislation for the industry promotion of other agricultural commodities contain somewhat different language pertaining to their industry operating committees.

The language of the specific legislation in question must itself be first examined for its obvious or "plain" meaning. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993):

> "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted).

Inasmuch as the [Dairy Production Stabilization] Act specifically authorizes NDB to administer the [Dairy] Order and enter into agreements for the conduct of the activities authorized under the order, 7 U.S.C. § 4504(c), (f), the agreement with UDIA, at very least, does not violate the Act's express provisions and comes within the broad powers it confers to NDB. . . .

Nothing more than that was deemed legally necessary in a case that came before the United States District Court for the Eastern District of California, challenging an agreement by industry committees appointed under marketing orders that regulate the handling of California Tree Fruits to employ a shared professional staff, *Wileman Bros. [& Elliott, Inc.] v. Madigan*, No. CV-F-90-473-OWW (consolidated with CV-F-88-568-OWW, CV-F-87-392-OWW, CV-F-90-088-OWW, CV-F-91-318-OWW, CV-F-91-319-OWW)(E.D. Cal. Jan. 27, 1993), *printed in* 52 Agric. Dec. 5 (1993). Holding the staffing arrangement to be lawful, the court stated:

The Judicial Officer offers a description which reflects the fluidity of the definition of CTFA depending on the circumstances:

> . . . .
>
> In a 1977 memorandum of agreement between the Control Committee of CTFA (i.e., the Control Committee of Order 917), the Nectarine Administrative Committee, and the Pear Program Committee, the term CTFA is defined to mean Order 917, and it is agreed that the Control Committee of Order 917 will provide all paid staff services and facilities for Order 916 and a California State Processed Pear Marketing Order through a somewhat complicated arrangement whereby the latter two Marketing Order Committees have input into the staff hiring and other expenditures (through a joint Management Services Committee). The staff employees paid under this arrangement are sometimes referred to as the CTFA, or the CTFA staff.

Wileman I, Judicial Officer's Opinion at 57-58.

> . . . If it [CTFA] refers to employees hired by the committees to help administer the marketing orders, their employment also has been authorized.[46] There is no prohibition against committees hiring employees and using a name, CTFA, to designate functionaries of the committees. There similarly appears to be no bar to the committees entering into agreements to share the same administrative staff.
>
> The powers of such employees are delineated by the marketing orders. Employees may implement the Secretary's regulations only as authorized by the committees. . . .

[46] Both marketing orders list among the duties of the committees "To appoint such employees, agents and representatives as it may

deem necessary, and to determine the compensation and define the duties of each."[2]

Wileman Bros. & Elliott, Inc. v. Madigan, slip op. at 66-68 & n.46; 52 Agric. Dec. at 50-51.

In addition to the language of the [Dairy Production Stabilization] Act itself, support for NDB's action is found in the Act's legislative history which contains the following statement by the Senate Committee which considered this legislation:

> . . . the Committee encourages the maximum feasible use of existing State and regional promotion agencies, so as to avoid as much as possible the establishment of a large bureaucracy in order to carry out this national program.

S. Rep. No. 163, 98th Cong., 1st Sess. [19] (1983), *reprinted in* 1983 U.S.C.C.A.N. 1658, 1676.

. . . [T]he Secretary [of Agriculture] twice responded to letters by the California Department of Food and Agriculture in which the question of statutory authority was raised. In his second letter of response, the Secretary [of Agriculture] stated:

> 1. Statutory authority. USDA did review with NDB the DMI structure, including the incorporation of DMI. There is nothing in the Act that prohibits NDB from such activity. The contract between NDB and UDIA leading to the creation of DMI was approved by USDA after a thorough review to make certain that NDB was not inappropriately delegating authority to a private entity. Moreover, one of the specific duties of NDB is to encourage coordination of programs of promotion, research, and nutrition education designed to strengthen the industry's position in the marketplace [7 C.F.R. § 1150.140(n)], which is central to the reasons for establishing DMI in the first place.

CX 72 at 1.

To the extent a statute administered by a federal agency is ambiguous, reviewing courts have been instructed by the [United States] Supreme Court to defer to a reasonable interpretation made by the administrator of an agency.

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[2]Similarly, the Dairy Order lists among the duties of NDB (7 C.F.R. § 1150.140(c)): "To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each[.]"

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) [(footnotes omitted)]:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron's instruction to a court conducting a judicial review of an agency's construction of a statute which it administers has logical application to an administrative review by an administrative law judge. . . . It is the experience and the sense of the legislative purpose those agency administrators possess that the *Chevron* court singled out for judicial deference; deference that should be given by an administrative law judge when a pertinent interpretation of this kind has been made prior to a petition for administrative review.

This deference combined with the foregoing review of the [Dairy Production Stabilization] Act and its legislative history shows the Secretary [of Agriculture's]

construction to be reasonable and consistent with the Act's purposes and necessitates the dismissal of this challenge by the Petitioners.

2. The formation of DMI did not violate 31 U.S.C. § 9102.

Petitioners allege that the formation of DMI should be invalidated as a violation of 31 U.S.C. § 9102 which states:

> An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.

This provision must be read in the context of [title] 31 of the United States Code which pertains to "Money and Finance" and[, specifically, 31 U.S.C.] §§ 9101-91[10] which control "Government Corporations." Government corporations are defined in 31 U.S.C. § 9101 as those listed therein. By way of example, they include Amtrak, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, and the Export-Import Bank of the United States. At present, the section lists 13 "mixed-ownership Government corporations" and 15 "wholly owned Government corporations." "Wholly owned Government corporations" must prepare and directly submit to the President annual budgets that must then be approved by Congress. 31 U.S.C. §§ 9103, 9104. Both types of Government corporations are subject to audit by the Comptroller General who submits reports on the audit to Congress. 31 U.S.C. §§ 9105, 9106. The Secretary of the Treasury keeps the accounts of a Government Corporation. 31 U.S.C. § 9107. A Government Corporation may issue obligations to the public in the manner prescribed by the Secretary of the Treasury. 31 U.S.C. § 9108.

. . . [T]he provisions, when taken together, show that they were not intended to apply to DMI or NDB.

Neither entity is among those listed as a Government Corporation. Neither performs functions equivalent to those of an executive department or agency which require the direct supervision of the President and Congress.

Oversight of NDB is provided by the Secretary [of Agriculture] as required by the [Dairy Production Stabilization] Act, and though DMI is in no sense a "Government Corporation," being instead a private not-for-profit corporation that performs tasks that could be performed by an outside contractor for UDIA and NDB, [the Secretary of Agriculture] does maintain oversight over its activities in addition to the controls exercised by UDIA and NDB.

For these reasons, the formation of DMI did not constitute a violation of 31 U.S.C. § 9102.

3. The formation of DMI did not constitute an invalid and improper delegation of administrative authority.

Broad delegations of authority by Congress to federal agencies are now generally upheld contrary to the holdings of the Supreme Court in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See Yakus v. United States*, 321 U.S. 414, 425-427 (194[4]); and *FPC v. New England Power Co.*, 415 U.S. 345, 353 (1974). Petitioners do not dispute this development, but they cite a third delegation case decided in the 1930's in support of their contention that DMI's formation is an invalid and improper delegation of authority.

Carter v. Carter Coal Co., 298 U.S. 238 (1936), contained an additional factor which caused the Supreme Court to denounce the statute before it as "legislative delegation in its most obnoxious form." *Id.* at 311. What [concerned] the majority . . . was the effective grant of decision-making power to committees of industry representatives rather than to governmental officials.

Despite this added concern, *Carter Coal*, like *Panama Refining* and *Schechter Poultry*, is often cited, but seldom followed.

A few years after the Bituminous Coal Conservation Act of 1935 was struck down in *Carter Coal*, the Bituminous Coal Act of 1937 was enacted. Once again administration was to be by industry committees. But this time the Supreme Court decided that Congress had not delegated its legislative authority to the industry. In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), Justice Douglas speaking for all but Justice McReynolds, held:

> Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin v. Wallace, supra*, and cases cited.

Applying this test, the use of an industry board to collect assessments and plan the spending of those funds for the promotion of beef was found not to be an unlawful delegation because there was considerable government oversight. *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989)[, *cert. denied*, 493 U.S. 1094 (1990)].

The [United States Court of Appeals for the] Ninth Circuit has visited the undue delegation question in the context of the extensive power conferred upon industry

members by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* In *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992), [the Ninth Circuit,] citing its earlier decision in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir.)[, *cert. denied*, 506 U.S. 999 (1992), found] the statutory requirement that marketing orders only become effective upon producers voting their approval [to be a constitutional] delegation of power because ultimate power is retained by the Secretary [of Agriculture]. *See also United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 577-578 (1939).

The United States District Court for the Eastern District of California in *Wileman*, held against the plaintiffs' challenge that the Agricultural Marketing Agreement Act of 1937 and its use of industry marketing committees, was [an] unconstitutional. . . [delegation of] legislative authority, stating, *supra*, slip op. at 63-64, 52 Agric. Dec. at 48:

> Plaintiffs are fifty years too late in pressing an unlawful delegation claim. *See Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990) (noting the "virtual absence of cases striking down a delegation"). "With respect to federal agencies, only very broad, literally standardless grants of legislative power will offend the Constitution." *Id.*; *see also Skinner v. Mid-America Pipeline*, 490 U.S. 212, 218 (1989) ("so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress had been obeyed,'" no unlawful delegation of legislative power has occurred).
>
> . . . .
>
> The argument that the unlawful delegation has been made not to the Secretary, but to the marketing committees themselves, is equally unavailing. As the court found in *Frame*, delegation of the responsibility for the implementation of an advertising campaign is not an unlawful delegation. 885 F.2d at 1128. No lawmaking authority has been entrusted to the committees. All budgets, plans and projects formulated by the committees become final only upon the approval of the Secretary.

On appeal, the unlawful delegation challenge was not pursued, but the Ninth Circuit did [uphold] the Secretary [of Agriculture's] reliance upon the industry committees who plan annual advertising programs. . . .:

Under the unique regulatory scheme of the Act, the Secretary may rely on the industry-led committees and their staff to do his homework for him and to provide up-to-date information. (Citation omitted.)

. . . .

. . . Although the Secretary has apparently always adopted the committees' budget recommendations, he retains the authority to reject them at any time under 7 U.S.C. § 608c(7)(C).

Finally, it is only because the handlers themselves, through the committees, recommend a budget with a generic advertising component that the program is renewed by the Secretary every year. . . . Of course, the interests of the voting committee members may not always coincide with those of every handler in the industry. However, this court has previously noted that the Supreme Court "upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree." *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1197 (9th Cir. 1990) (citing *United States v. Rock Royal Coop.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939)).

Wileman [Bros. & Elliott, Inc.] v. Espy, 58 F.3d 1367, 1375-76 (9th Cir. 1995), *cert denied*, 116 S.Ct. 1876 (1996) (footnote omitted).

Against the armada of cases, which for the past six decades have struck down virtually every constitutional challenge to a delegation or a subdelegation of authority even when the agency appears to have placed complete reliance on the recommendations of industry committees and their staff, Petitioners principally rely on *Pistachio Group of the Ass'n of Food Industries, Inc. v. United States*, 671 F. Supp. 31 (Ct. Int'l Trade 1987).

In *Pistachio*, the [United States] Court of International Trade did hold a delegation invalid under a statute which required the International Trade Administration of the Department of Commerce (ITA) to use an exchange rate for foreign currency specified by the Federal Reserve Bank of New York (N.Y. Fed) in order to administer the antidumping laws, which was isolated from all types of review. In so doing, the court stated:

The dispute in the instant case does not concern ITA's authority to delegate some authority, but rather, whether it may delegate to the N.Y. Fed *all* of its authority to select an appropriate exchange rate in the situation at hand.

. . . .

. . . The courts have consistently required subdelegation of significant functions to be checked by some form of review, either within the agency itself, or ultimately by the courts. Lower level procedural decisions generally require less oversight than decisions which affect the substantive rights of regulated parties, or which embody the agency's most potent use of its discretionary authority. In all cases cited by the parties, however, courts were willing to approve subdelegations only if they ultimately were subject to some form of scrutiny.

671 F. Supp. at 35-36 (footnotes omitted).

The *Pistachio* case does not fit the facts of this case. The Secretary [of Agriculture] does exercise active oversight over NDB, and both the Secretary [of Agriculture] and NDB exercise oversight over DMI.

Both the Secretary [of Agriculture] and NDB exercise independent judgment of the kind that appears to have been lacking on the part of the Army Corps of Engineers in another case cited by Petitioners. *Sierra Club v. Sigler*, 695 F.2d 957, 962-963 n.3 (5th Cir. 1983).

As the [United States Court of Appeals for the] Third Circuit stated in *Cospito v. Heckler*, 742 F.2d 72, 89 (3d Cir. 1984)[, *cert denied*, 471 U.S. 1131 (1985)]: "[W]here actions of private organizations were subject to review by a wholly public body, no unconstitutional delegation has occurred."

In light of the facts of this case and the weight of applicable legal precedents, the constitutional challenge by Petitioners to the formation of DMI as an invalid delegation of authority is untenable.

4. The formation of DMI is not incompatible with the requirements of the Freedom of Information Act.

The Freedom of Information Act (5 U.S.C. § 552) requires each federal agency to make its non-exempt records available[, upon request,] to [a requester]. If a request is denied, an aggrieved party may file a complaint in [the district court of the United States in which the aggrieved party resides, or has a principal place of business, or in which the agency records are situated, or in the District of Columbia, which court has jurisdiction] to enjoin the agency from withholding [agency] records [and to order production of any agency records improperly withheld from the Complainant.]

Petitioners have made such a request which Respondent advises is still pending (Respondent's Brief at 36, citing RX 21, 26, 27, 32, 34, 37, and 41). As

Respondent correctly points out, the exclusive forum for eventually correcting an improper denial of [Petitioners' Freedom of Information Act] request is a district court of the United States. Section [118] of the [Dairy Production Stabilization] Act [(7 U.S.C. § 4509)] cannot be used to provide Petitioners a different forum or a different method for ventilating Freedom of Information Act grievances.

Moreover, Petitioners' underlying concern that the workings of the [Dairy] Order are now secret and not open to the light of public scrutiny is unwarranted.

The Secretary [of Agriculture] has assured that DMI "will be subject to Department of Agriculture (USDA) oversight to ensure that all statutory, regulatory and USDA policy requirements are met." (CX 56 [at 1].) In response to [Mr. Henry J. Voss' October 11, 1994, letter] . . . the Secretary [of Agriculture] explicitly stated:

> With respect to oversight by USDA, we do not see this as changing the procedures that have been in practice for years. NDB is responsible for establishing objectives and priorities, is responsible for approving plans and budgets to achieve the objectives, and is accountable for results. USDA will continue to oversee all plans and budgets considered by NDB; its approval will still be required for adoption of all plans and budgets. USDA will monitor DMI activities to implement plans and budgets, much like we monitor NDB activities currently. By reviewing the coordinated annual plan, USDA will be in an even stronger oversight position, because it will be able to assess the plans and budgets for use of not only the "nickel" that has gone to NDB, but also a large portion of the "dime." USDA representatives have attended and will continue to attend the DMI Board meetings.

CX 72 at 2.

In other words, there is a continuation of the paper flow to USDA, both through the requisite passing on of the documents sent by DMI to NDB and by USDA directly obtaining documents from DMI. The kind of documents USDA maintained respecting the operation of the [Dairy] Order before DMI's formation is continuing to be maintained. These records appear, therefore, to be as available to [requesters] under the Freedom of Information Act [after the formation of DMI] as they were before [the formation of DMI].

Accordingly, Petitioners' assertion that the formation of DMI is incompatible with the requirements of the Freedom of Information Act is unfounded. In any event, this is the wrong forum for asserting Freedom of Information Act grievances.

5. The formation of DMI did not require compliance with the notice and comment provisions of the Administrative Procedure Act.

Petitioners contend that DMI's formation constituted a "substantive rule" and as such required an antecedent notice and comment rulemaking [proceeding] under the Administrative Procedure Act, [5] U.S.C. § 553. As a first step to deciding whether rulemaking was required, it must be determined whether a "rule" was involved within the meaning of the [Administrative Procedure Act]. *Wileman Bros. & Elliott, Inc. v. Espy, supra*, 58 F.3d at 1376; *Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993).

The [Administrative Procedure Act defines the word] "rule," as follows:

> **§ 551. Definitions**
>
> . . . .
>
> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Respondent states that nothing about NDB's agreement with UDIA to form DMI and employ a common staff fits within the definition of a "rule," and hence notice and comment rulemaking was not required [(Respondent's Brief at 40).] Petitioners respond that DMI's formation falls within the language of section 551(4) as "a major functional and structural change in the operations and policies of the National Board." [(Petitioners' Reply Brief at 22.)] Furthermore, the underlying agreement represents "an agency statement of `general or particular applicability;'" and "DMI was created to `implement joint programs and projects between NDB and UDIA.'" [(Petitioners' Reply Brief at 22-23.)]

Despite the many ways Petitioners say that "the DMI Agreements epitomize the very type of agency statement for which notice and comment are required by the [Administrative Procedure Act" (Petitioners' Reply Brief at 23)], the actions which resulted in DMI's formation do not fit the statutory definition of a rule.

DMI is not a government agency, but a private not-for-profit corporation whose staff performs . . . duties that are subject to the direction and supervision of NDB and UDIA. Therefore, it cannot be said that the agreement to form DMI pertained

to the "organization, procedures, or practice requirements of an agency," inasmuch as "agency" is defined by 5 U.S.C. § 551(1) as an "... authority of the Government of the United States," and there is no other aspect of the definition of "rule" that has conceivable application to DMI's formation....

Although the need for rulemaking in advance of staffing agreements was apparently not raised in *Wileman Bros. & Elliott, Inc. v. Madigan, supra*, the court did state:

> There is no prohibition against committees hiring employees and using a name, CTFA, to designate functionaries of the committees. There similarly appears to be no bar to the committees entering into agreements to share the same administrative staff.

slip op. at 67-78, 52 Agric. Dec. at 51.

The [United States District] Court for the Eastern District of California obviously regarded agreements respecting staffing of these committees which are the functional equivalents of NDB, not to . . . require . . . rulemaking.

For these reasons, the formation of DMI did not require compliance with the notice and comment provisions of the Administrative Procedure Act.

6. DMI as established and operated is not invalid under conflict-of-interest laws.

Petitioners assert that DMI is invalid because the agreement to form [DMI] was invalid under federal . . . conflict-of-interest laws . . . and [disclosure and recusal requirements under the Dairy Order] and because [DMI's] operation will continue to violate [federal conflict-of-interest laws].

As authority for the contention that federal law has been violated, Petitioners cite 1[8] U.S.C. § 208(a) which makes it a criminal offense for any officer or agent of the United States to transact business for the government with any business entity when the government officer or agent has a direct or indirect interest in its pecuniary profits or contracts. All but two of the cases cited by Petitioners applied this statutory provision in the context of the criminal convictions of federal agents and employees and are inapposite[3]. The only cases cited by Petitioners to apply the

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[3]*United States v. Nevers*, 7 F.3d 59 (5th Cir. 1993), *cert. denied*, 510 U.S. 1139 (1994); *United States v. Hedges*, 912 F.2d 1397 (11th Cir. 1990); *de Vera v. Blaz*, 851 F.2d 294 (9th Cir. 1988); *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *United States v. Irons*, 640 F.2d 872 (7th Cir. 1981); *United States v. Conlon*, 628 F.2d 150 (D.C. Cir.

provision in a context other than criminal law are *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) and *K & R Engineering Co. v. United States*, 616 F.2d 469 (Ct. Cl. 1980). Each of those decisions found a contract to be unenforceable against the United States when the government officer or agent who negotiated it had "a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute." *Mississippi Valley, supra*, 364 U.S. at 559, *cited in K & R Engineering Co.*, 616 F.2d at 474.

Although *Mississippi* and cases following it have allowed the federal government to disaffirm a contract tainted by a government agent's conflict of interest, Petitioners have not cited any case which has employed the conflict-of-interest law to invalidate a contract which the government has chosen to accept. For that reason, none of the Petitioners' stated concerns about the actions of NDB's chief executive officer and various of its members makes 1[8] U.S.C. § 208(a) in any way applicable to the remedy [Petitioners] seek.

Petitioners next argue for DMI's invalidation on the basis of section 1150.134 of the [Dairy] Order.

[Section 1150.134(b) and (c) of the Dairy Order provides that:

§ 1150.134 Nominee's agreement to serve.

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

. . . .

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

7 C.F.R. § 1150.134(b), (c).]

Petitioners argue that:

1980), *cert. denied*, 454 U.S. 1149 (1982); *United States v. Lord*, 710 F. Supp. 615 (E.D. Va. 1989), *aff'd per curiam*, 902 F.2d 1567 (4th Cir. 1990) (Table), 1990 WL 64578.

> . . . [T]he concept of DMI was outlined, discussed, voted upon and approved by members of the National Board with UDIA affiliations either as directors and/or members of UDIA and/or UDIA member units, in a non-public, executive session of the National Board. . . . Of the thirty-five members of the National Board as of March 16, 1994, nine had expressly professed membership in, or affiliation with, UDIA or its member units on their National Board nomination forms. [Three of these directors were also directors of both UDIA and DMI.] . . . An additional fourteen Board members were representatives of states with UDIA affiliation. . . . Only twelve Board members, less than 35%, possessed no UDIA affiliation.

Petitioners' Brief at 32-33 (footnote omitted).

Petitioners acknowledge that it is not known whether members with UDIA affiliations withdrew from participation in the discussion and vote to form DMI. But Petitioners argue:

> The DMI Board is comprised solely of National Board and UDIA representatives. . . . Because the National Board is dominated by UDIA members and affiliates, UDIA domination of the DMI Board is a virtual guarantee, rendering conflicts-of-interest a foregone conclusion every time it votes on a proposal or referendum. . . . The DMI Board, therefore, cannot fulfill its designated purposes without being improperly influenced by the interests and objectives of UDIA. . . . This continuing conflict is exacerbated by the absence of any provision in the Statute or Order dealing with this apparent conflict.

Petitioners' Brief at 33-34.

. . . If section 1150.134 were . . . applied [as urged by Petitioners], it would conflict with the [Dairy Production Stabilization] Act's requirement that the Secretary [of Agriculture] appoint members to NDB "from nominations submitted by eligible organizations" and take "into account, to the extent practicable, the geographical distribution of milk production volume throughout the United States." 7 U.S.C. § 4504(b). Adhering to this statutory directive necessarily leads to the very result that Petitioners decry. The majority of NDB's members are members of UDIA or its affiliates because [UDIA's members are state and regional organizations representing] dairy farmers, other than those in California, Wisconsin, Washington, Oregon, and Louisiana, . . . and the milk produced [by dairy farmers served by UDIA is] approximately 65% of the nation's total. . . . NDB [could not] hold meaningful discussions and [make] decisions respecting a

new staff structure which would also serve UDIA, if all members of UDIA and its affiliates absented themselves from the discussions and voting.

For section 1150.134 of the [Dairy] Order to be purposeful without precluding the achievement of the [Dairy Production Stabilization] Act's stated requirements and objectives, [the Dairy Order] cannot be interpreted so as to exclude full participation . . . in discussions and decisions respecting NDB's administrative structure by NDB's members who represent the majority of America's dairy farmers. What is needed is an interpretation of section [1150.134] that is consistent with both the [Dairy Production Stabilization] Act's objectives and the Secretary [of Agriculture's] oversight responsibilities for assuring that no segment of the industry gains unfair . . . advantage. This need was recognized in 1987 when the then Director of the Dairy Division stated in response to an earlier conflict-of-interest inquiry (RX 3 at 3): "In our view no Board member should be barred from the discussion and decisions pertaining to the establishment of a new National Dairy Board structure."

This position was reiterated and amplified by the Secretary [of Agriculture] in his initial response of July 25, 1994, to the California Department of Food and Agriculture:

> We do not believe that this effort to create a new, more efficient support staff presents a conflict of interest issue under the terms of the statute or order. The Order and National Dairy Board (Board) policy regarding conflict of interest issues is intended to address conflicts or potential conflicts involving the expenditure of Board funds for research and promotion programs and activities. The decision to create Dairy Management, Inc., was not a contractual issue of this type, but rather a decision to create a more efficient staff to support National Dairy Board activities and to facilitate coordination of Board and UDIA activities. The agreement does not include authority for the expenditure of funds. Each respective Board must approve the outlays of its funds to the joint venture. It was appropriate, indeed essential, that all Board members should participate in the discussion and decisions pertaining to the establishment of this new staff structure.

CX 56 at 1-2.

In his . . . December 2, 1994, . . . response to the California Department of Food and Agriculture, the Secretary [of Agriculture] explained how he envisioned the purported conflict-of-interest problem would be controlled[, as follows]:

> 5. Conflicts of Interest. The concern you express appears to be that the membership and voting structure of the DMI Board gives UDIA effective control of NDB's funds, and that the overlapping memberships of DMI Board members present irreconcilable conflicts. USDA believes that two critical factors negate this concern: (1) the NDB portion of the budget -- and therefore the overall DMI budget -- must be approved by the NDB Board, acting independently of the DMI Board or the UDIA Board, and (2) USDA must approve the Annual Plan and Annual Budget to the extent that NDB funds are committed through its contract with DMI. Thus, even if DMI Board members may serve in dual roles, their decisions are in no way final, and are subject to a careful plan of checks, balances, and approvals.

CX 72 at 2.

. . . .

Petitioners nonetheless argue that even though the vote [to merge NDB and UDIA staffs] "was 27 (for) to 7 (against)," [7 C.F.R. § 1150.134] requires recusal from deliberations as well as actual voting and this "unquestionable and impermissible conflicts-of-interest indelibly tainted the entire proceeding that resulted in the adoption and approval of DMI." (Petitioners' Reply Brief at 30.) Inasmuch as Congress placed responsibility in the Secretary [of Agriculture] to oversee NDB and its operations, the decision as to whether, under these circumstances, the agreement should be approved must exclusively rest with the Secretary [of Agriculture]. Through his delegates, [the Secretary of Agriculture] gave his approval subject to the various controls that were put in place to monitor DMI's operation, including [an] audit by the Office of the Inspector General. Accordingly, the Secretary [of Agriculture's] action appears not to be arbitrary, capricious, or an abuse of discretion.

For this reason, and the others previously discussed, Petitioners' contention that DMI is invalid for violation of conflict-of-interest laws [and disclosure and recusal provisions under the Dairy Order] is not well founded.

7. NDB's 1995 contribution to DMI's "core or administrative costs" did not violate 7 C.F.R. § 1150.151.

The [Dairy] Order [limits the percentage of projected revenue that NDB may incur for administrative expenses, as follows:

§ 1150.151 Expenses.

> (a) . . . [A]dministrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year.

7 C.F.R. § 1150.151(a).]

The Petition alleges that NDB's contribution to DMI's "core or administrative costs" for 1995 will exceed 5% of NDB's projected revenue. NDB's 1995 budget, however, belies that claim. NDB's projected revenues from assessments are $77,400,000, and its projected administrative costs are $2,616,000 (RX 47 at 3, 48 at 8 . . .). [Projected administrative expenses for 1995 are] less than 5% of the projected [1995] revenues.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises one issue in Respondent's Response to Petitioners' Appeal of Decision and Order (hereinafter Respondent's Response), as follows:

> . . . [R]espondent . . . continue[s] to believe . . . that neither the California Secretary of Agriculture nor the CMAB has standing, for the reasons set forth in [R]espondent's post-hearing brief. Respondent's Proposed Findings of Fact, Conclusions of Law, and Brief in Support Thereof at 4-8. . . .

Respondent's Response at 3 n.10.

I agree with Respondent's contention that CMAB and the Secretary of CDFA lack standing in this proceeding.

Section 111 of the Dairy Production Stabilization Act defines the term "person," as follows:

> **§ 4502. Definitions**
>
> As used in this subchapter—
>
> . . . .
>
> (g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity[.]

7 U.S.C. § 4502(g).

The term "person" as defined for the purposes of the Dairy Production Stabilization Act is extremely broad, and I find that it does include CMAB and the

Secretary of CDFA. However, section 118 of the Dairy Production Stabilization Act specifically limits the universe of *persons* who may file a petition with the Secretary of Agriculture requesting modification of or exemption from an order, as follows:

§ 4509. Petition and review

(a) Any person *subject to* any order issued under this subchapter may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

7 U.S.C. § 4509(a) (emphasis added).

The Dairy Production Stabilization Act does not define the term *subject to* or identify persons who are *subject to an order issued under this subchapter* and may therefore file a petition pursuant to 7 U.S.C. § 4509(a). Consistent with section 118 of the Dairy Production Stabilization Act, the Rules of Practice provide that a person *subject to* an order may file a petition (7 C.F.R. § 1200.52(a)). The term *subject to* has no well-defined meaning and the meaning of the term must be determined from the context in which it is used.[4] Courts have found the common and ordinary meaning of the term *subject to* in various contexts includes "bound by"; "controlled by"; "governed or affected by"; "obligated in law"; "placed under the authority of"; "regulated by"; and "under the control, power, or dominion of."[5]

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[4]*White v. Hopkins*, 51 F.2d 159, 163 (5th Cir. 1931); *United States v. Northern Pacific Ry. Co.*, 54 F. Supp. 843, 844 (D. Minn. 1944); *Del Rio Land, Inc. v. Haumont*, 514 P.2d 1003, 1005 (Az. 1973); *Bulger v. McCourt*, 138 N.W.2d 18, 22 (Neb. 1965).

[5]*Shell Oil Co. v. Manley Oil*, 124 F.2d 714, 716 (7th Cir.), *cert. denied*, 316 U.S. 690 (1942) (in a deed made "subject to" coal rights, the term "subject to" was used in its ordinary sense, i.e., "subordinate to, servient to, or limited by"); *Texaco v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964) (in a deed which states that the purchaser takes property "subject to" the oil and gas lease thereon, the words "subject to" mean "subservient to" or "limited by"); *In re Estate of Kraft*, 186 N.W.2d 628, 631-32 (Iowa 1971) (in a will that states "subject to the foregoing," the term "subject to" means "subordinate to"); *State v. Willburn*, 426 P.2d 626, 630 (Haw. 1967) (when construing the term "subject to" in a statute, it is well established that the term "subject to" may mean "limited by,"

The record clearly establishes and Respondent does not contest CMAB's status as a qualified state or regional dairy production promotion, research, or nutrition education program (Answer ¶ 2). Qualified state or regional programs must be certified in accordance with the Dairy Order (7 C.F.R. §§ 1150.109) and must meet certain criteria to be certified under the Dairy Order (7 C.F.R. § 1150.153). However, persons subject to the Dairy Order pay assessments, file reports, and maintain books and records (7 C.F.R. §§ 1152.152,.171,.172). As a qualified state program, CMAB is not subject to any of these requirements under the Dairy Order. Instead, CMAB conducts its own product promotion program which is not preempted or superseded by the Dairy Production Stabilization Act or the Dairy Order.[6]

"subordinate to," or "regulated by"): *Buiger v. McCourt, supra*, 138 N.W.2d at 22 (the term "subject to" is an expression of qualification and generally means "subordinate to, subservient to, or affected by"); *Turner v. Kansas City*, 191 S.W.2d 612, 615 (Mo. 1946) (the term "subject to state constitution and laws" means "placed under authority and dominion of such constitution and laws"); *Homan v. Employers Reinsurance Corp.*, 136 S.W.2d 289, 298 (Mo. 1940) (in a reinsurance contract, the term "subject to" all general and special terms and conditions of policies and endorsements means "bound, obligated, or controlled by"); *State v. Tilley*, 288 N.W. 521, 523 (Neb. 1939) (the term "subject to" in a law authorizing sums to be expended by the Attorney General "subject to" the approval of the state engineer, the term "subject to" means "dependent upon; limited by; and under the control, power, or dominion of"); *Van Duyn v. H.S. Chase & Co.*, 128 N.W. 300, 301 (Iowa 1910) (the term "subject to" in a deed means "under the control, power, or dominion of; subordinate to"); *Eslinger v. Pratt*, 46 P. 763, 766 (Utah 1896) (in a statute which reads "the chiefs shall have power, under such rules as the board may establish," the word "under" means "subject to"); *Lydig Construction, Inc. v. Rainier National Bank*, 697 P.2d 1019, 1022 (Ct. App. Wash. 1985) (the words "subject to" ordinarily denote "subordinate to, subservient to, or limited by"); *State Revenue Comm'n v. Columbus Bank & Trust Co.*, 178 S.E. 463, 464 (Ct. App. Ga. 1935) (the term "subject to" has been variously defined by courts and lexicographers as "made liable, subordinate, subservient, subject to the evils of, regulated by, brought under the control or action of, limited by, or affected by"); *Sanitary Appliance Co. v. French*, 58 S.W.2d 159, 163 (Ct. Civ. App. Tx. 1933) (where a contract between principal and an agent prohibited the agent from selling competitor's product and the contract between the agent and subagent was "subject to" the terms of the contract between the principal and agent, the term "subject to" means "bound by").

[6]Section 121(a) of the Dairy Product Stabilization Act specifically provides that:

§ 4512. Administrative provisions

(a) Nothing in this subchapter may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

7 U.S.C. § 4512(a).

It is well settled that an agency's interpretation of its own regulations must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulations, provided that the interpretation does not violate the Constitution or a federal statute. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Administrator of the Agricultural Marketing Service's[7] interpretation of the Dairy Order is that CMAB is not subject to the Dairy Order, and therefore, CMAB has no standing to seek a modification of the Dairy Order or an exemption from the Dairy Order (Respondent's Brief at 5-7). An examination of CMAB's self-described status, a qualified state program, under the Dairy Production Stabilization Act and the Dairy Order, reveals that CMAB is not *subject to the Dairy Order* and therefore has no standing in this proceeding.

The Chief ALJ found that the Secretary of CDFA has standing because: (1) the legislative history of the Dairy Production Stabilization Act shows that Congress expected NDB and the Secretary of Agriculture to carry out a coordinated program of dairy promotion by encouraging the maximum feasible use of existing State and regional promotion agencies; (2) there is no explicit language excluding an entity, such as the California Department of Food and Agriculture, from obtaining review in accordance with 7 U.S.C. § 4509(a); (3) the term *person* is broadly defined in the Dairy Production Stabilization Act; (4) the Dairy Production Stabilization Act's purposes would not be well served by imposing a narrow and restrictive interpretation on the Dairy Production Stabilization Act's provisions for administrative review; and (5) the California Department of Food and Agriculture possesses a real interest in the Dairy Order's lawful operation (Initial Decision and Order at 4-6).

I disagree with the Chief ALJ's analysis. I find that Congress provided standing to file petitions under the Dairy Production Stabilization Act only to those persons identified in 7 U.S.C. § 4509(a), *viz.*, persons subject to an order. I find no provision in the Dairy Order, and Petitioners have cited none, that governs, regulates, controls, obligates, or binds the Secretary of CDFA. Therefore, while the Secretary of CDFA is clearly a *person*, as defined by the Dairy Production Stabilization Act (7 U.S.C. § 4502(g)) and like many other individuals and organizations may have a real interest in the lawful operation of the Dairy Order,

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[7]The Administrator of the Agricultural Marketing Service has been delegated authority to exercise the functions of the Secretary of Agriculture contained in the Dairy Production Stabilization Act (7 C.F.R. § 2.79(a)(8)(xxvi)).

the Secretary of CDFA is not *subject to* the Dairy Order and does not have standing to file a petition in accordance with 7 U.S.C. § 4509(a).

Accordingly, Respondent's motion to exclude CMAB and the Secretary of CDFA for lack of standing is granted.

Petitioners raise 10 issues in their Appeal to the Secretary by Petitioners (hereinafter Petitioners' Appeal). First, Petitioners contend that:

> II. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE FORMATION OF DMI WAS A LAWFUL EXERCISE OF THE AUTHORITY CONFERRED UPON THE BOARD AND THE SECRETARY BY THE ACT AND THE ORDER.

Petitioners' Appeal at 2.

Petitioners contend that the Chief ALJ failed to identify any authority which would allow NDB to participate in the formation of DMI, and neither the Dairy Production Stabilization Act nor the Dairy Order "expressly or by implication permits a government agency to form and maintain a private corporation" (Petitioners' Appeal at 2). I find to the contrary. The Chief ALJ cited and fully discussed the authority for NDB's formation of DMI and maintenance of its relationship with DMI (Initial Decision and Order at 26-33), and I have adopted, with only slight modification, the Chief ALJ's discussion in this Decision and Order, *supra*, pp. 28-35.

Second Petitioners contend that:

> The ALJ . . . erred when he found that the formation of DMI did not violate 31 U.S.C. §9102. That section provides: "An agency may establish or acquire a corporation only by or under a law of the United States specifically authorizing the action." The National Board is an agency. DMI is a corporation. There is no law of the United States specifically authorizing the formation of DMI.

Petitioners' Appeal at 3.

I disagree with Petitioners' contention that DMI was established in violation of 31 U.S.C. § 9102. I agree with the Chief ALJ's reasons for finding that the formation of DMI does not violate 31 U.S.C. § 9102, and I have adopted his analysis and conclusion in this Decision and Order, *supra*, pp. 35-36.

Moreover, 31 U.S.C. § 9102 does not prohibit an agency from establishing or acquiring a corporation unless specifically authorized by statute, as Petitioners assert. Instead, the limitation on an agency's authority to establish or acquire a

corporation in 31 U.S.C. § 9102 only applies to those corporations that act as agencies, as follows:

> **§ 9102. Establishing and acquiring corporations**
>
> An agency may establish or acquire a corporation to *act as an agency* only by or under a law of the United States specifically authorizing the action.

31 U.S.C. § 9102 (emphasis added).

The record clearly establishes that DMI was not formed to act as an agency, but rather, was formed to merge the staffs of NDB and UDIA to perform services for NDB and UDIA.

Recently, the United States Supreme Court concluded that the National Railroad Passenger Corporation (hereinafter Amtrak) was an agency or instrumentality of the United States for purposes of individual rights guaranteed by the United States Constitution. *Lebron v. National Railroad Passenger Corp.*, 115 S.Ct. 961 (1995). The Court based its conclusion that Amtrak is an agency of the federal government on the following findings: (1) Amtrak is established under federal law for the purpose of pursuing federal government objectives under the direction and control of federal government appointees; (2) six of the nine Amtrak board members are appointed by the President; (3) the United States holds all of Amtrak's preferred stock; (4) the United States subsidizes Amtrak's losses; and (5) Amtrak is required to submit annual reports to the President and Congress. *Lebron v. National R.R. Passenger Corp., supra*, 115 S.Ct. at 967-74. The United States District Court for the District of Columbia examined these and other factors to determine whether the Office of Personnel Management violated 31 U.S.C. § 9102 when it created U.S. Investigations Services, a private employee-owned company, and concluded that the Office of Personnel Management had not created U.S. Investigations Services to act as a federal agency and had not, therefore, violated 31 U.S.C. § 9102. *Varicon International v. OPM*, 934 F. Supp. 440, 446-47 (D.D.C. 1996).

I find, based on the factors the United States Supreme Court applied in *Lebron* to determine whether Amtrak is an agency, that DMI was not created to act as a federal agency of the United States. The record clearly establishes that: (1) unlike Amtrak, DMI was not created solely by the federal government, but rather, by two organizations, UDIA, a not-for-profit corporation formed under the laws of Illinois, and NDB; (2) unlike Amtrak, which was established under federal law, DMI is a private not-for-profit corporation formed under the laws of the District of

Columbia; (3) unlike Amtrak, in which six of the nine board members are appointed by the President, none of the board members of DMI are appointed by the President and 50% of DMI's board members are appointed by NDB and the other 50% are appointed by UDIA; (4) unlike Amtrak, in which the United States owns all of the preferred stock, the United States owns no stock in DMI; and (5) although DMI must prepare an annual financial report and present that report to NDB and UDIA, there is no requirement, like that imposed on Amtrak, that DMI present the report to the President or Congress. Moreover, DMI's employees are not employees of the federal government; DMI provides staff support for both NDB and UDIA and is authorized to enter into agreements with the American Dairy Association and National Dairy Council, subsidiaries of UDIA, for the provision of administrative, financial and program services; and the Secretary of Agriculture, NDB, and UDIA oversee DMI's activities. I conclude, based on these factors, that DMI was not created to act as an agency, and that, therefore, NDB did not violate 31 U S.C. § 9102 when it and UDIA created DMI.

Third, Petitioners contend that:

> III. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE FORMATION OF DMI DID NOT CONSTITUTE AN INVALID AND IMPROPER DELEGATION OF ADMINISTRATIVE AUTHORITY.
>
> The ALJ's reasoning in support of his conclusion that the formation of DMI did not constitute an invalid and improper delegation of administrative authority is totally misplaced and is irrelevant to the issues presented in this case. Petitioners did not and do not challenge the proposition that Congress may delegate authority to an industry advisory board where that board is subject to the effective supervision and control of the Secretary. The authorities cited in the ALJ's opinion merely establish that delegation of functions to the National Board, when accompanied by proper standards for oversight, is proper and appropriate. What Petitioners challenge in this case is the standardless further delegation by the National Board to DMI of virtually all the functions of the National Board. The ALJ completely fails to address this point.

Petitioners' Appeal at 11 (emphasis in original).

The Chief ALJ thoroughly addressed Petitioners' challenge to the formation of DMI as an invalid delegation of authority and correctly found that Petitioners' challenge is untenable (Initial Decision and Order at 34-39). I have adopted, with only slight modification, the Chief ALJ's discussion of Petitioners' delegation challenge in this Decision and Order, *supra*, pp. 36-41.

Fourth, Petitioners contend that:

> The ALJ also ignored a specific mandate of Congress as expressed in the Food, Agriculture, Conservation and Trade Act for 1990 which provides:
>
> Each currently operational checkoff board or council should review its charter and activities to ensure that its responsibilities and duties have not been inappropriately delegated or otherwise relinquished to another organization.
>
> Public Law 101-624, § 1999S, November 28, 1990.

Petitioners' Appeal at 11.

I disagree with Petitioners' contention that the Chief ALJ ignored a mandate in the Food, Agriculture, Conservation and Trade Act of 1990 (hereinafter FACT Act). Section 1999S(b) of the FACT Act, characterized by Petitioners as a mandate, provides:

> **Title XIX—Agricultural Promotion**
>
> . . . .
>
> **Subtitle I—Miscellaneous Provisions**
>
> **SEC. 1999S. PRODUCER RESEARCH AND PROMOTION BOARD ACCOUNTABILITY**
>
> . . . .
>
> (b) SENSE OF THE CONGRESS.— It is the sense of Congress that, to ensure the continued success of the federally-authorized checkoff programs, boards or councils that participate in the administration of the checkoff programs should take care to faithfully and diligently perform the functions assigned to them under the authorizing legislation and otherwise meet their crucial program responsibilities. *It further is the sense of Congress that each of these boards and councils*, in carrying out the responsibilities assigned to it, is accountable to the Secretary of Agriculture, Congress, and the industry contributing funds for the checkoff program

involved, and that each currently operational checkoff board or council *should review its charter and activities to ensure that its responsibilities and duties have not been inappropriately delegated or otherwise relinquished to another organization.*

FACT Act, Pub. L. No 101-624, § 1999S(b), 104 Stat. 3927 (1990) (emphasis added).

As an initial matter, *sense of congress* provisions, such as that found in section 1999S(b) of the FACT Act, are generally precatory rather than mandatory,[8] and while the meaning of the word *should* varies widely depending on the context in which it is used, the word *should* is generally employed in a directory rather than a mandatory sense.[9] I find, based on the use of the terms *sense of congress* and

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[8]*Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 994-95 (1st Cir. 1992) (the use of the terms *should* and *it is the sense of Congress* in 42 U.S.C. § 10841 indicate that the statute is plainly precatory); *Croft v. Harder*, 730 F. Supp. 342, 350-51 (D. Kan. 1989) (42 U.S.C. § 9501--which provides "[i]t is the sense of the Congress that each State *should* review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision *should* take into account the recommendations of the President's Commission on Mental Health. . . ."--is only hortatory), *aff'd*, 927 F.2d 1163 (10th Cir. 1991); *Wood v. Verity*, 729 F. Supp. 1324, 1327 (S.D. Fla. 1989) (16 U.S.C. § 1822(e) (Supp. 1989)--which provides "[i]t is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to an exclusive economic zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States. . . ."--is precatory and solely intended to advise various branches, agencies, and departments of the United States Government as to what factors Congress thinks should be considered in evaluating a claim of a foreign nation to an exclusive economic zone); *Brooks v. Johnson and Johnson, Inc.*, 685 F. Supp. 107, 108 (E.D. Pa. 1988) (memorandum opinion) (the use of the terms *should* and *it is the sense of Congress* in 42 U.S.C. § 10841 indicate that the statute is precatory); *United States v. Shelhammer*, 681 F. Supp. 819, 820 (S.D. Fla. 1988) (16 U.S.C. § 1822(e) (1982)--which provides "[i]t is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States. . . ."--is precatory and solely intended to advise various branches, agencies, and departments of the United States Government as to what factors Congress thinks should be considered in evaluating a claim of a foreign nation to a fishery conservation zone).

[9]*New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988) (*will not* and *will* are mandatory terms; terms, such as, *should* are merely directory); *Doe v. Hampton*, 566 F.2d 265, 280-81 (D.C. Cir. 1977) (the term *should be* is generally directory; the terms *shall* and *must* are mandatory); *Clariton Sportsmen's Club v. Pennsylvania Turnpike Comm'n*, 882 F. Supp. 455, 476 (W.D. Pa. 1995) (a Council on Environmental Quality regulation, providing that an agency may wish to analyze actions in a single impact statement and *should* do so when the best way to adequately assess impacts of the actions or reasonable alternatives to such actions is to treat them in a single impact statement, is merely permissive); *Harris County Hospital District v.*

should in section 1999S(b) of the FACT Act, that NDB is not required by that section of the FACT Act to review its charter and activities to ensure that its responsibilities and duties have not been inappropriately delegated or otherwise relinquished to another organization, as Petitioners assert. Instead, it appears that Congress intended merely to exhort organizations, such as NDB, to examine their charters and activities to ensure that their responsibilities and duties had not been inappropriately delegated or relinquished to another organization.

Further, even if I were to construe section 1999S(b) of the FACT Act as mandatory (which I do not), the record does not support a finding that NDB failed to "review its charter and activities to ensure that its responsibilities and duties have not been inappropriately delegated or otherwise relinquished to another organization." Moreover, with respect to the merger of NDB's staff and UDIA's staff that is at issue in this proceeding, the record reveals that NDB reviewed the DMI structure with USDA and it was found "that NDB was not inappropriately delegating authority to a private entity." (CX 72 at 1.)

Fifth, Petitioners contend that:

IV. THE ADMINISTRATIVE LAW JUDGE MISINTERPRETS PETITIONERS' ARGUMENT WITH RESPECT TO THE FREEDOM OF INFORMATION ACT

The finding of the ALJ with respect to FOIA once again misapprehends Petitioners' contentions. Petitioners are not seeking to enforce their rights under the Freedom of Information Act in this proceeding. The undisputed fact that DMI is a private not-for-profit corporation renders it immune from the requirements of FOIA. Thus staff documents that were subject to FOIA prior to the formation of DMI are now immune from scrutiny by the public, and in particular, the nation's dairy farmers. Since the National Board now has no staff, all of its documents will be kept by DMI which is not subject to FOIA. There is no evidence that this result was considered in connection with the approval of the DMI agreement and this fact is yet another

Shalala, 863 F. Supp. 404, 410 (S.D. Tex. 1994) (*should* is mandatory only when used as the past tense of *shall*; otherwise *should* is precatory); *United States v. Strickrath*, 242 F. 151, 153 (S.D. Ohio 1917) (the word *ought* is a stronger word than its frequently used synonym *should*; *should* may imply an obligation of propriety or expediency, or a moral obligation; *ought* denotes an obligation of duty); *Bio-Medical Applications of Lewiston, Inc. v. United States*, 17 Cl. Ct. 84, 90 (Cl. Ct. 1989) (section 2728 of the Health Care Financing Administration's State Operating Manual, which provides when notices of deficiencies *should* be sent, is clearly precatory).

compelling reason why the DMI agreement is unauthorized by federal law.

. . .

The ALJ's statement at page 40 of his opinion that "[t]he kind of documents the Department of Agriculture maintained respecting the operation of the Order before DMI's formation, is continuing to be maintained" is beside the point. The public is entitled to access to the documents of the National Board and its staff <u>in addition to</u> documents maintained by USDA. The approval of the DMI agreement means that the public only has access to those documents which DMI elects to provide to USDA. This result is contrary to the policy of the Freedom of Information Act and it provides yet another reason why the DMI agreement should not have been approved.

Petitioners' Appeal at 20-21 (emphasis in original).

I disagree with Petitioners. I do not find that the Chief ALJ either erred or misapprehended Petitioners' contentions with respect to the Freedom of Information Act. The Chief ALJ directly addressed the issue of records that would be available to persons, pursuant to 5 U.S.C. § 552(a)(3), after the formation of DMI. The Chief ALJ correctly pointed out that the record in this proceeding clearly establishes that DMI is subject to oversight by the Secretary of Agriculture and that, in the normal course of that oversight, the Secretary of Agriculture obtains and maintains the same kinds of records that the Secretary maintained regarding the Dairy Order before DMI was formed. Therefore, persons requesting records from USDA after the formation of DMI have access to the same kinds of records that they had access to prior to the formation of DMI (Initial Decision and Order at 39-40).

Even if I were to find that the formation of DMI has resulted in persons being unable to obtain records pursuant to 5 U.S.C. § 552(a)(3) that were available to those same persons prior to the formation of DMI, that finding would not constitute a basis for finding that the formation of DMI violates the Freedom of Information Act, which provides as follows:

§ 552. Public information; agency rules. opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . . .

> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(3).

Disclosure is the dominant objective of the Freedom of Information Act, *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), and all records not covered by 5 U.S.C. § 552(a)(1) and (a)(2) or exempt from mandatory disclosure by 5 U.S.C. § 552(b) are to be released on proper identification and request according to rules established by the agency. Nonetheless, 5 U.S.C. § 552(a)(3) only applies to agency records subject to the control of the agency at the time of the Freedom of Information Act request and does not impose any obligation on an agency to create, obtain, or maintain records so that they may be accessed by requesters pursuant to 5 U.S.C. § 552(a)(3).[10] Thus, 5 U.S.C. § 552(a)(3) does not impose any obligation on the Secretary of Agriculture to create, obtain, or retain records regarding the Dairy Order. Further, the Freedom of Information Act does not, as Petitioners assert, make unlawful the formation or existence of an organization that is not subject to 5 U.S.C. § 552 even when that organization retains records, which would otherwise be retained by an agency from which the records could have been obtained by requesters pursuant to 5 U.S.C. § 552(a)(3).

Sixth, Petitioners contend that:

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[10]*United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (to qualify as an agency record, an agency must either create or obtain the requested record and must be in control of the requested record); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 152 (1980) (the Freedom of Information Act does not obligate agencies to create or retain records; the Freedom of Information Act only obligates agencies to provide access to those records which the agency has created and retains); *Goldgar v. Office of the Administrator, Executive Office of the President*, 26 F.3d 32, 34-35 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 728 (1995) (the Freedom of Information Act applies only to information in record form in the control of the agency at the time of the Freedom of Information Act request; the Freedom of Information Act does not require agencies to create or retain documents; the Freedom of Information Act only obligates agencies to provide access to those records which the agency has created and retains); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1247 (4th Cir. 1994) (an agency presented with a request for records under the Freedom of Information Act is required to produce only agency records; agency records are records that the agency created or obtained and that are within the control of the agency at the time the Freedom of Information Act request is made); *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) (a requester is entitled to records that an agency chooses to create and retain; thus, although an agency is entitled to possess a record, the agency is not required to obtain or regain possession of the record to satisfy a Freedom of Information Act request).

V. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT NOTICE AND COMMENT WAS NOT REQUIRED

The finding of the ALJ that the formation of DMI did not require compliance with the notice and comment provisions of the Administrative Procedure Act is a complete non-sequitur. While the appropriate statute is quoted in the opinion, the emphasized language relied upon by Petitioners is not analyzed or commented upon[.]

The APA's definition of "rule" is set forth as follows:

"rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4) (emphasis added).

The ALJ's opinion then concludes that since DMI is not a government agency, the requirements of Section 551(4) are not applicable to it. Opinion, p. 41. Apart from the fact that this finding ignores that DMI is 50% owned by a government agency (the National Board), the statement is irrelevant. The National Board is a government agency, it is subject to Section 551(4), and the clear statutory language of that section applies to a change in or restructuring of the National Board staff structure and its financial structure.

Petitioners' Appeal at 21-22.

I disagree with the Petitioners. The Chief ALJ clearly addressed Petitioners' assertion that the formation of DMI is a *rule* because it describes the organization, procedure, or practice requirements of an agency, and I agree with the Chief ALJ's reasons for finding that the formation of DMI is not a *rule*, as that word is defined for the purposes of the Administrative Procedure Act (5 U.S.C. § 551(4)).

DMI is a private, not-for-profit corporation formed under the laws of the District of Columbia. DMI is not an *agency* as that term is defined for the purposes of the Administrative Procedure Act (5 U.S.C. § 551), and the agreement between

NDB and UDIA to form DMI (CX 1; RX 12) does not describe the organization, procedure, or practice requirements of an *agency*.

Even if I agreed with Petitioners' assertion (which I do not) that the agreement between NDB and UDIA to form DMI is a *rule*, as defined in 5 U.S.C. § 551(4), because it describes the organization, procedure, or practice requirements of an agency, I would not find that the formation of DMI must be preceded by a notice and comment rulemaking proceeding in accordance with 5 U.S.C. § 553, as Petitioners assert.

Section 553(b)(A) of the Administrative Procedure Act provides that the notice and comment rulemaking requirements in 5 U.S.C. § 553 are not applicable to rules of agency organization, procedure, or practice, as follows:

> **§ 553. Rule making**
>
> . . . .
>
> (b) General notice of proposed rule making shall be published in the Federal Register[.] . . .
>
> . . . .
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice[.]

5 U.S.C. § 553(b)(A).

The Dairy Production Stabilization Act does not require notice or hearing for rules issued under the Act, and it is well settled that the notice and comment requirements in 5 U.S.C. § 553 are not applicable to rules describing the organization, procedure, or practice requirements of an agency.[11]

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[11] *See Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (notice and comment provisions of the Administrative Procedure Act apply only to legislative or substantive rules; the notice and comment provisions of the Administrative Procedure Act do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice); *United States v. American Production Industries, Inc.*, 58 F.3d 404, 407 (9th Cir. 1995) (Department of Justice regulations delegating the Attorney General's authority to compromise claims are not required to be promulgated

Seventh, Petitioners contend that:

> VI. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT DMI AS ESTABLISHED AND OPERATED IS NOT INVALID UNDER FEDERAL CONFLICT OF INTEREST LAWS AND THE ORDER
>
> . . . .
>
> . . . [T]he ALJ ignores the myriad federal cases cited by Petitioners to establish a conflict of interest with respect to the formation and operation of DMI on the grounds that they arose in the context of criminal convictions of federal agents and employees. (Opinion, p. 42.) By definition, the standard for a criminal conviction of an individual is a higher standard than that required in either a civil context or in an administrative proceeding. The cases cited are applicable with respect to the issue of whether or not the agreements involved in this case were tainted by a conflict of interest. The ALJ thus erred by ignoring the well established case law and by failing to apply the law as cited by Petitioners to the facts of this case.

Petitioners' Appeal at 22.

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under the Administrative Procedure Act's notice and comment procedures); *United States v. Saunders*, 951 F.2d 1065, 1067-68 (9th Cir. 1991) (internal delegation of administrative authority are rules of agency organization, procedure, or practice and need not be published in the Federal Register to be effective); *Guadamuz v. Bowen*, 859 F.2d 762, 771 (9th Cir. 1988) (only substantive agency rules must meet the Administrative Procedure Act's notice, comment, and publication requirements before final implementation; interpretative rules are not subject to the Administrative Procedure Act's notice and comment requirements; substantive rules grant rights and impose obligations, while interpretative rules express an agency's intended course of action, an agency's tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities); *City of Alexandria v. Helms*, 728 F.2d 643, 647-48 (4th Cir. 1984) (notice and comment are required when a rule makes a substantive impact on the rights and duties of those subject to the rule; notice and comment are not required for rules of agency organization, procedure, or practice); *Guardian Federal Savings & Loan Ass'n v. FSLIC*, 589 F.2d 658, 665-69 (D.C. Cir. 1978) (a rule delegating authority from FSLIC to the Federal Home Loan Bank Board's chief examiners is procedural in nature and thus exempt from notice and comment requirements of the Administrative Procedure Act); *United States v. McCall*, 727 F. Supp. 1252, 1254 (N.D. Ind. 1990) (it is well settled that rules of agency organization need not be published to be effective; delegation by an agency of authority to issue summons is a rule of internal agency procedure and need not be published in the Federal Register); *In re Schibilsky*, 185 B.R. 81, 83 (Bankr. N.D. Ga. 1995) (internal delegations of authority, such as a Treasury Department order delegating to the Commissioner of the Internal Revenue Service authority to file proof of claim for taxes on behalf of the United States in bankruptcy proceedings, are not substantive rules requiring publication in the Federal Register).

I disagree with Petitioners. The Chief ALJ explicitly addressed the cases cited by Petitioners and found that they are inapposite. I agree with the Chief ALJ, and in this Decision and Order, *supra*, pp. 45-50, I have adopted, with only slight modification, the Chief ALJ's discussion of the cases cited by Petitioners to support their claim that the establishment and operation of DMI is invalid under 18 U.S.C. § 208(a).

Petitioners further contend that:

> With respect to the conflict of interest provisions in Section 1150.134 of the Order, the ALJ finds that the explicit language of that provision is simply not applicable. He asks "how could the Board hold meaningful discussions and decisions respecting a new staff structure which would also serve UDIA, if all members of UDIA and its affiliates absented themselves from discussion and voting?" (Opinion, p. 44.) He also concludes that "Section 1150.134 was not mandated by the Act." Id. However, Section 1150.134 exists. . . .

Petitioners' Appeal at 24-25 (footnote omitted).

I agree with Petitioners that 7 C.F.R. § 1150.134 exists. However, I find that the Chief ALJ both fully addressed Petitioners' contention that NDB members violated 7 C.F.R. § 1150.134, when they participated in the discussions and voted on the decision to enter into an agreement with UDIA to merge staffs; and correctly found that 7 C.F.R. § 1150.134 is not applicable to the decision to enter into an agreement with UDIA to form DMI.

Section 1150.134 provides that any producer nominated to serve on NDB shall file with the Secretary of Agriculture at the time of nomination a written agreement to: (1) serve on NDB, if appointed; (2) disclose any relationship with any organization that operates a qualified state or regional program or has a contractual relationship with NDB; and (3) withdraw from participation in deliberations, decision-making, or voting on matters that concern an organization that operates a qualified state or regional program or has a contractual relationship with NDB if the producer has a relationship with that organization. The record clearly establishes that NDB members who voted whether to approve NDB's agreement with UDIA (CX 1) filed the written agreement required by 7 C.F.R. § 1150.134 (RX 50).

NDB's guidelines provide that.

> A "relationship" exists whenever a member of the Dairy Promotion and Research Board is a board member or employee, of an organization that

> operates a qualified State or Regional program or an organization which has a contractual relationship with the Board. Also, a "relationship" can exist if the Board member stands in a position to gain financially from the operations of such other organization. Any "relationship" raises a potential conflict of interest.

RX 2 at 4.

At the time of the vote to approve NDB's agreement with UDIA, only two individuals, Mr. Elwood Kirkpatrick and Joseph Bavido, were on the board or an employee of UDIA and thereby had a "relationship" with UDIA as defined under NDB's guidelines (RX 49). There is no evidence in the record that any NDB member who voted on NDB's agreement with UDIA was in a position to gain financially as a result of the merger of the staffs of NDB and UDIA.

Moreover, there is no evidence that Messrs. Kirkpatrick and Bavido were required by 7 C.F.R. § 1150.134 to withdraw from participation in deliberations, decision-making, or voting on the NDB-UDIA agreement. When NDB first proposed consolidating its staff with UDIA's, NDB sought advice from the Dairy Division, AMS, regarding board member participation in the deliberations and decision concerning the merger. as follows:

April 1, 1987

Mr. Edward T. Coughlin
Director
Dairy Division, AMS, USDA
Room 2968-S
Washington, DC 20250

Dear Ed:

Recently, some of my Board members have raised questions regarding the conflict of interest policy as it applies to the recent merger discussions. As you know, the intent behind the plan proposed by the National Milk Producers Federation is to merge the United Dairy Industry Association with the National Dairy Board. A few years ago, a conflict of interest policy was adopted in which National Dairy Board members serving on other boards would be required to abstain from voting should matters involving the other board on which they serve come before the National Dairy Board. I have enclosed an article which also raises this question

regarding our January Board meeting in Monterey, California. Is the action taken in Monterey inconsistent with the conflict of interest policy?

I want to make sure that Board actions, both in the past and in the future, are consistent with the Board and USDA policies. Please let me have your thoughts on this matter.

Sincerely,

Joseph J. Westwater
Chief Executive Officer

RX 3 at 1.

Mr. Coughlin responded that all NDB members may participate in discussions and decisions relating to NDB structure without violating NDB policy or the Dairy Order, as follows:

15 May 1987

Mr. Joseph J. Westwater
Chief Executive Officer
National Dairy Promotion and
Research Board
2111 Wilson Boulevard, Suite 600
Arlington, Virginia 22201

Dear Joe:

This is in response to your inquiry on the appearance of a conflict of interest by certain Board members at the January 1987 meeting in Monterey, California.

We reviewed the recent actions taken by Board members on the reorganization issue and determined that Board members have not violated either the Board's policy or the Order with respect to appearance of conflict of interest.

In our view no Board member should be barred from the discussion and decisions pertaining to the establishment of a new National Dairy Board structure.

Sincerely,
EDWARD T. COUGHLIN
Director
Dairy Division

RX 3 at 3.

The Secretary of Agriculture reiterated and amplified this position in his July 25, 1994, response to Henry J. Voss, then-Secretary of CDFA (CX 56), in which the Secretary of Agriculture explicitly states that 7 C.F.R. § 1150.134 is "intended to address conflicts or potential conflicts involving the expenditure of Board funds for research and promotion programs and activities. The decision to create Dairy Management Inc., was not a contractual issue of this type, but rather a decision to create a more efficient staff to support National Dairy Board activities and to facilitate coordination of Board and UDIA activities. The agreement does not include authority for the expenditure of funds . . . It was appropriate, indeed essential, that all the Board members should participate in the discussion and decisions pertaining to the establishment of this new staff structure."

I concur with the Chief ALJ's agreement with the Secretary of Agriculture's interpretation of 7 C.F.R. § 1150.134.

Moreover, the vote to enter into an agreement with UDIA to form DMI was 27 votes in favor of the agreement and 7 votes against the agreement. There is no evidence in the record that indicates how Messrs. Kirkpatrick and Bavido voted. However, even if Messrs. Kirkpatrick and Bavido voted in favor of the decision to enter into an agreement with UDIA, their recusal would not have affected the outcome of the decision to enter the agreement with UDIA. Finally, even if I found that Messrs. Kirkpatrick and Bavido violated 7 C.F.R. § 1150.134 (which I do not), the Dairy Order does not require the invalidation of the decision to enter the agreement with UDIA.

Eighth, Petitioners contend that:

VII. THE RECORD CONTRADICTS THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT THE NATIONAL BOARD'S 1995 CONTRIBUTION TO DMI'S "CORE OR ADMINISTRATIVE COSTS" DID NOT VIOLATE 7 C.F.R. SECTION 1150.151

> The ALJ states in the Opinion at page 24 that "The National Dairy Board's contribution to DMI's core costs for 1995 will not exceed 5% of the National Dairy Board's projected revenue." Projected revenues from assessments are $77,400,000. Opinion, p. 47. Yet on page 23, the ALJ finds that the anticipated core costs payable by the National Board was $4,446,209.80. Five percent of $77,400,000 is $3,870,000. Thus, the record establishes the ALJ erred in finding that the 1996 payment of core costs by the National Board did not exceed 5% of anticipated revenue.

Petitioners' Appeal at 26-27 (footnote omitted).

I disagree with Petitioners' contention that the Chief ALJ "erred in finding that the 1996 payment of core costs by the National [Dairy] Board did not exceed 5% of anticipated revenue." As an initial matter, the Chief ALJ did not make any finding regarding NDB's payment of core costs in 1996, and NDB's 1996 payment of core costs is not an issue in this proceeding.

The Chief ALJ did, however, make findings concerning NDB's 1995 budget. In Finding of Fact No. 31, the Chief ALJ found that a document entitled "DMI 1995 Budget Report to the Board of Directors November 15, 1994" (CX 84) states that DMI's core costs budget for 1995 is $8,924,196 (Initial Decision and Order at 23). The Chief ALJ calculated that, based on NDB's and UDIA's agreement to share core costs equally, NDB's anticipated share of 1995 core costs would be $4,446,209.80[12] (Initial Decision and Order at 23). However, the "DMI 1995 Budget Report to the Board of Directors November 15, 1994" (CX 84), on which Petitioners rely, is a budget projection for 1995 that was superseded by the final budget for 1995, approved by NDB at the January 1995 and May 1995 meetings, approved by USDA on June 13, 1995 (RX 47), and reported to Congress by USDA on July 1, 1995 (RX 48). The approved budget states that NDB's 1995 revenue from assessments is $77,400,000 and NDB's 1995 administrative expense is $2,616,000 (RX 48 at 8). The approved budget reveals that the administrative expenses incurred by NDB for 1995 are 3.37984496124% of revenue. USDA's July 1, 1995, report to Congress states that "[t]he Dairy Board's administrative

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[12]I disagree with the Chief ALJ's calculation and find that, based on DMI's core costs budget for 1995 as reflected in "DMI 1995 Budget Report to the Board of Directors November 15, 1994" (CX 84), and NDB's and UDIA's agreement to share core costs equally, NDB's anticipated share of core costs would be $4,462,098. However, this slight disagreement between the Chief ALJ's calculation and my calculation of NDB's anticipated share of core costs based on the superseded "DMI 1995 Budget Report to the Board of Directors November 15, 1994" (CX 84), is not relevant to Petitioners' contention that the administrative expense incurred by NDB exceeded 5% of projected revenue in 1995.

budget continued to be within the five-percent-of-revenue limitation required by the [Dairy] Order." (RX 48 at 8.) The Chief ALJ correctly relied on the approved budget (RX 47, 48) rather than the superseded budget projection (CX 84) and correctly found that "[NDB's] contribution to DMI's core costs for 1995 will not exceed 5% of [NDB's] projected revenue" (Initial Decision and Order at 24 (Finding of Fact No. 32)) and that "[NDB's] 1995 contribution to DMI's 'core or administrative costs' did not violate 7 C.F.R. § 1150.151." (Initial Decision and Order at 26 (Conclusion No. 7).)

Ninth, Petitioners contend that:

> . . . DMI's formation and operation directly contravene the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2. This Act prohibits the establishment of any advisory committee unless "specifically authorized by statute or by the President; or . . . determined as a matter of formal record by the head of the agency involved . . . with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law." Id. §9(a)(1),(2). There is no evidence that any of these conditions exist with respect to the establishment of DMI.
>
> The Act further provides that "[n]o advisory committee shall meet or take any action until an advisory committee charter has been filed with . . . the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency." Id. §9(c) (emphasis added). No such charter was ever filed in the instant case. The Federal Advisory Committee Act thus presents an independent basis for deeming DMI unlawful.

Petitioners' Appeal at 13 n.4 (emphasis in original).

I disagree with Petitioners' contention that DMI's formation and operation are in violation of the Federal Advisory Committee Act (5 U.S.C. app. I. §§ 1-15) (hereinafter FACA). FACA was enacted to assess the need for the numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the federal government; to ensure that new advisory committees are established only when essential and that their number is minimized; to ensure that they are terminated when they outlive their usefulness; to ensure that their creation, operation, and duration are subject to uniform standards and procedures; to ensure that Congress and the public are apprised of their number, purpose, membership, activities, and

cost; and to ensure that their work is exclusively advisory in nature (5 U.S.C. app. I. § 2).

Section 3(2) of the Federal Advisory Committee Act defines the term *advisory committee*, as follows:

> **§ 3. Definitions**
>
> For the purpose of this Act—
>
> . . . .
>
> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—
>
> (A) established by statute or reorganization plan, or
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

5 U.S.C. app. I. § 3(2).

Legislative history relevant to FACA indicates that Congress did not intend to include within the definition of *advisory committee* organizations that have operational responsibilities. The House Report on this legislation states:

> The term advisory committee as used in this bill does not include committees or commissions which have operational responsibilities. Only those committees established for the purpose of obtaining advice are within the bill's definition. . . .
>
> The term advisory committee does not include any contractor or consultant hired by an officer or agency of the government, since such

contractor would not be a "committee, board, commission, council . . ., or similar group. . . ."

H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972), *reprinted in* 1972 U.S.C.C.A.N 3491, 3494.

The Senate Report on S. 3529, legislation similar to the House bill which was enacted, states:

> . . . [T]here are instances in which advisory committees also have operational functions, or cases in which a primarily operational unit is termed "commission" or "council," and is established as a quasi-independent unit reporting to the President directly, or through a Cabinet officer. Some like the Advisory Committee on Opportunities for Spanish-Speaking People, and the National Commission on Productivity, perform both operational and advisory functions. In such cases, it is the responsibility of the Office of Management and Budget to determine whether such committees are primarily operational, rather than advisory. If so, they would not fall under the ambit of this bill, but would continue to be regulated under the relevant laws, subject to the direction of the President and the review of the appropriate legislative committees. This is not to indicate, however, that OMB should broadly or loosely interpret this provision to maintain in existence government "commissions" or "councils" that are no longer useful. The intent of this legislation is to eliminate as much as possible unnecessary governmental organizations.

S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972).

Further, a number of courts have addressed the scope of FACA and have held that FACA is not applicable to organizations that are primarily operational in nature, even in those instances in which part of the organizations' duties are advisory.[13] Moreover, the General Services Administration, the federal agency

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[13] *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1995) (the Presidential Legal Expense Trust Fund is not primarily advisory in nature; its main purpose is collecting and managing funds, and therefore, even if some advice is forthcoming, the Presidential Legal Expense Trust Fund is not within the ambit of FACA); *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 934 (D.C. Cir. 1995) (the Low Back Panel, a group of experts and consumers convened by the Agency for Health Care Policy and Research, is not an advisory committee under FACA because the Low Back Panel is operational and develops guidelines for health care practitioners and does not provide advice to the federal government), *cert denied*, 116 S.Ct. 910 (1996); *Natural Resources Defense Council v. EPA*, 806 F. Supp. 275, 278 (D.D.C. 1992) (the Governors' Forum on Environmental Management is not merely advisory to EPA, but acts operationally, and therefore, is not subject to FACA); *Public Citizen*

responsible for all matters relating to advisory committees (5 U.S.C. app. I. § 7(a)), promulgated regulations which provide that committees that are operational are not covered by FACA, as follows:

> **§ 101-6.1004 Examples of advisory meetings or groups not covered by [FACA] or this subpart.**
>
> The following are examples of advisory meetings or groups not covered by [FACA] or this subpart[:]
>
> . . . .
>
> (g) Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by [FACA] if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of [FACA] and this subpart, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees[.]

41 C.F.R. § 101-6.1007(g).

The record clearly establishes that DMI, a not-for-profit corporation under the laws of the District of Columbia, is an operational organization (CX 1, 2). The language of FACA, the legislative history related to FACA, the court cases interpreting FACA, and the regulations issued by the agency responsible for all matters relating to advisory committees clearly establish that FACA does not apply to organizations like DMI, whose primary function is providing operational services to NDB and UDIA.

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v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 753, 757-58 (D.D.C. 1985) (the Commission's duties are all active, and it is, therefore, not an advisory committee under FACA); *HLI Lordship Industries, Inc. v. Committee for Purchase from the Blind & Other Severely Handicapped*, 615 F. Supp. 970 (E.D. Va. 1985) (the National Industries for the Severely Handicapped, a non-profit District of Columbia corporation providing administrative support for a program administered by a federal agency, is primarily operational and not within the ambit of FACA).

Tenth, Petitioners contend that:

> VIII. AN UNDULY NARROW READING OF THE "MENTAL PROCESSES" PRIVILEGE PREVENTED PETITIONERS FROM MORE FULLY DEVELOPING THE ADMINISTRATIVE RECORD AND PRESENTING EVIDENCE RELEVANT TO THE FACTS AT ISSUE HERE
>
> The ALJ, in the Opinion, reaffirms his ruling at trial that prohibited Petitioners from questioning USDA employees with respect to the basis for their approval of the DMI agreements. (Opinion, pp. 3-4.) Petitioners respectfully submit that the Morgan case relied upon by the ALJ is not applicable here.

Petitioners' Appeal at 27.

I disagree with Petitioners. *United States v. Morgan, supra*, and its progeny are directly applicable to this proceeding. In *Morgan*, the United States Supreme Court held that the Secretary of Agriculture should not be questioned as to his mental processes, as follows:

> But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged consideration favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding". *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1288. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary". 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch*, 195 U.S. 276, 306, 25 S.Ct. 58, 67, 49

L.Ed. 193, so the integrity of the administrative process must be equally respected. *See Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593, 27 S.Ct. 326, 51 L.Ed. 636. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States v. Morgan*, 307 U.S. 183, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211.

United States v. Morgan, supra, 313 U.S. at 421-22.

The mental processes privilege protects testimony of a government official who acts in a judicial, a quasi-judicial, or an administrative capacity and has arrived at decisions within the scope of his or her duties. The protection covers testimony as to mental processes by which the official arrived at the decision, including the matters considered, the manner and extent of the study of the subject, contributing influences, consultation with subordinates, and reliance on the work or expression of others.[14] Since *Morgan*, federal courts have held that, absent a strong showing of bad faith or wrong doing on the part of the government official, a government decision-maker will not be compelled to testify about his or her mental processes in reaching a decision.[15]

The Chief ALJ properly sustained objections to Petitioners' questions probing the mental processes of Richard McKee,[16] and the Chief ALJ properly informed Petitioners that he would sustain objections to questions probing the mental

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[14]*See Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *United States v. Hooker Chemicals & Plastics Corp.*, 123 F.R.D. 3, 17 (W.D.N.Y. 1988).

[15]*See FDIC v. 11,950 Acres of Land*, 58 F.3d 1055, 1060 (5th Cir. 1995); *In re United States*, 985 F.2d 510, 512 (11th Cir.), *cert. denied sub nom. Faloon v. United States*, 510 U.S. 989 (1993); *In re Office of the Inspector General, R.R. Retirement Bd.*, 933 F.2d 276, 278 (5th Cir. 1991); *Franklin Savings Ass'n v. Ryan, supra*, 922 F.2d at 211-12; *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586-87 (D.C. 1985); *Warren Bank v. Camp*, 396 F.2d 52, 56-57 (6th Cir. 1968); *Singer Sewing Machine v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964). (The Judicial Officer has also held that, absent a strong showing of bad faith or wrong doing on the part of the government official, a government decision-maker will not be compelled to testify about his or her mental processes in reaching a decision. *In re Sequoia Orange Co., supra*, 47 Agric. Dec. at 198-202 (1988)).

[16]Richard McKee is the Director of the Dairy Division, AMS, USDA (Tr. Vol. III at 37).

processes of Eugene Krueger[17] and Silvio Capponi[18] if Petitioners called them as witnesses, as follows:

[BY MR. McKEE:]

Q. Now prior to Mr. Capponi's letter, did you read the agreement, CX-1?

[BY MR. WINEBERG:]

A. Yes, I had read it.

Q. Okay. And I assume -- well, let me ask you, did you have any problems with this agreement?

MS. CARROLL: Objection.

JUDGE PALMER: What basis?

MS. CARROLL: It's overbroad, and problems, it calls for legal answer. It's trying to probe his processes as a government --

JUDGE PALMER: I'll sustain it. I am concerned with the Morgan issue.

MR. WINEBERG: Let me see if I can rephrase it and get it in a different way.

BY MR. WINEBERG:

Q. Did you raise any questions concerning this agreement with anyone?

MS. CARROLL: Same objection.

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[17]Mr. Krueger is the Chief of the Promotion and Research Staff, Dairy Division, AMS, USDA (CX 33; Tr. Vol. III at 54).

[18]Mr. Capponi is the Acting Director of the Dairy Division, AMS, USDA (Finding of Fact No. 18).

JUDGE PALMER: Under Morgan, that would be inappropriate. You're probing his mental processes. You can't probe the processes of a government official who is performing an institutional act.

BY MR. WINEBERG:

Q. In approving this agreement, you read the agreement, is that correct?

A. I did not approve the agreement. I read the agreement in a review of a letter that was submitted to another office.

Q. Okay. Now the letter that was submitted to the other office, is that the exhibit that we showed you previously, CX-33?

A. CX-33, that's correct.

Q. Other than CX-1 and CX-33, did you review any other documents concerning this agreement?

MS. CARROLL: I'm going to object again.

JUDGE PALMER: Sustained. You're still probing his mental processes.

MS. CARROLL: He signed the approval letter and -- or initialed it.

JUDGE PALMER: Well, we're probing his mental processes.

MR. WINEBERG: I think I'm entitled, Your Honor, even under Morgan, to show what materials and what information was presented in connection with the approval.

JUDGE PALMER: No, not at all. You're not allowed to probe anything. You have the institutional act. The institutional act stands on its face.

I'm very aware of this because I allowed some probing of a government official in another case and was chastised for it both by the

judicial officer and by [the] 9th Circuit, so Morgan is still good law. You cannot ask these people why they did what they did.

MR. WINEBERG: I might comment, Your Honor, based upon several 9th Circuit cases that I think we're all familiar with recently, I don't think the law of the 9th Circuit applies in that way at this time.

JUDGE PALMER: As to the Morgan case it does.

MR. WINEBERG: May I have a standing tender that with the next three witnesses I would ask the same type of questions as to what material they considered?

JUDGE PALMER: Yes. That's right, they're all government officials and we have the same problem with all of them. We'd be groping --

MS. CARROLL: We'd make the same objection.

JUDGE PALMER: Yes.

MR. WINEBERG: And may I ask, just so that the record is clear, one other question?

JUDGE PALMER: All right.

BY MR. WINEBERG:

Q. What section if any of the order or act did you rely upon when you reviewed this material?

MS. CARROLL: Objection.

JUDGE PALMER: Sustained for the same reason.

MR. WINEBERG: As I understand it, I have a standard, and if I were to show him documents and ask him if he reviewed them, it would be the same --

JUDGE PALMER: Same objections and same rulings.

MR. WINEBERG: Okay.

JUDGE PALMER: You do have the same objection?

MS. CARROLL: Yes.

MR. WINEBERG: So I have a standing --

JUDGE PALMER: The concept is, as you know, that for government to operate there has to be some meetings between government officials and you're not to probe into those, other than if they come into one of these open meeting situations, but typically they're allowed to make an institutional-type decision. Under Morgan cases you don't go behind them.

. . . .

Q. Now let me go back to Exhibit 1 for a minute. I will ask a question and see if I get an objection.

When you -- at any time prior to the approval of Exhibit 1, did you receive a budget in connection with the activities set forth in Exhibit 1?

MS. CARROLL: Objection. I don't want to disappoint you.

JUDGE PALMER: Pardon?

MS. CARROLL: Objection.

JUDGE PALMER: On what grounds?

MS. CARROLL: On the grounds that it requests information that would have led to --

JUDGE PALMER: Getting back to his mental processes?

MS. CARROLL: It's asking him what in fact he relied on.

JUDGE PALMER: I think it would open the door, so I'll sustain it.

MR. WINEBERG: I think we've gone -- I think, Your Honor, that is carrying it to the -- when you have an attorney-client objection, you can ask if there was a communication and find out that the communication existed, but then you can't get the substance of the communication.

Whether or not there was a budget is a significant issue in connection with the submission of an agreement. The answer can be yes or no and then not mental processes. It's whether or not there was a physical document submitted.

MS. CARROLL: But the question itself suggests that there was more that was contained in -- that was subject to the approval process than just this document.

JUDGE PALMER: I'm fearful that if we start going down a litany of what he had and didn't have, we're right back where we were, and if we ask one of these, then the implication may be that he wants to show that there were additional things. We're sort of making the problem worse and worse.

I'm going to sustain the objection.

MR. WINEBERG: I'll just make an offer of proof so there is no claim that anyone was sandbagged on this. My reading of the statute and the order is that for the approval of any contract there must be a budget submitted as set forth in those sections, and the issue is on this case is whether or not there was a proper approval of this agreement.

The agreement provides for expenditure of funds. I'm not permitted to go through the agreement and ask about provisions. I'd like to but I understand Your Honor has ruled that I can't. But I think that at a minimum the existence of a budget, since it is specifically provided in the order and statute, is an essential element.

I mean, if they'll stipulate there was none, that's fine.

MS. CARROLL: This is a legal issue and --

JUDGE PALMER: There must be some other way to establish whether or not a budget was submitted other than through this witness, I would think.

MS. CARROLL: I think that the agreement speaks for itself and that whether it was properly authorized or approved by the department is -- I mean, it's a legal issue.

JUDGE PALMER: Well, I've sustained the objection. We'll leave it there.

. . . .

JUDGE PALMER: Let's go on the record. Where were we when we were off the record before?

MR. WINEBERG: I think we just finished Mr. McKee.

JUDGE PALMER: All right, who will you call now?

MR. WINEBERG: Your Honor, I'd like to make a short statement, and it might modify what's going to happen.

JUDGE PALMER: Sure.

MR. WINEBERG: Over the lunch break, Stephanie was good enough to find a copy of the Morgan case for me, which I've reviewed again to refresh my recollection. I would just like to state for the record, I feel that Morgan is irrelevant to the issues that we're facing here. That was a rate-making proceeding in which the secretary was establishing rates, and there were findings, et cetera, that supported his determination, which was then subject to review.

The United States Supreme Court -- I believe it was Justice Frankfurter -- said the proceedings before the secretary, quote, "had the quality resembling that of a judicial proceeding."

Based on that finding, the Court went on and said, "such an examination of a judge would be destructive of judicial responsibility," and

went ahead and basically found as Your Honor recalls, that the mental processes of the secretary could not be pursued.

I continue to think that this is very distinguishable from the type of proceeding that was involved in Morgan, which is the issue of supervision of a -- not an advisory board but of a marketing board pursuant to a statute and order, and there is basically no basis for a decision set forth in any of the approvals. It is a bare bones approved.

Having made that statement, I respectfully disagree with Your Honor's ruling as to what I could inquire into with Mr. McKee. I was going to call Mr. Krueger and Mr. Capponi, but the questions I would ask them would pretty much mirror the inquiry that I was going to conduct with Mr. McKee.

Unless Your Honor will reconsider his ruling on that basis, I can call them and we can spend time making a record, or we could stipulate that we don't need to do that. I would propose the latter.

MS. CARROLL: I would agree to that.

JUDGE PALMER: I'll make the same ruling. I appreciate your reviewing the Morgan case, and you're right, it had a certain context, but it's been expanded, as I recall, to virtually everything in the government and it's cited as one of the major bastions, if you will, of administrative law.

It's been brought to my attention on a number of different occasions where I thought that you could go somewhat off just to find out what happened. Although I do allow some latitude, and I think I did with Mr. McKee until he gets into what did you consider in making your decision. I think that comes within the ambit the proscriptions of Morgan and I think that's inappropriate to allow.

MR. WINEBERG: I disagree to the extent that I was prohibited from saying what documents were before him. But I'm happy to proceed on the record that we have now on that basis. I assume rulings made in my examination will also apply when counsel gets up.

JUDGE PALMER: Yes, I would imagine the same thing would apply, that she's not going to look into somebody's mental processes behind a decision.

MS. CARROLL: Mr. Wineberg was completely at ease in making his own Morgan objections, too.

JUDGE PALMER: Do you have another witness, then?

MR. WINEBERG: Mr. Adri Boudewyn.

The record is then clear that I would have called Mr. Krueger and Mr. Capponi and asked about the approval of the various contracts, et cetera.

JUDGE PALMER: Yes, this is all on the record.

Tr. Vol. III at 40-43, 48-50, 71-73.

In *Franklin Savings Ass'n, supra*, Mr. Wall, Director of the Office of Thrift Supervision, refused to answer the following five questions:

Q. Mr. Wall, why did you decide to impose a conservatorship upon Franklin Savings Association?

* * * * * *

Q. What information did you rely upon in deciding to impose a conservatorship upon Franklin?

* * * * * *

Q. What were the sources of the information upon which you based your decision to placed [sic] Franklin under conservatorship?

* * * * * *

Q. Did you have any conversation with anyone at the OTS about placing Franklin into a conservatorship?

* * * * * *

Q. Did anyone at the OTS provide you with any information about Franklin that led you to put them [sic] into a conservatorship?

Franklin Savings Ass'n v. Ryan, supra, 922 F.2d at 210 n.2.

Mr. Wall was ordered by the district court to answer the five questions, and when he refused, an order of civil contempt was entered against him. Mr. Wall appealed and the United States Court of Appeals for the Fourth Circuit vacated and set aside the order of civil contempt on the ground that the five questions posed to Mr. Wall went to the mental processes by which Mr. Wall arrived at his decision to appoint a conservator and there was no showing of misconduct or wrongdoing on the part of Mr. Wall. *Franklin Savings Ass'n, supra,* 922 F.2d at 211-12. The questions asked of Mr. Wall are similar to those Petitioners posed to Mr. McKee and asserted they would have posed to Messrs. Krueger and Capponi. Petitioners have not made a showing of bad faith or misconduct on the part of Messrs. McKee, Krueger, or Capponi with respect to their decisions regarding the approval of the agreement between NDB and UDIA (CX 1). Therefore, the Chief ALJ properly sustained objections to Petitioners' questions regarding Mr. McKee's mental processes and properly informed Petitioners that he would sustain objections to questions posed to Messrs. Krueger and Capponi regarding their mental processes with respect to their decision to approve the agreement between NDB and UDIA. Moreover, I note that Petitioners' challenge in this proceeding is primarily focused on the decision to approve the agreement between NDB and UDIA (CX 1) and the agreement between NDB and DMI (CX 2), not on the reasons for the approval of the agreements.

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

Order

The relief requested by Petitioner is denied and the Petition is dismissed.

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISIONS

In re: ROBERT SPRING.
DNS Docket No. 95-13.
Decision and Order filed January 24, 1996.

Nonprocurment debarment and suspension--Decision of debarring official affirmed--Conviction of conspiring to rig bids--"Present responsibility" not shown.

Chief Judge Palmer affirmed the three year debarment of Respondent which was based on his conviction of conspiring to rig bids and allocate contracts for the sale of dairy and related products to public schools. The seriousness of the offense, the length of time that has passed since the offense, and Respondent's conduct in the interim must be considered by the debarring official when determining "present responsibility.' The Notice of Debarment indicates that the debarring official considered the relevant factors, including the mitigating circumstances presented by Respondent. The debarring official's decision to debar Respondent was reasonably related to a valid administrative purpose and was not arbitrary or capricious.

William E. Ludwig, Debarring Official.
Rachel H. Bishop, for FCS.
David I. Pollowitz, New Britain, CT, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515 (1993), the regulations which implement a governmentwide system for nonprocurement debarment and suspension (Regulations).[1] On November 14, 1995, Respondent Robert Spring filed an appeal of the October 6, 1995, decision of the debarring official, William E. Ludwig, Administrator, Food and Consumer Service (FCS), United States Department of Agriculture (USDA or Department), which debarred Respondent from participation in government programs for a three-year period beginning October 6, 1995. The basis for the debarment is Respondent's conviction on September 16, 1994, in the United States District Court for the District of Connecticut, of conspiring to rig bids and allocate contracts for the sale of dairy and related products to public schools in various towns in

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[1]The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

Connecticut beginning at least as early as 1980 and continuing thereafter until at least June 1991, in violation of section 1 of the Sherman Act (15 U.S.C. § 1). In connection with his conviction, Respondent was ordered to pay a criminal fine of $20,000 and a special assessment of $50. Respondent also received three years of probation, including two months of home detention.

These debarment proceedings were instituted by FCS pursuant to 7 C.F.R. §§ 3017.100-.515. On January 18, 1995, William E. Ludwig, Administrator of FCS, issued a Notice of Proposed Debarment received by Respondent on January 21, 1995. The notice advised Respondent that his debarment was proposed pursuant to 7 C.F.R. § 3017.305(a)(2), which authorizes debarment for "[v]iolation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging."

Pursuant to 7 C.F.R. § 3017.313(a), on February 8, 1995, and February 14, 1995, Respondent submitted a timely response in opposition to the Notice of Proposed Debarment. Additional written submissions on Respondent's behalf were submitted to the debarring official by Respondent's probation officer and the Connecticut Department of Agriculture. On March 28, 1995, May 11, 1995, June 26, 1995, August 8, 1995, and October 2, 1995, William E. Ludwig, Administrator of FCS, advised Respondent that he had extended the time for filing his decision on the basis of his "need to consider each of the many factors in this case." On October 6, 1995, Respondent was issued a Notice of Debarment, debarring him from participation in Federal nonprocurement programs for a period of three (3) years.

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The decision by the administrative law judge is based solely upon the administrative record which must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Respondent appealed the decision of the debarring official on November 14, 1995 (Appeal).

On November 17, 1995, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, FCS filed a copy of the administrative record and a Response in Opposition to the Appeal Petition (Response) on December 15, 1995. Although the rules of procedure provide that Respondent was entitled to file a reply within ten days of the filing of the administrative record, no reply has been filed.

References to the record in the administrative proceeding below are cited as "AR" followed by the number of the document.

The administrative record fully supports the three-year debarment of Respondent, Robert Spring. Accordingly, the decision of the debarring official is affirmed.

Findings

The debarring official must reach a decision "on the basis of all the information in the Administrative Record, including any submission made by the respondent." 7 C.F.R. § 3017.314(a). Respondent submitted to the debarring official a letter dated February 8, 1995, contesting his suspension and proposed debarment (AR 8).[2] Specifically, the letter stated, in relevant part:

> . . .
>
> Finally, regarding the matter of whether Mr. Spring is a responsible person in his personal life, other than the anti-trust violation, which he deeply regrets and which has caused him great emotional pain, suffering and financial stress, has lived and continues to live an exemplary life as a father and husband to his wife of 24 years. . . . In the difficult world we live in he would receive the highest marks for being a responsible family man.
>
> In § 3017.115(b) debarment is defined as a serious action which shall be used only in the public interest and for the Federal Government protection and not for the purpose of punishment.
>
> First, Mr. Spring has not engaged in any action since 1990 to the present or would engage in the future in any action that is contrary to the public interest. He has never had any previous problems with the law. He has provided through Mohawk Dairy Inc. school milk service to five rural towns for the past 10 to 15 years in accordance with their special needs. Without Mohawk they may have a disruption of their delivery system and higher costs. He has provided through Mohawk Dairy Inc. competition to the other school milk providers and the public has benefited from this competition.
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> . . .

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[2]Respondent submitted an additional letter in opposition on February 14, 1995. (AR 11). The information contained therein essentially reiterates the allegations made in the previous letter (AR 8) and need not be set forth in this decision.

It is essential to maintain competition in the school milk market place otherwise the towns will be left to deal with eventually one vendor at its terms and prices which will not benefit the public interest.

In the event of debarment of Mr. Spring there is no one to run Mohawk Dairy plus the school business represents one-half of his business and it will make it impossible to operate.

Connecticut has suffered severely in the job recession and for many of the old time employees it would mean loss of a job and permanent unemployment.

Ironically instead of maintaining competition debarment would reduce competition which would not be in the public interest and only serve for the purpose of punishment.

It is therefore respectfully requested that the proposed debarment of Mr. Robert Spring not be pursed [sic] in that the policy set forth in §3017.115 (a) regarding the issue of responsible person and (b) regarding the use only in the public interest and not for purposes of punishment are not appropriate under the circumstances.

In the Notice of Debarment issued on October 6, 1995, the debarring official concluded that Respondent's submission consisted of five points and dealt with them as follows (AR 23):

1. You have cooperated with the Federal Government and the State of Connecticut in their school milk antitrust investigation.

Included in the submission from your counsel is a letter from Robert M. Langer, Assistant Attorney General of the State of Connecticut. Admin. Rec. Ex. 8, Attachment 2. Mr. Langer indicates that you have cooperated in the school milk antitrust investigation and are willing to be of further assistance. *Id.*

Your cooperation with the Federal Government and the State of Connecticut's investigations is a factor in making a final determination in your case. However, while your cooperation with the investigations is a positive element, it does not change the wrongdoing, alleviate the effect your activities had on FCS programs, or fully address the question of your present responsibility to engage in nonprocurement transactions. Furthermore, you

received the benefit of your full cooperation in the forum in which it was offered. According to the plea agreement you entered into with the United States, the United States agreed not to bring "any further criminal charges under the federal antitrust laws or any criminal charges under 18 U.S.C. §1503 and 18 U.S.C. §1623 against Robert Spring...for any offense committed before entry of the plea pursuant to this plea agreement involving the conspiracy to rig bids for the supply of dairy and other products to public schools in Connecticut." Admin. Rec. Ex. 2, para. 16.

2. You have acted in a responsible and reliable manner over many years as demonstrated by the company's longstanding relationship with five rural school districts and two recently won non-rural school districts.

Your counsel states in the written submission that you have acted in a responsible manner as demonstrated by the contracts awarded to Mohawk Farms, Inc. (Mohawk Farms) over the past 10 to 15 years by 5 rural towns where low volume, distance and high cost have made them unattractive to competing dairies. Admin. Rec. 8, page 3. You have also recently won two highly competitive non-rural contracts from a larger competitor which has contracts in approximately 65% of the schools in Connecticut, thereby demonstrating that Mohawk Farms, and thus you as its sole principal, are reliable. *Id.*

The Administrative Record reflects that your customers trust and value your service. Admin. Rec. Ex. 12. However, the fact remains that you engaged in and were convicted on Federal charges of bidrigging. By doing so you not only participated in a serious crime, but exploited the trust of your customers and placed the future of your company and its employees in jeopardy. The Administrative Record is unfortunately devoid of indications that since the time of your conviction, you have sought to address the problem by obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines for your company. It is my duty to act in the public interest and for the Federal Government's protection. Your failure to institute checks and balances on school milk bidding and to prevent future bidrigging, reflects a failure to attain present responsibility. In light of the seriousness of the crime with which you were convicted, and the lack of action on your part to address the problem, I cannot consider you to be presently responsible.

3. You have not been involved in any action contrary to the public interest since 1990 and will not be in the future. You never had any previous problems with the law. You are remorseful about your involvement in the bidrigging activity.

The submission by your counsel indicates that "other than the antitrust violation, which [you] deeply regret[]" you have lived and continue to live an exemplary life dedicated to your family. Admin. Rec. Ex. 8, pages 3-4. Your wife, in a letter to the Honorable Ellen B. Burns, further describes your remorse as well as your dedication to her and your two children. Admin. Rec. Ex. 8, Attachment 1. Your second submission by counsel further states that you have committed no further violations of section 1 of the Sherman Act. Admin. Rec. Ex. 8., pages 2 and 11.

Your remorse and commitment to never become involved in any unethical or illegal activity again, and record of no antitrust violations since 1990 are factors in your favor. However, to date you have not taken any active measures (such as obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines for your company) to assure me that you would not become involved in any anti-competitive activities again. Nor have you instituted any safeguards as president of your company to ensure that no employee does so.

In light of your past conduct and your lack of active efforts to address the problem, I cannot consider you to be presently responsible simply based on remorse and statements of commitment. The public interest and that of the Federal Government will be best served by ensuring that you are prohibited from participating in Federal nonprocurement programs for the period of your debarment.

4. You are the sole principal of Mohawk Farms, and if you are debarred there will be no one to run Mohawk Farms.

According to the written submission from your counsel, Mohawk Farms is "totally dependent upon [you]" and in the event of your debarment there will be no one to run Mohawk Farms. Admin. Rec. Ex. 8, pages 2 and 4. The Commissioner of Agriculture of the State of Connecticut further notes that as President and sole principal of Mohawk Farms, "[you] are extremely critical to its continuing operation." Admin. Rec. Ex. 12.

While we recognize the asserted importance of your position and your experience to the company, FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. §3017.115 (b). FCS is taking this action against you in keeping with that standard. The company's future is in jeopardy as a result of your illegal activity. Further, your failure to take appropriate corrective action has left me no alternative but to consider that you are not presently responsible. Therefore, I must debar you in keeping with FCS' obligation to the public interest and the Federal Government to conduct business only with responsible persons.

5. Debarring you would result in a less competitive market.

Your counsel contends that because debarring you would jeopardize Mohawk's continued existence that it would also reduce competition which would not be in the public interest and would only serve as punishment. Admin. Rec. Ex. 8, page 4. The five rural towns served by Mohawk Farms for the last 10-15 years could suffer disruption of their delivery system, face higher costs, and be "left to deal with eventually one vendor at its terms and prices which would not benefit the public interest." Id. The Commissioner of Agriculture of the State of Connecticut indicates that your debarment "would almost certainly cause a severe disruption of the distribution of milk to school children. . . ." Admin. Rec. Ex. 12.

FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. §3017.115(b). The potential effect on market competitiveness is a factor in making a final determination in this matter. FCS is concerned about the potential impact of debarment on competition and the economic conditions of the communities and businesses in your region. However, while FCS is committed to maintaining as broad a competitive market as possible, we must balance these concerns with our obligation to protect that interest and the Federal Government. In fulfilling this obligation, FCS is committed to assuring that dairy companies bidding on school milk contracts are presently responsible, and therefore, worthy of serving those school districts. Theoretical price increases or potential reductions in competition cannot outweigh that regulatory obligation.

Conclusions

The debarring official must reach a decision "on the basis of all the information in the Administrative Record, including any submission made by the respondent." 7 C.F.R. § 3017.314(a). In making such decision, the debarring official is required to consider the seriousness of respondent's offenses and any mitigating factors. 7 C.F.R. § 3017.300. The ultimate inquiry in a debarment decision must be directed to the "present responsibility" of the respondent. *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989). The seriousness of the offense, the length of time that has passed since the offense, and the respondent's conduct in the interim must all be considered when determining "present responsibility." *Silverman v. United States Dep't of Defense*, 817 F. Supp. 846, 849 (S.D. Cal. 1993).

In his appeal, Respondent raises several arguments: 1) he has cooperated with the Federal Government and the State of Connecticut in their antitrust investigations; 2) his present responsibility is demonstrated by his longstanding relationship with five rural school districts and two recently-won non-rural contracts; 3) he has committed no violations since the beginning of the antitrust investigations; 4) he is the sole principal of Mohawk Farms, and if he is debarred no one will be able to run the business; and 5) his debarment would result in reduced competition. Respondent contends that the debarring official's decision was "arbitrary and capricious and an abuse of discretion." (Appeal).

As stated in *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983), in assessing agency action under the "arbitrary and capricious" standard, it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." As evidenced in the Notice of Debarment, it is clear that the debarring official considered the mitigating circumstances presented by Respondent:

. . .

> Your cooperation with the Federal Government and the State of Connecticut's investigations is a factor in making a final determination in your case. However, while your cooperation with the investigations is a positive element, it does not change the wrongdoing, alleviate the effect your activities had on FCS programs, or fully address the question of your present responsibility to engage in nonprocurement transactions. Furthermore, you received the benefit of your full cooperation in the forum in which it was offered.

. . .

> The Administrative Record reflects that your customers trust and value your service. Admin Rec. Ex. 12. However, the fact remains that you engaged in and were convicted on Federal charges of bidrigging. By doing so you not only participated in a serious crime, but exploited the trust of your customers and placed the future of your company and its employees in jeopardy.
>
> . . .
>
> While we recognize the asserted importance of your position and your experience to the company, FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. § 3017.115 (b). FCS is taking this action against you in keeping with that standard. The company's future is in jeopardy as a result of your illegal activity.
>
> . . .
>
> FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. § 3017.115(b). The potential effect on market competitiveness is a factor in making a final determination in this matter. FCS is concerned about the potential impact of debarment on competition and the economic conditions of the communities and businesses in your region. However, while FCS is committed to maintaining as broad a competitive market as possible, we must balance these concerns with our obligation to protect that interest and the Federal Government. In fulfilling this obligation, FCS is committed to assuring that dairy companies bidding on school milk contracts are presently responsible, and therefore, worthy of serving those school districts. Theoretical price increases or potential reductions in competition cannot outweigh that regulatory obligation.

Moreover, the Notice of Debarment indicates that the debarring official examined the administrative record, took into account all of the relevant factors in reaching a conclusion, and articulated a rational basis for these conclusions:

> Upon review of the Administrative Record, it is my determination that the information in support of the debarment outweighs the information and argument presented in the written submissions on your behalf. Therefore, it is my determination that you shall be debarred effective on the date of this letter and extending for 3 years.

When discussing the present responsibility and remorse of Respondent, however, the debarring official stated:

> The Administrative Record is unfortunately devoid of indications that since the time of your conviction, you have sought to address the problem by obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines for your company. . . . Your failure to institute checks and balances on school milk bidding and to prevent future bidrigging, reflects a failure to attain present responsibility.
>
> . . .
>
> Your remorse and commitment to never become involved in any unethical or illegal activity again, and record of no antitrust violations since 1990 are factors in your favor. However, to date you have not taken any active measures (such as obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines for your company) to assure me that you would not become involved in any anti-competitive activities again. Nor have you instituted any safeguards as president of your company to ensure that no employee does so.

(AR 23).

There are no regulations requiring such measures to be taken. Nor is there any showing that Respondent was ever asked to take such measures or given the opportunity to do so. *See In re Jeffrey K. Bennett*, 54 Agric. Dec. ___, DNS Docket No. 95-10 (Oct. 2, 1995); *In re George R. Reynolds*, 54 Agric. Dec. ___ , DNS Docket No. 95-8 (Aug. 9, 1995). In fact, Respondent states in his Appeal, "Mr. Spring [was] unaware that any additional action was required to satisfy the issue of being responsible since compliance had been made for approximately five years and would continue to be made by Mr. Spring, the only employee involved in bidding." However, in that the debarring official clearly stated in the Notice of Debarment that "the seriousness of the criminal acts" was the essential reason why he could not consider respondent to be presently responsible, I find that the inclusion of this additional concern constitutes harmless error.

Respondent's conviction for bidrigging strikes at the very heart of public trust. Respondent presented evidence that his customers value his service and have placed their trust in him and his product. (AR 12). However, Respondent's conviction for bidrigging shows this trust to have been exploited. Nothing less than his debarment will provide the necessary protection of the public interest. Respondent participated in a bidrigging scheme from 1981-1990, a lengthy period

of time. The three year, maximum term of debarment imposed by the debarring official is an appropriate time period for resolving the serious doubts that first concerning Respondent's present responsibility and whether the government's interest would be adequately protected in future dealings with Respondent.

In conclusion, the record supports the debarring official's decision to debar Respondent. The debarring official, after consideration of all relevant factors, including the mitigating circumstances presented by Respondent, concluded that debarment was warranted. The debarring official's decision to debar Respondent was reasonably related to a valid administrative purpose and was, therefore, clearly not arbitrary or capricious.

Order

The decision of the debarring official is affirmed.

This order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final January 24, 1996.-Editor]

In re: MOHAWK FARMS, INC.
DNS Docket No. 95-14.
Decision and Order filed January 24, 1996.

Nonprocurement debarment and suspension--Decision of debarring official affirmed--Conviction of Respondent's sole principal for conspiring to rig bids--Imputation of conviction--"Present responsibility" not shown.

Chief Judge Palmer affirmed the three year debarment of Respondent which was based on the conviction of its sole principal for conspiring to rig bids and allocate contracts for the sale of dairy and related products to public schools. Criminal conduct of Respondent's principal was imputed to Respondent corporation. The seriousness of the offense, the length of time that has passed since the offense, and Respondent's conduct in the interim must be considered by the debarring official when determining "present responsibility." The Notice of Debarment indicates that the debarring official considered the relevant factors, including the mitigating circumstances presented by Respondent. The debarring official's decision to debar Respondent was reasonably related to a valid administrative purpose and was not arbitrary or capricious.

William E. Ludwig, Debarring Official.
Rachel H. Bishop, for FCS.
David I. Pollowitz, New Britain, CT, for Respondent
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515 (1993), the regulations which implement a governmentwide system for nonprocurement debarment and suspension (Regulations).[1] On November 14, 1995, Respondent Mohawk Farms, Inc., filed an appeal of the October 6, 1995, decision of the debarring official, William E. Ludwig, Administrator, Food and Consumer Service (FCS), United States Department of Agriculture (USDA or Department), which debarred Respondent from participation in government programs for a three-year period beginning October 6, 1995. The basis for the debarment is the conviction of Respondent's sole principal, Robert Spring, on September 16, 1994, in the United States District Court for the District of Connecticut, of conspiring to rig bids and allocate contracts for the sale of dairy and related products to public schools in various towns in Connecticut beginning at least as early as 1980 and continuing thereafter until at least June 1991, in violation of section 1 of the Sherman Act (15 U.S.C. § 1).

These debarment proceedings were instituted by FCS pursuant to 7 C.F.R. §§ 3017.100-.515. On January 18, 1995, William E. Ludwig, Administrator of FCS, issued a Notice of Proposed Debarment received by Respondent's principal on February 9, 1995. The notice informed Respondent's principal, Robert Spring, that under 7 C.F.R. §3017.325(b)(1), his criminal conduct may be imputed to Respondent since such conduct occurred in connection with his performance of duties for or on behalf of Respondent, or with Respondent's knowledge, approval, or acquiescence. The notice further advised Respondent that its debarment was proposed pursuant to 7 C.F.R. § 3017.305(a)(2), which authorizes debarment for "[v]iolation of Federal or State anti-trust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging."

Pursuant to 7 C.F.R. § 3017.313(a), on February 8, 1995, and February 14, 1995, Respondent submitted a timely response in opposition to the Notice of Proposed Debarment. An additional written submission on Respondent's behalf was submitted to the debarring official by the Connecticut Department of Agriculture. On March 28, 1995, May 11, 1995, June 26, 1995, August 8, 1995, and October 2, 1995, William E. Ludwig, Administrator of FCS, advised Respondent that he had extended the time for filing his decision on the basis of his

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[1]The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

"need to consider each of the many factors in this case." On October 6, 1995, Respondent was issued a Notice of Debarment, debarring it from participation in Federal nonprocurement programs for a period of three (3) years. Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The decision by the administrative law judge is based solely upon the administrative record which must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Respondent appealed the decision of the debarring official on November 14, 1995 (Appeal).

On December 6, 1995, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, on December 18, 1995, FCS filed a timely copy of the administrative record and a Response in Opposition to the Appeal Petition (Response). Although the rules of procedure provide that Respondent was entitled to file a reply within ten days of the filing of the administrative record, no reply has been filed.

References to the record in the administrative proceeding below are cited as "AR" followed by the number of the document.

The administrative record fully supports the three-year debarment of Respondent, Robert Spring. Accordingly, the decision of the debarring official is affirmed.

Findings

The debarring official must reach a decision "on the basis of all the information in the Administrative Record, including any submission made by the respondent." 7 C.F.R. § 3017.314(a). Respondent submitted to the debarring official a letter dated February 14, 1995, contesting the suspension and proposed debarment and incorporating the material contained in a letter submitted on behalf of Respondent's principal on February 8, 1995. (AR 8). Specifically, the Respondent stated in relevant part[2]:

. . .

[2]The pertinent allegations from both submissions are set forth and identified by document number.

> The Justice Department commenced its anti-trust action sometime in 1990 and since then there have been no violations by ... Mohawk Farms, Inc. of Section 2 [sic] of the Sherman Act (15 USC 1).

(AR 11).

> . . .
>
> The dairy, because of its size and small staff is totally dependent upon Mr. Spring and he has acted as a most responsible person to the many long time employees and school and home customers.
>
> In § 3017.115(b) debarment is defined as a serious action which shall be used only in the public interest and for the Federal Government protection and not for the purpose of punishment.
>
> . . . [Mohawk has provided] school milk service to five rural towns for the past 10 to 15 years in accordance with their special needs. Without Mohawk they may have a disruption of their delivery system and higher costs. [Mohawk has] provided competition to the other school milk providers and the public has benefited from this competition.
>
> . . .
>
> It is essential to maintain competition in the school milk market place otherwise the towns will be left to deal with eventually one vendor at its terms and prices which will not benefit the public interest.
>
> . . .
>
> Connecticut has suffered severely in the job recession and for many of the old time employees it would mean loss of a job and permanent unemployment.
>
> Ironically instead of maintaining competition debarment would reduce competition which would not be in the public interest and only serve for the purpose of punishment.
>
> It is therefore respectfully requested that the proposed debarment of [Mohawk] not be pursed [sic] in that the policy set forth in § 3017.115 (a) regarding the issue of responsible person and (b) regarding the use only in the public interest

> and not for purposes of punishment are not appropriate under the circumstances.

(AR 8).

In the Notice of Debarment issued on October 6, 1995, the debarring official concluded that Respondent's submission consisted of three points and dealt with them as follows (AR 24):

1. Mohawk Farms has acted in a responsible and reliable manner over many years as demonstrated by the company's longstanding relationship with five rural school districts and two recently won non-rural school districts.

> Your counsel states in the written submission that you have acted in a responsible manner as demonstrated by the contracts awarded to Mohawk Farms, Inc. (Mohawk Farms) over the past 10 to 15 years by 5 rural towns where low volume, distance and high cost have made them unattractive to competing dairies. Admin. Rec. 8, page 3. You have also recently won two highly competitive non-rural contracts from a larger competitor which has contracts in approximately 65% of the schools in Connecticut, thereby demonstrating that Mohawk Farms is reliable. *Id.*

The Administrative Record reflects Mohawk Farms' customers trust and value its service. However, the fact remains that the sole principal of Mohawk Farms engaged in and was convicted on Federal charges of bidrigging. The Administrative Record is unfortunately devoid of indications that either Mohawk Farms or its principal has addressed the problem by developing a code of ethics, antitrust guidelines, or ethics and antitrust compliance training for its employees. It is my duty to act in the public interest and for the Federal Government's protection. The failure to institute checks and balances on school milk bidding and to prevent future bidrigging, reflects a failure to attain present responsibility. In light of the seriousness of the criminal acts which were imputed to Mohawk Farms, and the lack of action on the part of Mohawk Farms or its principal to address the problem, I cannot consider Mohawk Farms to be presently responsible.

2. There have been no violations by Mohawk Farms since the Justice Department commenced its anti-trust action sometime in 1990.

Your counsel indicates that there have been no violations of section 1 of the Sherman Act by Mohawk Farms since the Justice Department commenced its antitrust action sometime in 1990. Admin. Rec. Ex. 8., pages 2 and 11.

The fact that Mohawk Farms has not been involved in any antitrust violations since 1990 is a factor in Mohawk Farms' favor. However, to date Mohawk Farms has not taken any active measures (such as obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines) to assure me that Mohawk Farms would not become involved in any anti-competitive activities in the future.

In light of the past conduct of the sole principal of Mohawk Farms, which has been in turn imputed to Mohawk Farms, and the lack of active efforts to address the problem, I cannot consider Mohawk Farms to be presently responsible simply based on the fact Mohawk Farms has not been involved in any antitrust activities for the past few years. The public interest and that of the Federal Government will be best served by ensuring that Mohawk Farms is prohibited from participating in Federal nonprocurement programs for the period of Mohawk Farms' debarment.

3. Debarring Mohawk Farms would result in a less competitive market.

Your counsel contends that because debarring Mohawk Farms would jeopardize Mohawk's continued existence that it would also reduce competition which would not be in the public interest and would only serve as punishment. Admin. Rec. Ex. 8, page 4. The five rural towns served by Mohawk Farms for the last 10-15 years could suffer disruption of their delivery system, face higher costs, and be "left to deal with eventually one vendor at its terms and prices which would not benefit the public interest." Id. The Commissioner of Agriculture of the State of Connecticut indicates that debarring Mohawk Farms "would almost certainly cause a severe disruption of the distribution of milk to school children. . . ." Admin. Rec. Ex. 12.

FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. § 3017.115(b). The potential effect on market competitiveness is a factor in making a final determination in this matter. FCS is concerned about the potential impact of

debarment on competition and the economic conditions of the communities and businesses in your region. However, while FCS is committed to maintaining as broad a competitive market as possible, we must balance these concerns with our obligation to protect that interest and the Federal Government. In fulfilling this obligation, FCS is committed to assuring that dairy companies bidding on school milk contracts are presently responsible, and therefore, worthy of serving those school districts. Theoretical price increases or potential reductions in competition cannot outweigh that regulatory obligation.

Conclusions

The debarring official must reach a decision "on the basis of all the information in the Administrative Record, including any submission made by the respondent." 7 C.F.R. § 3017.314(a). In making such decision, the debarring official is required to consider the seriousness of respondent's offenses and any mitigating factors. 7 C.F.R. § 3017.300. The ultimate inquiry in a debarment decision must be directed to the "present responsibility" of the respondent. *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989). The seriousness of the offense, the length of time that has passed since the offense, and the respondent's conduct in the interim must all be considered when determining "present responsibility." *Silverman v. United States Dep't of Defense*, 817 F. Supp. 846, 849 (S.D. Cal. 1993).

In its appeal, Respondent raises several arguments: 1) its responsibility is demonstrated by its longstanding relationship with five rural school districts and two recently-won non-rural contracts; 2) it has committed no violations since the beginning of the antitrust investigations; and 3) its debarment would result in reduced competition. Respondent contends that the debarring official's decision was "arbitrary and capricious and an abuse of discretion."

As stated in *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983), in assessing agency action under the "arbitrary and capricious" standard, it is necessary to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." The Notice of Debarment demonstrates that the debarring official considered the mitigating circumstances presented by Respondent:

. . .

The fact that Mohawk Farms has not been involved in any antitrust violations since 1990 is a factor in Mohawk Farms' favor.

. . .

FCS must act "in the public interest and for the Federal Government's protection and not for purposes of punishment." 7 C.F.R. § 3017.115(b). The potential effect on market competitiveness is a factor in making a final determination in this matter. FCS is concerned about the potential impact of debarment on competition and the economic conditions of the communities and businesses in your region. However, while FCS is committed to maintaining as broad a competitive market as possible, we must balance these concerns with our obligation to protect that interest and the Federal Government. In fulfilling this obligation, FCS is committed to assuring that dairy companies bidding on school milk contracts are presently responsible, and therefore, worthy of serving those school districts. Theoretical price increases or potential reductions in competition cannot outweigh that regulatory obligation.

Moreover, the Notice of Debarment indicates that the debarring official examined the administrative record, took into account all of the relevant factors in reaching a conclusion, and articulated a rational basis for these conclusions:

Upon review of the Administrative Record, it is my determination that the information in support of the debarment outweighs the information and argument presented in the written submissions on behalf of Mohawk Farms. Admin. Rec. Ex. 8, 9, 11, and 12. Therefore, it is my determination that you shall be debarred effective on the date of this letter and extending for 3 years.

When discussing the present responsibility of Respondent, however, the debarring official stated:

The Administrative Record is unfortunately devoid of indications that either Mohawk Farms or its principal has addressed the problem by developing a code of ethics, antitrust guidelines, or ethics and antitrust compliance training for its employees. . . . The failure to institute checks and balances on school milk bidding and to prevent future bidrigging, reflects a failure to attain present responsibility. In light of the seriousness of the criminal acts which were imputed to Mohawk Farms, and the lack of action on the part of Mohawk Farms or its principal to address the problem, I cannot consider Mohawk Farms to be presently responsible.

. . .

. . . However, to date Mohawk Farms has not taken any active measures (such as obtaining antitrust compliance training, or developing a code of ethics or antitrust guidelines) to assure me that Mohawk Farms would not become involved in any anti-competitive activities in the future.

There are no regulations requiring such measures to be taken. Nor is there any showing in the record that Respondent was either asked to take such measures or given the opportunity to do so. *See In re Jeffrey K. Bennett*, 54 Agric. Dec. ___, DNS Docket No. 95-10 (Oct. 2, 1995); *In re George R. Reynolds*, 54 Agric. Dec. ___ , DNS Docket No. 95-8 (Aug. 9, 1995). In fact, Respondent states in its Appeal, "Mohawk Farms [was] unaware that any additional action was required to satisfy the issue of being responsible since compliance had been made for approximately five years and would continue to be made by Mr. Spring, the only employee involved in bidding." However, in that the debarring official clearly stated in the Notice of Debarment that the seriousness of the criminal acts "was the essential reason why he could not consider respondent to be presently responsible, I find that the inclusion of this additional concern constitutes harmless error.

Respondent's conviction for bidrigging strikes at the very heart of public trust. Respondent presented evidence that its customers value its service and trust the company and its product. (AR 12). However, Respondent's conviction for bidrigging shows this trust to have been exploited. The debarring official reasonably concluded that nothing less than Mohawk Farms' debarment will provide the necessary protection of the public interest. Respondent participated in a bidrigging scheme from 1981-1990, a lengthy period of time. The three-year, maximum term of debarment imposed by the debarring official is an appropriate time period for resolving the serious doubts that exist concerning Respondent's present responsibility and whether the government's interest would be adequately protected in future dealings with Respondent.

In conclusion, the record supports the debarring official's decision to debar Respondent. The debarring official, after consideration of all relevant factors, including the mitigating circumstances presented by Respondent, concluded that debarment was warranted. The debarring official's decision to debar Respondent was reasonably related to a valid administrative purpose and was, therefore, clearly not arbitrary or capricious.

Order

The decision of the debarring official is affirmed.

This order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final January 24, 1996.-Editor]

In re: MORRIS WINKLER.
DNS Docket No. RHS-97-0001.
Decision and Order filed April 9, 1997.

Nonprocurement debarment and suspension - Decision of Debarring Official vacated - Arbitrary and capricious and an abuse of discretion - Imputed conduct - Reason to know defined - No duty of inquiry.

Chief Judge Palmer vacated the decision of the Debarring Official as arbitrary and capricious and an abuse of discretion. RHS debarred Respondent based on the criminal conviction of his partner for conversion of property pledged as security for an FmHA loan. In order to impute criminal conduct to a participant's partner it must be shown that the partner participated in, knew of, or had reason to know of the criminal conduct. Neither the Notice of Debarment nor the underlying Administrative Record presented facts which would have given Respondent reason to know of his partner's conduct. The Debarring Official's decision was, therefore, arbitrary and capricious and an abuse of discretion.

Jan E. Shadburn, Debarring Official.
Janice Bullard, for RHS.
Frank A. Bersani, Jr., Syracuse, NY, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations that implement a government wide system for nonprocurement debarment and suspension (regulations).[1]

The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

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[1] The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a government wide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.

(b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Respondent appeals the decision of the Debarring Official Jan E. Shadburn, Acting Administrator of the Rural Housing Service (RHS or the agency), formerly Farmers Home Administration (FmHA), United States Department of Agriculture (USDA), which debarred Respondent from participating in government programs for a period of three years. The debarment is based on Respondent's partnership with George Kidney, who pleaded guilty to the misdemeanor, conversion of property pledged as security for an FmHA loan.

RHS notified Respondent of its intent to debar him for a period of five years in July of 1996. Respondent contested the debarment and the Debarring Official determined that additional proceedings were necessary in order to determine disputed material facts. An informal meeting was held in October 1996, at which Respondent was able to present witnesses and confront witnesses presented by RHS. After considering evidence submitted at the meeting, the Debarring Official concluded that the debarment was appropriate but should be reduced to a period of three years, since George Kidney's debarment period had been so reduced. The Respondent appeals the decision on the grounds that he did not have knowledge, and did not have reason to have knowledge, of Kidney's criminal acts.

Pursuant to 7 C.F.R. § 3017.515 a decision to debar may be appealed to the Office of Administrative Law Judges. The decision of the administrative law judge is based solely on the administrative record that must demonstrate the evidentiary basis for the decision. The decision of a Debarring Official may be vacated if it is: (1) Not in accordance with law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion.

References to the administrative record are cited as "A.R." followed by the document number.

Conclusion

Upon consideration of the Debarring Official's decision and the underlying administrative record, the decision of the Debarring Official which imposed a

three-year period of debarment on Respondent, is being vacated as arbitrary and capricious and an abuse of discretion.

Discussion

Respondent is a general partner, along with George Kidney, of three limited partnerships managing three multi-family housing projects in New York State. The three properties--Falls Court Property Company, Cazenovia Village Apartment Company, and Chittenango Housing for Elderly--were financed by RHS; and RHS maintained a security interest in all monies derived from the operation of the projects. On September 8, 1995, George Kidney pleaded guilty to the misdemeanor, conversion of property pledged as security for an FmHA loan. Specifically, Mr. Kidney admitted to receiving money in excess of the reported laundry income, and converting the remaining unreported income to his own purposes. The total unreported laundry income was $6,760.42. (A.R. M-21-22).

Debarment proceedings were instituted against Respondent under 7 C.F.R. § 3017.325(b)(2), which allows criminal conduct of a participant to be imputed to a partner who participated in, knew of, or had reason to know of that participant's conduct. The grounds for debarment under 7 C.F.R. § 3017.305(b)(1) and (2) which were imputed to Respondent were identified in the Notice of Debarment as follows:

> Violation of the terms of a public agreement or transaction so serious as to affect the integrity of any agency program, such as a willful failure to perform in accordance with the terms of one or more public agreements or transactions, and a history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions.

(A.R. A-3).

Respondent appeals on the ground that he did not participate in, know of, or have reason to know of Kidney's conduct. He claims that it was Kidney's responsibility alone to collect and report laundry income; and that any financial reports bearing his signature that referred to laundry income were based on information provided to him by Kidney. Respondent further maintains that there was no reason to suspect any reporting irregularities because the amounts reported were consistent over the years.

The regulations provide that conduct may be imputed to a partner if he participated in, knew of, or had reason to know of the conduct. A person has "reason to know" under the common law definition if he:

> *[H]as information* from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence.

Restatement (Second) of Agency, § 9 cmt. d (1958). *See also Restatement (Second) of Torts* § 12(1) (1965). This is not a strict liability standard; an affirmative showing must be made with respect to Respondent's involvement. In *Kisser v. Kemp*, 786 F. Supp. 38 (D.D.C. 1992) *rev'd on other grounds*, 14 F.3d 615 (D.C. Cir. 1994), the court noted the distinction between the "affiliate" and "imputation" sections of the Department of Housing and Urban Development's (HUD) debarment regulations:

> Under the "affiliate" section of the regulations, all that the agency needs prove is that an individual was an affiliate, namely that there existed the requisite "control" relationship between the individual and the suspended company. No actual proof of wrongdoing on the part of the individual is required . . . . In contrast, to have proceeded under the "imputation" section, HUD would have actually had to prove, first, that DRG's conduct was itself improper and deserving of suspension, and second, that the individuals suspended "participated in, knew of, or had reason to know of" DRG's wrongful conduct.

Id. at 40-41.

The Debarring Official's decision did not identify any facts known to Respondent that would have given him reason to know of Kidney's conduct; instead it made the summary statement that:

> You are debarred because we find that you acted in the capacity as co-manager with George Kidney and were responsible for the preparation and submission of financial reports to RHS and that you participated in, knew of, or had reason to know of the conversion of laundry receipts as set out below. Therefore, under 7 C.F.R. § 3017.325, the conduct of George Kidney is imputed to you.

(A.R. A-3). The statement that Respondent was a co-manager and was responsible for preparing financial reports does not indicate any specific information that Respondent had which should have given him reason to know of Kidney's conduct; rather it simply refers to Respondent's position in the partnership.

In *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991), which involved a debarment issued by the Defense Logistics Agency, the court found that inquiring into whether an individual "had a responsible relationship to misconduct" and the "power to prevent it," equated to improper use of the strict liability standard:

> Appellant argues, however, that the Special Assistant misconstrued the 'reason to know' standard and instead improperly imputed Dale's misconduct to him under either a strict liability or a 'should have known' standard. So it would appear. The Special Assistant, defining 'reason to know' as 'related to status rather than knowledge,' characterized the relevant inquiry as whether Novicki was 'in such a responsible relationship to the misconduct as to have had the power to prevent the misconduct by exercising the level of care and exertion that society would reasonably expect from someone in [his] position.' She concluded that, by virtue of his status at Dale, Novicki did have both 'a responsible relationship to the misconduct' and the power to prevent it. This language parallels that of *United States v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L. Ed.2d 489 (1975), in which the Supreme Court upheld the imposition of strict liability on a corporate officer who had a 'responsible relationship' to corporate wrongdoing under the Federal Food, Drug and Cosmetic Act.

Novicki, 946 F.2d, at 941-42.

RHS suggests in its Opposition to the Appeal that Respondent had reason to know of Kidney's conduct because he signed financial documents submitted to RHS that contained the incorrect information. It further asserts that "it is reasonable for RHS to hold Respondent responsible for the information which he certified as correct." (Opposition at 6). Including the incorrect information on the reports does not prove that Respondent knew, or had reason to know, the information was incorrect. In fact, Respondent signed the documents with the certification that: "The foregoing information is complete and accurate to the best of my knowledge."(A.R. K-13). The agency has not submitted any evidence which would indicate that certification is false. Respondent claims that he did not know the amounts reported by Kidney were incorrect and the agency has not shown otherwise. Respondent correctly argues in his Appeal Petition that he had no duty to conduct an independent audit of the figures reported to him by Kidney. The court in *Novicki*, stated that "[t]he *Restatement* definition of 'reason to know' imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him." *Id.* at 941. *See also Restatement (Second) of Torts* § 12 cmt. a.

Respondent contends that Kidney was solely responsible for collecting and reporting the laundry receipts and that he had no reason to suspect any misconduct

as the amounts reported were consistent over the years. There is nothing in the record which would refute these contentions. In fact, the record supports the assertion that only Kidney was involved in the collection of the laundry money, as the on-site manager confirmed that the money was always sent to Kidney. (A.R. M-4). It is not clear from the record whether the amounts collected over the years were consistent. The only financial reports included in the record are from the time period in which Kidney misappropriated funds. It is not necessary, however, that the record support Respondent's claims. The Debarring Official has the burden of showing that the record supports his decision by a preponderance of the evidence. That burden is not met here. The record does show cause for debarring Kidney, however, it does not support imputing the cause to Respondent. There is no evidence that Respondent participated in, knew of, or had reason to know of Kidney's conduct. The Debarring Official appears to simply impute Kidney's conduct to Respondent under a strict liability standard based on his position as general partner.

The regulations provide that a decision to debar shall be vacated if it is arbitrary and capricious and an abuse of discretion. The proper inquiry is whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas and Electric v. Natural Resources Defense Counsel*, 462 U.S. 87, 105 (1983). The agency's decision must articulate its findings and the reasons for its decision. *See In re: George R. Reynolds*, 54 Agric. Dec. 1061, 1067 (Aug. 3, 1995); *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092 (D.C. Cir. 1979).

In order to find that Respondent had reason to know of Kidney's actions, it was necessary for the Debarring Official to first find that Respondent had knowledge of facts that would have led a reasonable person to believe that Kidney was underreporting laundry income. Those facts needed to be articulated in the decision together with an explanation of how they led to the conclusion reached. The Debarring Official failed to make any such articulation. It appears likely that he used the wrong standard in imputing conduct to Respondent; and in any case, he failed to establish by a preponderance of the evidence that the correct standard was met. As such, the decision is arbitrary and capricious and an abuse of discretion, and must accordingly be vacated.

Order

The decision of the Debarring Official is hereby vacated.

This order shall take effect immediately. The decision is final and not appealable within the Department. 7 C.F.R. § 3017.515 (d).

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final April 9, 1997.-Editor]

In re: GEORGE KIDNEY.
DNS Docket No. RHS-97-0002.
Decision and Order filed April 9, 1997.

Nonprocurement debarment and suspension - Dismissal of the appeal - Debarment does not affect ownership rights - No basis for appeal.

RHS debarred Respondent for a period of three years, based on his plea of guilty to conversion of property pledged as security for an FmHA loan. Respondent appealed the debarment only as it applied to his ownership of the properties involved. Debarment does not deprive Respondent of ownership rights, therefore, there is no basis for the appeal. Accordingly, Chief Judge Palmer dismissed the appeal.

Jan E. Shadburn, Debarring Official.
Janice Bullard, for RHS.
Frank A. Bersani, Jr., Syracuse, NY, for Respondent.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations that implement a government wide system for nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.
>
> (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

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[1]The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a government wide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

Respondent appeals the decision of the debarring official Jan E.

Shadburn, Acting Administrator of the Rural Housing Service (RHS), formerly Farmers Home Administration(FmHA), United States Department of Agriculture (USDA), which debarred Respondent from participating in government programs for a period of three years. The debarment is based on Respondent's plea of guilty to the misdemeanor, conversion of property pledged as security for an FmHA loan.

RHS sent Respondent a Notice of Suspension and Proposed Debarment on July 1, 1996. On July 26, 1996, Respondent sent the agency a letter opposing the debarment. On December 10, 1996, the Debarring Official sent Respondent notice of his decision to debar Respondent from participation in government programs for a period of three years effective July 1, 1996 through July 1, 1999. The letter notified Respondent that the grounds for debarment were as follows:

> Conviction or civil judgment for: (1) Commission of an offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person, 7 C.F.R. § 3017.305 (a)(4); and (2) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of any agency program, such as a willful failure to perform in accordance with the terms of one or more public agreements or transactions, and a history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions, 7 C.F.R. § 3017. 305 (b)(1) and (2).
>
> The Information and Criminal Action filed in the U.S. District Court, Northern District of New York, on September 8, 1995 (copy enclosed), describes the acts committed by you and states in part, that:
>
> > The defendant George Kidney, with the intent to defraud the Farmers Home Administration, knowingly and willfully concealed, removed, disposed of and converted to his own use and to that of another, property pledged to the Secretary of Agriculture acting through the Farmers Home Administration (to wit, laundry receipts from three FmHA funded projects) in that he underreported the amount of laundry income from the projects . . . and converted to his own use the unreported income.

(A.R. A-3) (omission in original). On January 14, 1997, Respondent filed an appeal with the hearing clerk which states in part:

> Our client has consented to the debarment with respect to management of the three properties referenced in the Notice of Debarment and of any other federally financed properties. However, with respect to his continuing passive ownership of the three projects referenced, we seek firstly clarification that the Notice of Debarment would not apply to such ownership and if it does, we wish to appeal this aspect of the Notice of Debarment as to our client.

(Respondent's Appeal Petition at 1).

On January 21, 1997, I issued a Ruling on the Procedural Requirements governing this proceeding. RHS filed a copy of the Administrative Record with the hearing clerk on February 6, 1997, along with an Opposition to Respondent's Appeal which stated in part that there was no basis for the appeal since debarment does not affect ownership rights. More than ten days after the Opposition was filed, Respondent submitted a Response which withdrew consent to debarment as follows:

> The Respondent does not consent or agree to be excluded from management of the subject projects based upon the fact that Respondent's request to have a co-owner of the project, Morris Winkler, serve as the sole manager of the projects has been denied by the agency.

(Response at 2).

Pursuant to 7 C.F.R. § 3017.200(a) and (b), persons who are debarred are excluded from participating in transactions with the government as principals or participants, as described in 7 C.F.R. § 3017.110. Debarred persons may not participate in primary covered transactions, which are described as nonprocurement transactions between an agency and a person, including grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transaction. 7 C.F.R. § 3017.110 (a)(1)(i). Debarred persons may not participate in lower tier covered transactions which include any primary transaction between a participant with the government and another person, or any procurement contract for goods or services between a participant and person. 7 C.F.R. § 3017.110(a)(1)(ii).

There is no basis for Respondent's appeal. Debarment does not provide sufficient legal cause to deprive Respondent of title ownership of the federally financed projects at issue in this matter. During the period of debarment, Respondent will not be eligible for grants, loans or other benefits which owners of projects financed by RHS ordinarily enjoy; however, he will not be divested of ownership. Furthermore, Respondent's revocation of consent to debarment is

ineffective since it was not filed as a timely appeal, it was not filed as a timely response, and it would appear to be moot since Morris Winkler's debarment has been vacated.

Conclusion

There is no basis for Respondent's appeal on the limited issue of ownership rights. Accordingly, the appeal is dismissed and the decision of the Debarring Official is final.

Order

It is hereby ordered that the debarment of Respondent, George Kidney, shall be effective July 1, 1996 through July 1, 1999. This order shall take effect immediately. This decision and order is final and is not appealable within the department pursuant to 7 C.F.R. § 3017.515.

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final April 9, 1997.-Editor]

In re: LUIS C. TRIGO-VELA.
DNS Docket No. RHS-97-0003.
Decision and Order filed April 17, 1997.

Nonprocurement debarment and suspension - Decision of Debarring Official vacated - Fundamental fairness - Notice and opportunity to be heard - Timeliness - Period of debarment.

Chief Administrative Law Judge Victor W. Palmer vacated the decision of the Debarring Official which debarred Respondent for a period of five years. The procedures used to debar Respondent were not consistent with principles of fundamental fairness because the agency denied Respondent a meaningful opportunity to be heard; conducted the debarment proceedings for an unreasonable length of time; and debarred Respondent for a period exceeding the general prescribed maximum without explanation. The decision was accordingly vacated as arbitrary, capricious and an abuse of discretion.

Jan E. Shadburn, Debarring Official.
Donald M. McAmis, for RHS.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This decision and order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations that implement a governmentwide system for nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.
>
> (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Respondent appeals the December 4, 1996, decision of the Debarring Official, Jan E. Shadburn, Acting Administrator, Rural Housing Service (RHS), United States Department of Agriculture (USDA), which debarred Respondent from participation in government programs for a period of five years. The debarment is based on mismanagement of funds relating to thirty-eight housing projects financed by RHS.

RHS instituted these debarment proceedings pursuant to 7 C.F.R. §§ 3017.100-.515. On August 11, 1995, the Debarring Official Jan E. Shadburn, sent Respondent, by certified mail, a Notice of Suspension and Proposed Debarment, dated August 4, 1995. The notice was returned unclaimed. A second attempt to serve the notice by certified mail was made on October 30, 1995. The second notice was also returned unclaimed. In or around April of 1996, Respondent learned of the debarment proceedings from an RHS attorney during a bankruptcy hearing. Respondent contacted the Rural Housing and Community Development Service in Texas which confirmed that proceedings had been instituted, and provided Respondent with a copy of the August 4, 1995, letter. On April 20, 1996, Respondent wrote to RHS requesting the opportunity to respond to the allegations.

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[1]The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

RHS denied Respondent's request, by letter dated May 20, 1996, stating that the thirty-day time limit for contesting the proposed debarment had run. By letter dated December 4, 1996, RHS notified Respondent that he was debarred from government programs for a period of five years, effective August 4, 1995 through August 4, 2000.

Debarment decisions may be appealed to the Office of Administrative Law Judges pursuant to 7 C.F.R. § 3017.515. The decision of the administrative law judge is based solely on the administrative record that must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law; not based on the applicable standard of evidence; or is arbitrary and capricious, and an abuse of discretion.

References to the record in the administrative proceeding below are cited as "A.R." followed by the number of the document.

Conclusion

Upon consideration of the Debarring Official's decision and the underlying administrative record, I have determined that the agency failed to adhere to principles of fundamental fairness in reaching the decision to debar Respondent for a five-year period; accordingly, the decision of the Debarring Official is being vacated as arbitrary and capricious and an abuse of discretion.

Factual Background

Respondent, Luis C. Trigo-Vela was the Chairman of the Board of Directors of Indeco Housing Corporation (Indeco), a Puerto Rican corporation involved in the operation of thirty-eight housing projects in the state of Texas which were financed by RHS. In June 1993, RHS asked the USDA's Office of Inspector General (OIG) to conduct an inquiry into the management of these projects. (A.R. N-8). OIG conducted an investigation and audit from which it concluded that Indeco defaulted on loans made by RHS and failed to properly maintain funds in separate accounts, pay local property taxes, or properly maintain the projects. (A.R. N-8, I-1-22). Based upon OIG's findings, RHS recommended that the Administrator debar Respondent and its affiliates, officers, and directors. (A.R. L, M). RHS required Indeco to transfer management of the projects to other companies. (A.R. N-9). Indeco complied with this request in August of 1993. (A.R. N-9). The United States Attorney's Office was notified of the investigation results, but declined to prosecute due to the weakness of the evidence. (A.R. H).

By letter dated August 4, 1995, RHS sent Respondent a notice of proposed debarment by certified mail, pursuant to 7 C.F.R. § 3017.400. (A.R. F-1-3). The notice, and a second mailing of the notice by certified mail, were both returned as unclaimed. (A.R. E-8-9). Respondent received actual notice of the debarment proceedings in or around April of 1996. On April 20, 1996, Respondent wrote to RHS requesting the opportunity to contest the proposed debarment. (A.R. D). That request was denied (A.R. E-2), and on December 4, 1996, RHS sent Respondent a Notice of Debarment which listed the causes of debarment pursuant to 7 C.F.R. § 3017.305(b)(1), (2) & (3) as follows:

> (a) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as: [1] A willful failure to perform in accordance with the terms of one or more public agreements or transactions, paragraph (b)(1); [2] A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions, paragraph (b)(2); and [3] A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, (b)(3); and (b) any other cause of so serious or compelling a nature that it affects your present responsibility, 7 C.F.R. § 3017 (d).

(A.R. A-3).

Discussion

The regulations require that: "USDA shall process debarment actions as informally as possible consistent with the principles of fundamental fairness, using the procedures in §§ 3017.311 through 3017.314." 7 C.F.R. § 3017.310. The procedures RHS used to debar Respondent did not comply with this requirement. RHS debarred Respondent through a procedure which took almost a year and a half. It did not successfully serve notice on the Respondent. When Respondent did learn of the proceedings, RHS refused to allow submission of information and argument despite the fact that a final decision to debar had not yet been reached. RHS ultimately debarred Respondent for a period which exceeded the general maximum without explanation and without considering any defenses or mitigating evidence which Respondent attempted to offer. In light of all of these circumstances, I conclude that the process used to debar Respondent was not consistent with principles of fundamental fairness; and accordingly it must be vacated as arbitrary and capricious and an abuse of discretion.

The regulations require that debarment proceedings be initiated by providing notice to the respondent advising that debarment is being considered, and stating

the reasons, causes and potential effects of the debarment. The notice shall be signed by the Debarring Official and transmitted by certified mail, return receipt requested. 7 C.F.R. § 3017.312. The regulations further require that the respondent be given an opportunity to contest the proposed debarment. Within thirty days after receiving notice of the proposed debarment the respondent is entitled to submit, in person, or in writing, or through a representative, information and argument in opposition to the proposed debarment. 7 C.F.R. § 3017.313(a). If the submission raises a genuine dispute of material fact, the Debarring Official is required to provide the respondent with an opportunity to appear with a representative, to submit documentary evidence, present witnesses, and confront any witnesses the agency presents. 7 C.F.R. § 3017.313(b).

The Debarring Official made two attempts to serve Respondent with notice of the proposed debarment via certified mail. There is no indication that the notice was ever sent by regular mail. With respect to sending the notice of proposed debarment, the regulations state only that it must be sent by certified mail, return receipt requested. 7 C.F.R. § 3017. 312. They do not specify what procedure should be taken if certified mail is returned unclaimed. The regulations do, however, define "notice" as follows:

> A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

7 C.F.R. § 3017.105.

The regulations do not define "undeliverable" or "properly sent." It is axiomatic, however, that the method of service used may not be a mere gesture, but instead must be reasonably calculated to apprise one of the pendency of the proceedings and afford an opportunity to be heard. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314-15 (1950). Due process does not always require that actual notice be received, however, a reasonable effort must be made to ensure that the respondent has notice and an opportunity to answer. Although certified mail is generally a reliable method for providing service, the agency knew that it had failed in this case; and there remained a method which was reasonably likely to provide notice to the Respondent. The agency had confirmed that Respondent was receiving regular mail at its last known address. It could have sent the notice by regular mail to that address and have been reasonably assured that notice was

effectuated. Such an action would have been consistent with the general procedures followed by the Department in adjudicative proceedings under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, 7 C.F.R. § 1.147(c).

RHS had a second opportunity to allow Respondent to submit information and argument in April of 1996, after Respondent received actual notice of the debarment proceedings during a bankruptcy hearing. Upon receiving a copy of the Notice, Respondent wrote to the Debarring Official requesting an opportunity to answer the allegations. RHS informed Respondent that the thirty-day period in which to contest a debarment had expired. (A.R. E-2). The agency, however, was not treating the debarment as if that were the case. The regulations provide that if the respondent does not provide a timely submission in opposition to the proposed debarment the matter will be considered decided. 7 C.F.R. § 3017.314(1). However, when Respondent's request to be heard was denied, RHS informed Respondent that the agency was "currently moving forward with final debarment proceedings." (A.R. E-2).

If the debarment was not final, the agency should have been willing to accept information and argument from Respondent before a final decision was made. The agency would not have been harmed since it had not made a final decision and, in fact, was seven months away from making such a decision. Furthermore, the facts and circumstances suggest that further fact finding would have been valuable to the decision making process. This case presents complicated factual issues; and Respondent disputes some of the factual assertions made by the agency. Specifically, questions are raised with regard to the identity of the individuals and corporate entities responsible for the management of properties in question; and whether it was RHS funds that were transferred between accounts.

The opportunity to be heard is essential to notions of fundamental fairness and due process.[2] Since Respondent had a significant interest in being heard, and the agency did not have any valid interest in not allowing Respondent to respond after he received actual notice of the proposed debarment, the Debarring Official erred by not allowing submission of information and argument in opposition at that time.

In addition, the Debarring Official failed to issue a decision in a reasonable amount of time; and he imposed a period of debarment which exceeded the general maximum prescribed by the regulations. The notice of proposed debarment was initially sent to Respondent on August 4, 1995. Agency proceedings continued

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[2]*See, e.g. Richards v. Jefferson County, Alabama*, 116 S. Ct. 1761, 1765 n. 4 (1996); *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

until December 4, 1996, nearly a year and a half later. In its opposition to the Respondent's appeal, RHS notes that the December 4, 1996 decision was not untimely, since the 45 day time limit only applies if the Respondent submits information and argument. In fact, there is no time limit if information and argument are not submitted because the matter is considered decided when the respondent's time to file expires. There is no requirement that a final decision to debar be filed. 7 C.F.R. § 3017.314(a)(1). RHS, however, notified Respondent in May that proceedings were ongoing, and then continued to leave the matter open for another six months. The agency cannot continue to investigate and deliberate for an indefinite period, especially after purporting to hold Respondent to a strict deadline. The regulations anticipate a prompt decision, as do general principles of fairness. Therefore, although RHS did not miss any express deadline, it did not act in a reasonably expeditious manner consistent with the regulations or principles of fundamental fairness.

Respondent was debarred for a period of five years effective August 4, 1995 through August 4, 2000. The regulations provide that:

> Debarment for causes other than those related to a violation of the [Drug-Free Workplace Requirements] generally should not exceed three years. Where circumstances warrant a longer period of debarment may be imposed.

7 C.F.R. § 3017.320(a)(1). The Debarring Official did not give any explanation as to why a five year period of debarment was warranted. To impose the longer period without an express articulation of the circumstances and reasons for that decision was arbitrary and capricious and an abuse of discretion.

For the foregoing reasons, the Debarring Official's decision to debar Respondent for a period of five years must be vacated as arbitrary and capricious and an abuse of discretion.

Order

The decision of the Debarring Official is hereby vacated.

This Order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served on the parties.

[This Decision and Order became final April 17, 1997.-Editor]

In re: INDECO HOUSING CORP.
DNS Docket No. RHS-97-0004.
Decision and Order filed April 17, 1997.

Nonprocurement debarment and suspension - Decision of Debarring Official vacated - Fundamental fairness - Notice and opportunity to be heard - Timeliness - Period of debarment.

Chief Administrative Law Judge Victor W. Palmer vacated the decision of the Debarring Official which debarred Respondent for a period of five years. The procedure used to debar Respondent was not consistent with principles of fundamental fairness because the agency denied Respondent a meaningful opportunity to be heard; conducted the debarment proceedings for an unreasonable length of time; and debarred Respondent for a period exceeding the general prescribed maximum without explanation. The decision was accordingly vacated as arbitrary, capricious and an abuse of discretion.

Jan E. Shadburn, Debarring Official.
Donald M. McAmis, for RHS.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This decision and order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations that implement a governmentwide system for nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.
>
> (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

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[1]The Regulations implement Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986), which requires to the extent permitted by law, executive departments and agencies to participate in a governmentwide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

Respondent appeals the December 4, 1996, decision of the Debarring Official, Jan E. Shadburn, Acting Administrator, Rural Housing Service (RHS), United States Department of Agriculture (USDA), which debarred Respondent from participation in government programs for a period of five years. The debarment is based on mismanagement of funds relating to thirty-eight housing projects financed by RHS.

RHS instituted these debarment proceedings pursuant to 7 C.F.R. §§ 3017.100-.515. On August 11, 1995, the Debarring Official Jan E. Shadburn, sent Respondent, by certified mail, a Notice of Suspension and Proposed Debarment, dated August 4, 1995. The notice was returned unclaimed. A second attempt to serve the notice by certified mail was made on October 30, 1995. The second notice was also returned unclaimed. In or around April of 1996, Respondent learned of the debarment proceedings from an RHS attorney during a bankruptcy hearing. Respondent contacted the Rural Housing and Community Development Service in Texas which confirmed that proceedings had been instituted, and provided Respondent with a copy of the August 4, 1995, letter. On April 20, 1996, Respondent wrote to RHS requesting the opportunity to respond to the allegations. RHS denied Respondent's request, by letter dated May 20, 1996, stating that the thirty-day time limit for contesting the proposed debarment had run. By letter dated December 4, 1996, RHS notified Respondent that it was debarred from government programs for a period of five years, effective August 4, 1995 through August 4, 2000.

Debarment decisions may be appealed to the Office of Administrative Law Judges pursuant to 7 C.F.R. § 3017.515. The decision of the administrative law judge is based solely on the administrative record that must demonstrate the evidentiary basis for the decision. The administrative law judge may vacate the debarment if the implementing decision is found not in accordance with law; not based on the applicable standard of evidence; or is arbitrary and capricious, and an abuse of discretion.

References to the record in the administrative proceeding below are cited as "A.R." followed by the number of the document.

Conclusion

Upon consideration of the Debarring Official's decision and the underlying administrative record, I have determined that the agency failed to adhere to principles of fundamental fairness in reaching the decision to debar Respondent for a five-year period; accordingly, the decision of the Debarring Official is being vacated as arbitrary and capricious and an abuse of discretion.

Factual Background

Respondent, Indeco Housing Corporation, is a Puerto Rican corporation involved in the operation of thirty-eight housing projects in the state of Texas which were financed by RHS. In June 1993, RHS asked the USDA's Office of Inspector General (OIG) to conduct an inquiry into the management of these projects. (A.R. N-8). OIG conducted an investigation and audit from which it concluded that Respondent defaulted on loans made by RHS and failed to properly maintain funds in separate accounts, pay local property taxes, or properly maintain the projects. (A.R. N-8, J-1-22). Based upon OIG's findings, RHS recommended that the Administrator debar Respondent and its affiliates, officers, and directors. (A.R. L, M). RHS required Respondent to transfer management of the projects to other companies. (A.R. N-9). Respondent complied with this request in August of 1993. (A.R. N-9).. The United States Attorney's Office was notified of the investigation results, but declined to prosecute due to the weakness of the evidence. (A.R. I).

By letter dated August 4, 1995, RHS sent Respondent a notice of proposed debarment by certified mail, pursuant to 7 C.F.R. § 3017.400. (A.R. F-1-3). The notice, and a second mailing of the notice by certified mail, were both returned as unclaimed. (A.R. E-6-7). Respondent received actual notice of the debarment proceedings in or around April of 1996. On April 20, 1996, Respondent wrote to RHS requesting the opportunity to contest the proposed debarment. (A.R. D- 3). That request was denied (A.R. D-1), and on December 4, 1996, RHS sent Respondent a Notice of Debarment which listed the causes of debarment pursuant to 7 C.F.R. § 3017.305(b)(1), (2) & (3) as follows:

> (a) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as: [1] A willful failure to perform in accordance with the terms of one or more public agreements or transactions, paragraph (b)(1); [2] A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions, paragraph (b)(2); and [3] A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, (b)(3); and (b) any other cause of so serious or compelling a nature that it affects your present responsibility, 7 C.F.R. § 3017 (d).

(A.R. A-3).

Discussion

The regulations require that: "USDA shall process debarment actions as informally as possible consistent with the principles of fundamental fairness, using the procedures in §§ 3017.311 through 3017.314." 7 C.F.R. § 3017.310. The procedures RHS used to debar Respondent did not comply with this requirement. RHS debarred Respondent through a procedure which took almost a year and a half. It did not successfully serve notice on the Respondent. When Respondent did learn of the proceedings, RHS refused to allow submission of information and argument despite the fact that a final decision to debar had not yet been reached. RHS ultimately debarred Respondent for a period which exceeded the general maximum without explanation and without considering any defenses or mitigating evidence which Respondent attempted to offer. In light of all of these circumstances, I conclude that the process used to debar Respondent was not consistent with principles of fundamental fairness; and accordingly it must be vacated as arbitrary and capricious and an abuse of discretion.

The regulations require that debarment proceedings be initiated by providing notice to the respondent advising that debarment is being considered, and stating the reasons, causes and potential effects of the debarment. The notice shall be signed by the Debarring Official and transmitted by certified mail, return receipt requested. 7 C.F.R. § 3017.312. The regulations further require that the respondent be given an opportunity to contest the proposed debarment. Within thirty days after receiving notice of the proposed debarment the respondent is entitled to submit, in person, or in writing, or through a representative, information and argument in opposition to the proposed debarment. 7 C.F.R. § 3017.313(a). If the submission raises a genuine dispute of material fact, the Debarring Official is required to provide the respondent with an opportunity to appear with a representative, to submit documentary evidence, present witnesses, and confront any witnesses the agency presents. 7 C.F.R. § 3017.313(b).

The Debarring Official made two attempts to serve Respondent with notice of the proposed debarment via certified mail. There is no indication that the notice was ever sent by regular mail. With respect to sending the notice of proposed debarment, the regulations state only that it must be sent by certified mail, return receipt requested. 7 C.F.R. § 3017. 312. They do not specify what procedure should be taken if certified mail is returned unclaimed. The regulations do, however, define "notice" as follows:

> A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its

identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

7 C.F.R. § 3017.105.

The regulations do not define "undeliverable" or "properly sent." It is axiomatic, however, that the method of service used may not be a mere gesture, but instead must be reasonably calculated to apprise one of the pendency of the proceedings and afford an opportunity to be heard. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). Due process does not always require that actual notice be received, however, a reasonable effort must be made to ensure that the respondent has notice and an opportunity to answer. Although certified mail is generally a reliable method for providing service, the agency knew that it had failed in this case; and there remained a method which was reasonably likely to provide notice to the Respondent. The agency had confirmed that Respondent was receiving regular mail at its last known address. It could have sent the notice by regular mail to that address and have been reasonably assured that notice was effectuated. Such an action would have been consistent with the general procedures followed by the Department in adjudicative proceedings under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, 7 C.F.R. § 1.147(c).

RHS had a second opportunity to allow Respondent to submit information and argument in April of 1996, after Respondent received actual notice of the debarment proceedings during a bankruptcy hearing. Upon receiving a copy of the Notice, Respondent wrote to the Debarring Official requesting an opportunity to answer the allegations. RHS informed Respondent that the thirty-day period in which to contest a debarment had expired. (A.R. D-1). The agency, however, was not treating the debarment as if that were the case. The regulations provide that if the respondent does not provide a timely submission in opposition to the proposed debarment the matter will be considered decided. 7 C.F.R. § 3017.314(1). However, when Respondent's request to be heard was denied, RHS informed Respondent that the agency was "currently moving forward with final debarment proceedings." (A.R. D-1).

If the debarment was not final, the agency should have been willing to accept information and argument from Respondent before a final decision was made. The agency would not have been harmed since it had not made a final decision and, in fact, was seven months away from making such a decision. Furthermore, the facts and circumstances suggest that further fact finding would have been valuable to the decisionmaking process. This case presents complicated factual issues; and

Respondent disputes some of the factual assertions made by the agency. Specifically, questions are raised with regard to the identity of the individuals and corporate entities responsible for the management of properties in question; and whether it was RHS funds that were transferred between accounts.

The opportunity to be heard is essential to notions of fundamental fairness and due process.[2] Since Respondent had a significant interest in being heard, and the agency did not have any valid interest in not allowing Respondent to respond after he received actual notice of the proposed debarment, the Debarring Official erred by not allowing submission of information and argument in opposition at that time.

In addition, the Debarring Official failed to issue a decision in a reasonable amount of time; and he imposed a period of debarment which exceeded the general maximum prescribed by the regulations. The notice of proposed debarment was initially sent to Respondent on August 4, 1995. Agency proceedings continued until December 4, 1996, nearly a year and a half later. In its opposition to the Respondent's appeal, RHS notes that the December 4, 1996 decision was not untimely, since the 45 day time limit only applies if the Respondent submits information and argument. In fact, there is no time limit if information and argument are not submitted because the matter is considered decided when the respondent's time to file expires. There is no requirement that a final decision to debar be filed. 7 C.F.R. § 3017.314(a)(1). RHS, however, notified Respondent in May that proceedings were ongoing, and then continued to leave the matter open for another six months. The agency cannot continue to investigate and deliberate for an indefinite period, especially after purporting to hold Respondent to a strict deadline. The regulations anticipate a prompt decision, as do general principles of fairness. Therefore, although RHS did not miss any express deadline, it did not act in a reasonably expeditious manner consistent with the regulations or principles of fundamental fairness.

Respondent was debarred for a period of five years effective August 4, 1995 through August 4, 2000. The regulations provide that:

> Debarment for causes other than those related to a violation of the [Drug-Free Workplace Requirements] generally should not exceed three years. Where circumstances warrant a longer period of debarment may be imposed.

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[2]*See, e.g. Richards v. Jefferson County, Alabama*, 116 S. Ct. 1761, 1765 n. 4 (1996); *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

7 C.F.R. § 3017.320(a)(i). The Debarring Official did not give any explanation as to why a five year period of debarment was warranted. To impose the longer period without an express articulation of the circumstances and reasons for that decision was arbitrary and capricious and an abuse of discretion.

For the foregoing reasons, the Debarring Official's decision to debar Respondent for a period of five years must be vacated as arbitrary and capricious and an abuse of discretion.

Order

The decision of the Debarring Official is hereby vacated.

This Order shall take effect immediately. This decision is final and not appealable within the Department. 7 C.F.R. § 3017.515(d).

Copies of this Decision and Order shall be served on the parties.

[This Order and Decision became final April 17, 1997.-Editor]

In re: JEROL WAYNE JONES AND DELTA FARM SERVICES.
DNS Docket No. FCIC-97-0001.
Decision and Order filed June 19, 1997.

Submission of false claims and reports to ASCS and FCIC - Decision of debarring official affirmed - Settlement agreement - Three year period of debarment.

Chief Administrative Law Judge Victor W. Palmer affirmed the decision of the Debarring Official which debarred Respondents for a period of three years. Judge Palmer found that the Debarring Official had properly considered Respondents' submissions in opposition to the proposed debarment; and that a settlement agreement that Respondents had previously entered into did not prevent USDA from initiating debarment proceedings. The administrative record supported the Debarring Official's decision by a preponderance of the evidence. The decision was not arbitrary and capricious and an abuse of discretion, and was in accordance with the law and applicable standards of evidence.

Kenneth D. Ackerman, Debarring Official.
Janice Bullard, for FCIC.
Timothy O. Dudley, Little Rock, AR, for Respondent.
Decision and Order issued by Victor W. Palmer Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515, the regulations that implement a government wide system for

nonprocurement debarment and suspension (regulations).[1] The objective of the regulations is stated at 7 C.F.R. § 3017.115(a) and (b):

> (a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment [is a] discretionary action[] that, taken in accordance with Executive Order 12549 and [the] regulations, [is an] appropriate means to implement this policy.
>
> (b) Debarment . . . shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment.

Pursuant to 7 C.F.R. § 3017.515, debarment decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the debarment if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary capricious and an abuse of discretion. Decisions of the administrative law judge must be based solely on the administrative record which must demonstrate the evidentiary basis of the decision.

Respondents appeal the decision of the Debarring Official, Kenneth D. Ackerman, Acting Administrator, Risk Management Agency (the agency), United States Department of Agriculture (USDA), which debarred Respondent from participating in government programs for a period of three years. The debarment is based on Respondents' submission of false claims to the Agricultural Stabilization and Conservation Service (ASCS) and false information to the Federal Crop Insurance Corporation (FCIC).

On February 25, 1997, Respondents received a Notice of Proposed Debarment from the Debarring Official, dated February 21, 1997. The Notice informed Respondents that FCIC proposed a three year period of debarment pursuant to 7 C.F.R. § 3017.305(b)(3) and (d) which provide that debarment may be imposed for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

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[1]The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a government wide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

. . .

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

. . .

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

The letter further identified the reasons for Respondents' debarment as follows:

> [Y]ou provided a statement to OIG, to which you attested, in which you admitted to submitting false receipts and false leases to the Agricultural Stabilization and Conservation Service (ASCS) on behalf of George Wilcox (Wilcox), in relation to Wilcox's participation in ASCS programs. . . . You also stated that you prepared applications for crop insurance for Wilcox which were based upon false production reports. Your willful participation in submitting false claims to ASCS, and false information to FCIC, is a serious act which compromises your responsibility. Accordingly, debarment is appropriate in order to protect the public interest in having the Federal government conduct business only with responsible persons. . . .
>
> Because you are the owner and operator of a crop insurance agency, Delta, which participates in the Federal crop insurance program, debarment of Delta is included in the scope of your proposed debarment. Your conduct with respect to falsifying records occurred in connection with your role as owner and operator of Delta. Therefore, your conduct is imputed to Delta, pursuant to 7 C.F.R. section 3017.325.

(A.R. A1, at 2).

Respondents had thirty days from the receipt of the notice to respond with any information and argument in opposition to the proposed debarment. 7 C.F.R. § 3017.313. Respondents opposed the debarment by letter dated March 24, 1997. The letter was not received by the agency until April 1, 1997, after the Debarring Official had issued a final Decision to Debar, dated March 27, 1997. Respondents filed a timely appeal of the March 27, 1997 decision on April 28, 1997. By letter dated April 29, 1997, the Debarring Official notified Respondents that, notwithstanding his prior communication, he had considered Respondents' March 24, 1997 submission, and concluded that it raised no genuine issue of material fact; and therefore renewed the Decision to Debar. On May 5, 1997, in response to the

April 29, 1997 Decision to Debar, Respondents renewed their appeal with a letter incorporating the initial appeal petition.

On May 1, 1997, I issued a ruling with respect to the procedural requirements governing this proceeding. Pursuant to that ruling the agency filed a response to the appeal along with a copy of the administrative record. Respondents did not file a reply to the agency's response.

References to the administrative record are cited as "A.R." followed by the number of the document.

Findings

Respondent Jerol Wayne Jones is the owner and operator of Respondent Delta Farm Service, a crop insurance agency located in Pine Bluff, Arkansas. Respondents insured crops and performed consulting work for Wilcox Grass Farms, owned and operated by George Wilcox. In this capacity, Respondents advised Mr. Wilcox with respect to ASCS programs; filed for ASCS disaster payments; completed applications for crop insurance; completed acreage and production reports; and negotiated land leases.

On February 23, 1995, Jones gave a statement to USDA Office of Inspector General (OIG) investigators in which he admitted that he and Wilcox withheld crop production from FCIC and submitted false receipts to ASCS. (A.R. B). Based on the OIG investigation, the United States Attorney for the Eastern District of Arkansas instituted an action against Jones for violation of the False Claims Act, 31 U.S.C. § 3729 *et seq.* On April 6, 1995, Jones entered into a Settlement Agreement with the government whereby he denied the allegations, but agreed to pay USDA $10,000, and agreed that he, and any entity in which he holds an interest, would not participate in any USDA program for a period of twenty years. The Agreement did not bar Jones from selling crop insurance; however, it did not restrict USDA from barring Jones from its crop insurance programs. (A.R. G).

Conclusions

Respondents raise two issues on appeal, neither of which challenge the factual basis for the debarment. First, they maintain that the Debarring Official improperly failed to consider information and argument that Respondents submitted in opposition to the proposed debarment. The initial decision of the Debarring Official, issued on March 27, 1997, did not consider the Respondents' submission in opposition because it had not yet been received. The decision was issued on the thirtieth day after Respondents received the proposed decision. Although

Respondents mailed the opposition prior to the March 27, 1997 deadline, it was not received by the agency until April 1, 1997. The Debarring Official did, however, review the submission after it was received, and determined that Respondents did not present any information or argument which raised any issue of material fact or warranted reversal of the Proposed Decision to Debar. Pursuant to those findings, the Debarring Official issued a second Decision to Debar on April 29, 1997, within the forty-five days allowed by the regulations. Respondents first argument is, therefore, moot.

Respondents next argue that debarment from Federal crop insurance programs is prohibited under the terms of an agreement entered into with the government in settlement of a suit brought under the False Claims Act. The Settlement Agreement, however, explicitly allows the Department to institute debarment proceedings:

> This Settlement Agreement and said bar from participating in the Department of Agriculture programs and receiving benefit therefrom is not intended to bar or prohibit Defendant from selling crop insurance as an insurance agent, *nor is this Agreement intended to restrict the Department of Agriculture or the Federal Crop Insurance Corporation from baring [sic] Defendant from selling crop insurance that might be issued or guaranteed by the Federal Crop Insurance Corporation or Department of Agriculture.*

(A.R. G-2) (emphasis added). Respondents maintain that despite the above language, it was the intent of the agreement that Respondents not be barred from crop insurance programs, either under the Agreement or in the future. While immunity from debarment may have been Respondents' intent or understanding based on negotiations, the language of the Agreement is clear and represents the final, binding understanding of the parties. Debarment proceedings, therefore, were not precluded by the Agreement.

Furthermore, it should be noted that Respondents incorrectly characterize the debarment as a ban on selling insurance. In fact, Respondents can continue to sell insurance, as long as it is not guaranteed or reinsured by the government.

The administrative record demonstrates by a preponderance of the evidence that a three year period of debarment is appropriate to protect the public interest and the integrity of Federal programs. The Decision of the Debarring Official was not arbitrary and capricious and an abuse of discretion; was issued in accordance with the law and the applicable standards of evidence. Accordingly, the decision is affirmed.

Order

The decision of the Debarring Official is hereby affirmed. The effective date of the debarment is March 27, 1997. This order is final and not appealable within the Department.

Copies of this Decision and Order shall be served upon the parties.

[This Decision and Order became final June 19, 1997.-Editor]

MISCELLANEOUS ORDERS

ANIMAL QUARANTINE and RELATED LAWS

In re: JERRY STOKES, d/b/a STOKES LIVESTOCK CO.
A.Q. Docket No. 96-0007.
Granting of Motion to Dismiss and Cancellation of Hearing filed March 28, 1997.

James A. Booth, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant's Motion to Dismiss, filed March 28, 1997, is hereby granted. The oral hearing, scheduled for April 29, 30, 1997, is cancelled.

Copies hereof shall be served upon the parties.

In re: KEN RICHARDSON.
A.Q. Docket No. 95-0053.
Dismissal filed May 5, 1997.

Susan Golabek, for Complainant
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

On the basis of a Motion by Complainant, this case is hereby dismissed.

ANIMAL WELFARE ACT

In re: PAUL KENIS.
AWA Docket No. 95-0040.
Supplemental Order filed March 21, 1997.

Darlene Bolinger, for Complainant.
Patrick C. Valentino, San Diego, California, for Respondent.
Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon the motion of the complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's license as an exhibitor under the Animal Welfare Act, as amended, contained in the Order issued in this case on February 6, 1997, is hereby terminated. This order shall be effective upon issuance.

Copies shall be served upon the parties.

In re: ROBERT L. SPOON and MICHAELE P. SPOON, dba ROCKEY ROAD MOBILE PET STORE.
AWA Docket No. 96-0037.
Order Dismissing Complaint Without Prejudice filed March 26, 1997.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondents is dismissed without prejudice.

In re: CATHERINE TWISS.
AWA Docket No. 95-0007.
Order filed April 11, 1997.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by James D. Hunt, Administrative Law Judge.

For good cause shown, upon motion of the complainant and without objection by the respondent, the complaint in this matter is dismissed without prejudice and the allegations of the complaint may be included in any subsequent hearing involving the respondent.

In re: DELTA AIR LINES, INC., a Georgia Corporation
AWA Docket No. 96-70
Withdrawal of Complaint and Termination of Proceedings filed May 27, 1997.

Susan Golabek, for Complainant
Karen L. Abrahams, Atlanta, Georgia, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon Complainant's Motion and For Good Cause Shown, the complaint is withdrawn and these proceedings are hereby terminated.

FARM SERVICE AGENCY

In re: CLARK V. CHRISTENSON.
FSA Docket No. 97-0001.
Order of Dismissal Without Prejudice filed April 2, 1997.

Jim Wood, for Complainant.
Michael J. McGill, Beresford, SD, for Respondent.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

On November 5, 1996, the United States Attorney's Office for the District of South Dakota, on behalf of the Farm Service Agency, gave notice to Respondent that it intended to impose an administrative offset on his military reservist's pay, pursuant to 5 U.S.C. § 5514, in order to recover money owed to the government for an outstanding and overdue loan from the Farmers Home Administration. Pursuant to the notice Respondent filed an appeal with the hearing clerk on December 16, 1996. On December 20, 1996, the United States Attorney's Office was notified that the procedural requirements to impose a salary offset had not been adhered to; and that the notice of intent to offset salary should be revised in order to comply with 7 C.F.R. § 1951.101 *et seq.* Subsequently, Respondent filed for bankruptcy, based on which the U.S. Attorney's Office determined that it was not feasible to pursue the offset and did not issue an amended notice. Since the government has decided not to impose the offset at this time, the appeal petition is dismissed without prejudice.

HORSE PROTECTION ACT

In re: JACKIE McCONNELL.
HPA Docket No. 91-162.
Ruling on Respondent's Motion to Correct Order Lifting Stay Order filed March 11, 1996.

Sharlene A. Deskins, for Complainant.
Carthel L. Smith, Lexington, TN, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

This proceeding was instituted under the Horse Protection Act, as amended, (15 U.S.C. § 1821 *et seq.*), (hereafter Act), by a Complaint filed on April 30, 1991, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that Jackie McConnell, (hereafter Respondent), entered for the purpose of showing or exhibiting a horse known as "Executive Order" at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee, while the horse was sore. On March 4, 1993, Chief Administrative Law Judge Victor W. Palmer, (hereafter Chief ALJ), issued an Initial Decision and Order finding that Respondent violated the Act. The Chief ALJ assessed a $2,000 civil penalty against Respondent and disqualified Respondent from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for 2 years. Both parties appealed to the Judicial Officer who issued a Decision and Order on September 16, 1993, affirming the Decision and Order of the Chief ALJ. *In re Jackie McConnell* (Decision as to Jackie McConnell) 52 Agric. Dec. 1156 (1993).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit, and filed a Motion for Stay Pending Review with the Judicial Officer who granted Respondent's motion. *In re Jackie McConnell*, 52 Agric. Dec. 1172 (1993). The United States Court of Appeals for the Sixth Circuit affirmed the Decision and Order of the Judicial Officer on April 29, 1994. *Jackie McConnell v. United States Department of Agriculture*, 23 F.3d 407 (6th Cir. 1994) (Table), and subsequently denied the Respondent's petition for rehearing. *Jackie McConnell v. United States Department of Agriculture*, (Order of June 15, 1994).

Complainant filed a Report to the Judicial Officer and Motion to Lift Stay on February 9, 1995, which was not opposed by Respondent. The Judicial Officer lifted the Stay Order on February 14, 1995, *In re Jackie McConnell*, 54 Agric Dec. 448 (1995), and, in so doing, ordered that Respondent pay the $2,000 civil penalty within 30 days from the date of service of the Order Lifting Stay Order on Respondent and begin the 2-year disqualification period on the 30th day after service of the Order Lifting Stay on Respondent. Respondent was served on February 17, 1995, and Respondent's 2-year disqualification period began on March 19, 1995.

On February 15, 1996, Respondent filed a Motion to Correct Order, (hereafter RM), on February 29, 1996, Complainant filed an Opposition to Respondent's Motion to Correct Order, and on March 1, 1996, the matter was referred to the Judicial Officer.

Respondent requests that the Order Lifting Stay Order be amended so that Respondent's 2-year disqualification period begins September 13, 1994, rather

than March 19, 1995, and requests oral argument. The issues raised by Respondent's motion are not complex and are controlled by established precedents, and, thus, oral argument would appear to serve no useful purpose, and Respondent's request for oral argument is denied.

Respondent asserts in his Motion to Correct Order that after the United States Court of Appeals for the Sixth Circuit's June 15, 1994, denial of his petition for rehearing, he had 90 days, ending September 13, 1994, in which to file a petition for a writ of certiorari with the United States Supreme Court, and that his failure to file such a petition within that 90-day period ended all possibility of further proceedings for judicial review. (RM, pp. 1-2.) Respondent states:

> Of course, Respondent and his Counsel of record assumed that the Stay Order would be automatically lifted on September 13, 1994, because there was no other remedy, and upon advice of Counsel the Respondent began his disqualification in September, 1994 and has refrained from all activity prohibited by the disqualification since said time. (RM, p. 2.)

The facts do not support Respondent's contention that the Order Lifting Stay Order should be corrected.

Stay Orders issued by the Judicial Officer pending the outcome of judicial review are not automatically lifted upon conclusion of judicial review. Instead, action must be taken to lift Stay Orders and there are numerous instances in which the Judicial Officer has lifted Stay Orders in administrative proceedings instituted for violations of the Act. *See, e.g.*, *In re Jackie McConnell*, 54 Agric Dec. 448 (1995); *In re William Dwaine Elliott*, 52 Agric. Dec. 1372 (1993); *In re Larry E. Edwards*, 51 Agric. Dec. 436 (1992); *In re Eldon Stamper*, 43 Agric. Dec. 829 (1984); *In re Preach Fleming*, 43 Agric. Dec. 829 (1984); *In re Joe Fleming*, 43 Agric. Dec. 829 (1984); *In re Albert Lee Rowland*, 43 Agric. Dec. 799 (1984).

In the instant case, Complainant filed a Report to the Judicial Officer and Motion to Lift Stay on February 9, 1995. Under the applicable Rules of Practice, 7 C.F.R. § 1.143(d), Respondent's response to Complainant's motion was due within 20 days after service of the motion on Respondent. Respondent did not respond to Complainant's motion and the Judicial Officer issued an Order Lifting Stay Order on February 14, 1995, *In re Jackie McConnell*, 54 Agric Dec. 448 (1995), which was served on Respondent on February 17, 1995. The Order Lifting Stay Order provides that the disqualification provisions of the Order previously issued in the case, *see, In re Jackie McConnell* (Decision as to Jackie McConnell) 52 Agric. Dec. 1156 (1993), shall become effective on the 30th day after service of the Order Lifting Stay Order on Respondent, and Respondent shall

pay the civil penalty within 30 days from the date of service of the Order Lifting Stay Order on Respondent. Three hundred sixty-three days after service of the Order Lifting Stay Order on Respondent, Respondent asks for a correction of the Order Lifting Stay Order based upon Respondent's belief that the Stay Order was automatically lifted on September 13, 1994.[1] Respondent's failure to respond to Complainant's Report to the Judicial Officer and Motion to Lift Stay and the substantial delay between service of the Judicial Officer's Order Lifting Stay Order and the Respondent's Motion to Correct Order causes me to question the credibility of Respondent's assertion that he believed in September 1994, that the Stay Order issued in this case was automatically removed on September 13, 1994.

Further, if Respondent did, in fact, believe that the Stay Order was automatically lifted on September 13, 1994, compliance with the automatically resuscitated Order would have caused Respondent to pay the assessed civil penalty no later than October 13, 1994, within the required 30 days after Respondent believed the Stay Order had been removed. Instead, Respondent paid the assessed civil penalty by check dated June 8, 1995, which was after the Judicial Officer issued the Order Lifting Stay Order, and over 8½ months after Respondent asserts the Stay Order had been automatically removed.

Finally, Respondent was free to move to have the Stay Order lifted at any time after it was issued and free to move to have the 2-year disqualification period begin on September 13, 1994, at any time prior to September 13, 1994. The applicable Rules of Practice, 7 C.F.R. § 1.143(b)(1), provide that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." Respondent was fully aware of his right to file motions under the applicable Rules of Practice as evidenced by his Motion for Stay Pending Review, which he filed in the instant case on December 13, 1993, and which was granted by the Judicial Officer December 15, 1993, *In re Jackie McConnell*, 52 Agric. Dec. 1172 (1993).

I find no basis upon which to disturb the Order Lifting Stay Order issued February 14, 1995, and Respondent's motion is therefore denied.

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[1]Respondent states that he "has made repeated requests to correct and/or amend the Order to no avail." (RM, p. 3.) I have thoroughly reviewed the record in this case and can find no request by Respondent asking for a correction or amendment of the Order Lifting Stay Order prior to Respondent's Motion To Correct Order filed February 15, 1996.

In re: CECIL JORDAN, SHERYL CRAWFORD, AND RONALD R. SMITH.
HPA Docket No. 91–0023.
Order Lifting Stay Order filed May 19, 1997.

Donald A. Tracy, for Complainant.
David N. Patterson, Willoughby, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued a Decision and Order holding that Sheryl Crawford (hereinafter Respondent) had violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), assessing Respondent a $2,000 civil penalty, and disqualifying Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for a period of 1 year. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995). Respondent was served with the Decision and Order on November 24, 1993 (Return Receipt). The Decision and Order requires payment of the assessed civil penalty within 30 days after service of the Decision and Order on Respondent and imposes the disqualification period beginning on the 30th day after service of the Decision and Order on Respondent, *viz.*, December 24, 1993. Respondent appealed the November 19, 1993, Decision and Order, and on February 16, 1994, Respondent filed Respondent's Motion for Stay of Sanctions Pending Appeal, which the Judicial Officer granted on February 28, 1994. *In re Cecil Jordan*, 53 Agric. Dec. 536 (1994) (Stay Order).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and on May 1, 1995, Respondent filed Respondent's Motion to Initiate Sanctions. On May 11, 1995, prior to a ruling on Respondent's Motion to Initiate Sanctions, Respondent filed Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion to Stay Order of Judicial Officer. On June 6, 1995, the Judicial Officer granted Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions, and the Judicial Officer granted Respondent's motion for stay pending the outcome of Respondent's then contemplated petition for a writ of certiorari. *In re Cecil Jordan*, 54 Agric. Dec. 449 (1995) (Order to Stay Execution).

On October 2, 1995, the Supreme Court of the United States denied Respondent's petition for a writ of certiorari. *Crawford v. United States Dep't of Agric.*, 116 S.Ct. 88 (1995). Subsequently, Complainant filed a Motion to Lift Stay as to Sheryl Crawford, which was granted by the Judicial Officer on February 23,

1996. *In re Cecil Jordan*, 55 Agric. Dec. 332 (1996). Pursuant to the February 23, 1996, Order Lifting Stay, Respondent was to pay the assessed civil penalty within 30 days after service of the Order Lifting Stay on Respondent and the disqualification provisions were to become effective on the 30th day after service of the Order Lifting Stay on Respondent.

On March 25, 1995, Respondent filed Respondent's Motion to Stay Order of Judicial Officer, pending the disposition of Respondent's Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. On March 28, 1996, prior to the 30th day after service on Respondent of the Order Lifting Stay, a Temporary Stay Order was issued which provided Complainant with an opportunity to respond to Respondent's Motion to Stay Order of Judicial Officer. *In re Cecil Jordan*, 55 Agric. Dec. 333 (1996) (Temporary Stay Order).

Complainant filed Complainant's Opposition to Respondent's Motion to Stay the Judicial Officer's Order on April 11, 1996. On May 8, 1996, a Stay Order, which provides that the "Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction," was issued. *In re Cecil Jordan*, 55 Agric. Dec. 334 (Stay Order).

On May 7, 1996, Respondent filed a Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. The Supreme Court denied Respondent's motion on June 24, 1996. *Crawford v. United States Dep't of Agric.*, 116 S.Ct. 2574 (1996). On April 21, 1997, Complainant filed a Motion to Judicial Officer to Lift Stay, on May 12, 1997, Respondent filed Respondent's Response to Motion to Judicial Officer to Lift Stay (hereinafter Respondent's Response), and on May 13, 1997, the case was referred to the Judicial Officer for a ruling.

Respondent does not oppose Complainant's Motion to Judicial Officer to Lift Stay, but asserts that she has served the entire 1-year disqualification period (Respondent's Response).

The Decision and Order filed November 19, 1993, disqualifying Respondent, became "effective on the 30th day after service of [the] Order on Respondent," *In re Cecil Crawford, supra*, 52 Agric. Dec. at 1242, *viz.*, December 24, 1993. The November 19, 1993, Order was stayed effective February 28, 1994, and Respondent was disqualified during the period December 24, 1993, through February 27, 1994. At no other time was the disqualification provision in the November 19, 1993, Decision and Order in effect. Therefore, Respondent's request that she be considered to have been disqualified during the period December 24, 1993, through February 27, 1994, is granted, and Respondent's request that she be considered to have been disqualified during the periods February 28, 1994, to

March 16, 1994; March 31, 1995, to June 6, 1995; and October 31, 1995, to May 31, 1996, is denied.

Complainant's Motion to Judicial Officer to Lift Stay is granted. The Stay Order issued in this proceeding on May 8, 1996, *In re Cecil Jordan*, 55 Agric. Dec. 334 (1996), is lifted, and the Order issued in *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995), is effective as follows:

1. Respondent shall pay the civil penalty assessed in the Order within 30 days after service of this Order Lifting Stay Order on Respondent; and
2. The disqualification provisions of the Order shall become effective on the 30th day after service of this Order Lifting Stay Order on Respondent.[1]

In re: CECIL JORDAN, SHERYL CRAWFORD, AND RONALD R. SMITH.
HPA Docket No. 91-0023.
Order on Reconsideration of Order Lifting Stay Order filed June 13, 1997.

Donald A. Tracy, for Complainant.
David N. Patterson, Willoughby, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 19, 1993, the Judicial Officer issued a Decision and Order holding that Sheryl Crawford (hereinafter Respondent) had violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), assessing Respondent a $2,000 civil penalty, and disqualifying Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction for a period of 1 year. *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995). Respondent was served with the Decision and Order on November 24, 1993 (Return Receipt). The Decision and Order requires payment of the assessed civil penalty within 30 days

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[1]Respondent shall be disqualified for a period of 1 year as provided in the Order issued November 19, 1993. Respondent has been disqualified in accordance with the Order for the period during which the Order issued November 19, 1993, was in effect, *viz.*, December 24, 1993, through February 27, 1994 (a period of 66 days). Therefore, Respondent shall be disqualified for 299 days beginning on the 30th day after service on Respondent of this Order Lifting Stay Order.

after service of the Decision and Order on Respondent and imposes the disqualification period beginning on the 30th day after service of the Decision and Order on Respondent, *viz.*, December 24, 1993. Respondent appealed the November 19, 1993, Decision and Order, and on February 16, 1994, Respondent filed Respondent's Motion for Stay of Sanctions Pending Appeal, which the Judicial Officer granted on February 28, 1994. *In re Cecil Jordan*, 53 Agric. Dec. 536 (1994) (Stay Order).

The agency decision was affirmed, *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), and on May 1, 1995, Respondent filed Respondent's Motion to Initiate Sanctions. On May 11, 1995, prior to a ruling on Respondent's Motion to Initiate Sanctions, Respondent filed Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions and Respondent's Motion to Stay Order of Judicial Officer. On June 6, 1995, the Judicial Officer granted Respondent's Motion to Withdraw Respondent's Motion to Initiate Sanctions, and the Judicial Officer granted Respondent's motion for stay pending the outcome of Respondent's then contemplated petition for a writ of certiorari. *In re Cecil Jordan*, 54 Agric. Dec. 449 (1995) (Order to Stay Execution).

On October 2, 1995, the Supreme Court of the United States denied Respondent's petition for a writ of certiorari. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 88 (1995). Subsequently, Complainant filed a Motion to Lift Stay as to Sheryl Crawford, which was granted by the Judicial Officer on February 23, 1996. *In re Cecil Jordan*, 55 Agric. Dec. 332 (1996). Pursuant to the February 23, 1996, Order Lifting Stay, Respondent was to pay the assessed civil penalty within 30 days after service of the Order Lifting Stay on Respondent, and the disqualification provisions were to become effective on the 30th day after service of the Order Lifting Stay on Respondent.

On March 25, 1995, Respondent filed Respondent's Motion to Stay Order of Judicial Officer, pending the disposition of Respondent's Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. On March 28, 1996, prior to the 30th day after service on Respondent of the Order Lifting Stay, a Temporary Stay Order was issued which provided Complainant with an opportunity to respond to Respondent's Motion to Stay Order of Judicial Officer. *In re Cecil Jordan*, 55 Agric. Dec. 333 (1996) (Temporary Stay Order).

Complainant filed Complainant's Opposition to Respondent's Motion to Stay the Judicial Officer's Order on April 11, 1996. On May 8, 1996, a Stay Order, which provides that the "Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction," was issued. *In re Cecil Jordan*, 55 Agric. Dec. 334 (Stay Order).

On May 7, 1996, Respondent filed a Motion for Leave to File Petition for Rehearing with the Supreme Court of the United States. The Supreme Court denied Respondent's motion on June 24, 1996. *Crawford v. United States Dep't of Agric.*, 116 S. Ct. 2574 (1996). On April 21, 1997, Complainant filed a Motion to Judicial Officer to Lift Stay; on May 12, 1997, Respondent filed Respondent's Response to Motion to Judicial Officer to Lift Stay; and on May 19, 1997, I issued an Order Lifting Stay Order, which states:

> Respondent does not oppose Complainant's Motion to Judicial Officer to Lift Stay, but asserts that she has served the entire 1-year disqualification period (Respondent's Response [to Motion to Judicial Officer to Lift Stay]).
>
> The Decision and Order filed November 19, 1993, disqualifying Respondent became "effective on the 30th day after service of [the] Order on Respondent," *In re Cecil Crawford, supra*, 52 Agric. Dec. at 1242, *viz.*, December 24, 1993. The November 19, 1993, Order was stayed effective February 28, 1994, and Respondent was disqualified during the period December 24, 1993, through February 27, 1994. At no other time was the disqualification provision in November 19, 1993, Decision and Order in effect. Therefore, Respondent's request that she be considered to have been disqualified during the period December 24, 1993, through February 27, 1994, is granted, and Respondent's request that she be considered to have been disqualified during the periods February 28, 1994, to March 16, 1994; March 31, 1995, to June 6, 1995; and October 31, 1995, to May 31, 1996, is denied.

In re Cecil Jordan, 56 Agric. Dec. ___, slip op at 3-4 (May 19, 1997) (Order Lifting Stay Order).

On May 29, 1997, Respondent filed Respondent's Motion for Reconsideration of Order Lifting Stay Order; on June 11, 1997, Complainant filed Complainant's Opposition to "Respondent's Motion for Reconsideration of Order Lifting Stay Order"; and on June 12, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent reiterates the arguments which she made in Respondent's Response to Motion to Judicial Officer to Lift Stay. A good faith belief that a stay order has been lifted does not in fact cause a stay order to be lifted. Instead, action must be taken to lift a stay order. *In re Jackie McConnell*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 11, 1996) (Ruling on Respondent's Motion to Correct Order Lifting Stay). The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), which are

applicable to this proceeding, provide that "[a]ny motion will be entertained other than a motion to dismiss on the pleading." (7 C.F.R. § 1.143(b)(1).) Respondent was fully aware of her right to file a motion to lift a stay and begin her disqualification period under the Rules of Practice, as evidenced by Respondent's Motion to Initiate Sanctions filed May 1, 1995.

I find no basis upon which to disturb the Order Lifting Stay Order issued May 19, 1997, and Respondent's Motion for Reconsideration of Order Lifting Stay Order is therefore denied. The Order issued in *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 116 S. Ct. 88 (1995) is effective, as follows:

1. Respondent shall pay the civil penalty assessed in the Order within 30 days after service of this Order on Reconsideration of Order Lifting Stay Order on Respondent; and

2. The disqualification provisions of the Order shall become effective on the 30th day after service of this Order on Reconsideration of Order Lifting Stay Order on Respondent.[1]

MUSHROOM PROMOTION RESEARCH and CONSUMER INFORMATION ACT

In re: DONALD B. MILLS, INC., A CALIFORNIA CORPORATION, d/b/a DBM MUSHROOMS.
MPRCIA Docket No. 95-0001.
Order to Show Cause filed March 19, 1997.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Richard T. Rossier, Washington, DC, for Intervenor.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

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[1]Respondent shall be disqualified for a period of 1 year as provided in the Order issued November 19, 1993. Respondent has been disqualified in accordance with the Order for the period during which the Order issued November 19, 1993, was in effect, *viz.*, December 24, 1993, through February 27, 1994 (a period of 66 days). Therefore, Respondent shall be disqualified for 299 days beginning on the 30th day after service on Respondent of this Order on Reconsideration of Order Lifting Stay Order.

An examination of Administrative Law Judge Edwin S. Bernstein's Initial Decision and Order and the appellate pleadings filed in this proceeding, *sub judice*, reveals that any decision by the Judicial Officer herein would have to address the First Amendment/commercial free speech issues that are still being litigated in the consolidated *Wileman*[1] and the consolidated *Cal-Almond*[2] proceedings.

Consequently, I am issuing this Order for the parties and intervenor in this proceeding to show cause why I should not forestall my Decision and Order herein, and await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*.

Therefore, the parties and intervenor herein shall, within 20 days from the service of this Order to Show Cause, file with the Hearing Clerk any cause showing why I should not await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant case.

In re: DONALD B. MILLS, INC., A CALIFORNIA CORPORATION, d/b/a DBM MUSHROOMS.
MPRCIA Docket No. 95-0001.
Ruling on Order to Show Cause filed May 22, 1997.

Gregory Cooper, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Richard T. Rossier, Washington, DC, for Intervenor.
Ruling issued by William G. Jenson, Judicial Officer.

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[1] *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705 (1990), and *In re Wileman Bros. & Elliott, Inc. (Wileman II)*, 50 Agric. Dec. 1165 (1991), *aff'd*, No. CV-F-90-473-OWW (E.D. Cal. Jan. 27, 1993); *In re Asakawa Farms*, 50 Agric. Dec. 1144 (1991), *appeal docketed*, CV-F-91-686-OWW (E.D. Cal. 1991); and *In re Gerawan Co. (Gerawan I)*, 50 Agric. Dec. 1338 (1991), and *In re Gerawan Co. (Gerawan II)*, 50 Agric. Dec. 1363 (1991), consolidated with CV-F-90-473-OWW (E.D. Cal. Sept. 14, 1993)), *aff'd in part, rev'd in part & remanded*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott Inc.*, 116 S.Ct. 1875 (1996).

[2] *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (1991), *aff'd sub nom. Cal-Almond, Inc. v. USDA*, No. CV-F-91-064-REC (E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 44 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 171 (1991), *aff'd*, No. CV-F-91-122-REC (E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 79 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 183 (1991), *aff'd*, No. CV-F-91-123-REC (E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 85 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 1445 (1991), *aff'd*, No. CV-F-91-685-REC (E.D. Cal. July 8, 1992), *aff'd in part, rev'd in part & remanded*, 14 F.3d 429 (9th Cir. 1993), *final order and judgment on remand*, No. CV-F-91-064-REC (E.D. Cal. Sept. 6, 1994), *aff'd in part & rev'd in part*, 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879).

On March 19, 1997, I issued an Order to Show Cause stating that an examination of Administrative Law Judge Edwin S. Bernstein's Initial Decision and Order and the appellate pleadings filed in this proceeding, *sub judice*, reveals that any decision by the Judicial Officer in this proceeding would have to address the First Amendment/commercial free speech issues that are still being litigated in the consolidated *Wileman*[1] and the consolidated *Cal-Almond*[2] proceedings. I requested the parties and the intervenor to show cause why I should not await the outcome of the consolidated *Wileman* and the consolidated *Cal-Almond* proceedings before issuing a Decision and Order in this proceeding.

Neither Petitioner nor the intervenor in this proceeding filed a response to the Order to Show Cause. Respondent filed Respondent's Reply to Show Cause Order which states:

> This is in response to the order of the Judicial Officer served on [R]espondent on March 26, 1997, which seeks the parties' position on whether the Decision and Order herein should be forestalled pending the judicial review in *Glickman v. Wileman* and *United States v. Cal-Almond, Inc.*
>
> Under Supreme Court practice, the decision of the high court in *Wileman* should be issued by June 30, 1997. Presumably, the *Cal-Almond*

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[1] *In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705 (1990), and *In re Wileman Bros. & Elliott, Inc. (Wileman II)*, 50 Agric. Dec. 1165 (1991), *aff'd*, No. CV-F-90-473-OWW (E.D. Cal. Jan. 27, 1993); *In re Asakawa Farms*, 50 Agric. Dec. 1144 (1991), *appeal docketed*, CV-F-91-686-OWW (E.D. Cal. 1991); and *In re Gerawan Co. (Gerawan I)*, 50 Agric. Dec. 1338 (1991), and *In re Gerawan Co. (Gerawan II)*, 50 Agric. Dec. 1363 (1991), consolidated with CV-F-90-473-OWW (E.D. Cal. Sept. 14, 1993)), *aff'd in part, rev'd in part & remanded*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott Inc.*, 116 S.Ct. 1875 (1996).

[2] *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23 (1991), *aff'd sub nom. Cal-Almond, Inc. v. USDA*, No. CV-F-91-064-REC(E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 44 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 171 (1991), *aff'd*, No. CV-F-91-122-REC (E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 79 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 183 (1991), *aff'd*, No. CV-F-91-123-REC(E.D. Cal. June 3, 1992), *printed in* 51 Agric. Dec. 85 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 1445 (1991), *aff'd*, No. CV-F-91-685-REC(E.D. Cal. July 8, 1992), *aff'd in part, rev'd in part & remanded*, 14 F.3d 429 (9th Cir. 1993), *final order and judgment on remand*, No. CV-F-91-064-REC(E.D. Cal. Sept. 6, 1994), *aff'd in part & rev'd in part*, 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879).

case will be remanded to the Ninth Circuit for modification in accordance therewith. Since the Supreme Court's analysis of the First Amendment issues will be instructive in this proceeding, there are sound reasons of judicial economy for the course of action proposed by the Judicial Officer. Therefore, [R]espondent has no objection to a short delay in this proceeding.

No cause having been shown, I shall await the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond* before issuing a Decision and Order in the instant proceeding.

PLANT QUARANTINE ACT

In re: MARIE DUVIVIER.
P.Q. Docket No. 97-0015.
Order Granting Motion To Dismiss Without Prejudice filed June 6, 1997.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on May 16, 1997, be dismissed without prejudice, this the 6th day of June 1997.

SHEEP PROMOTION RESEARCH and INFORMATION ACT

REENA SLOMINSKI v. DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, and THE UNITED STATES DEPARTMENT OF AGRICULTURE.
SPRIA Docket No. 96-0001.
Order of Dismissal filed April 24, 1997.

Colleen A. Carroll, for Complainant.
Robert M. Cook, Yuma, AZ, for Petitioner.
Order issued by James W. Hunt, Administrative Law Judge.

Pursuant to the foregoing Motion to Dismiss, and good cause appearing, IT IS ORDERED that the above-entitled action is dismissed.

DATED this 24th day of April, 1997.

AGRICULTURAL MARKETING AGREEMENT ACT

In re: TORRES DATE PACKING, a general partnership; GUADALUPE E. TORRES, an individual; FERNANDO TORRES, an individual; JOSE LUIS TORRES, an individual; and ROGELIO TORRES, an individual.
AMAA Docket No. 97-0001.
Decision and Order filed February 10, 1997.

Failure to file an answer - Failure to remit assessments - Failure to file handler reports with the California Date Administrative Committee - Failure to file reports of handler carryover - Failure to file reports of acquisition and disposition dates - Cease and Desist Order - Payment order - Civil penalty.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

The Administrator of the Agricultural Marketing Service instituted this proceeding under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), by filing a complaint alleging that respondents Torres Date Packing, Guadalupe E. Torres, Fernando Torres, José Luis Torres and Rogelio Torres willfully violated the Marketing Order for Domestic Dates Produced or Packed in Riverside County, California, 7 C.F.R. §§ 987.1-987.84 (the "Order"), and the Administrative Rules, 7 C.F.R. §§ 987.101-172 (the "Rules") issued pursuant to the Act.

The Hearing Clerk served on the respondents, by certified mail, copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. § 1.130 *et seq.* (the "Rules of Practice"). The Hearing Clerk, in the accompanying letter of service, informed the respondent that it should file an answer to the complaint pursuant to the Rules of Practice and that the failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice.

The material facts alleged in the complaint, which are admitted by reason of the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Torres Date Packing is a partnership whose principal place of busine[redacted] Avenue 81, [redacted], California [redacted]. Respondents Guadalupe E. Torres, Fernando Torres, Jose Luis Torres and Rogelio Torres are partners in respondent Torres Date Packing, and their business mailing address is [redacted] Th[redacted], California [redacted].

2. At all times mentioned herein, the respondents were handlers of California dates as defined in the Act, 7 U.S.C. § 608c(1), and the Order, 7 C.F.R. § 987.8.

3. Respondents willfully violated section 987.72(a) of the Order, 7 C.F.R. § 987.72(a), by failing to remit $14,359.53 in assessments owed in the 1994-1995 crop year.

4. Respondents willfully violated section 987.38 of the Order (7 C.F.R. § 987.38) and section 987.138 of the Rules (7 C.F.R. § 987.138), by failing to file with the California Date Administrative Committee ("CDAC") a handler report (CDAC Form No. 18), for crop years 1994-1995 and 1995-1996.

5. Respondents willfully violated section 987.61 of the Order (7 C.F.R. § 987.61) and section 987.161 of the Rules (7 C.F.R. § 987.161), by failing to file with the CDAC two reports of handler carryover (CDAC Form No. 5), for crop year 1994-1995

6. Respondents willfully violated sections 987.62, 987.63 and 987.64 of the Order (7 C.F.R. §§ 987.62, 987.63, 987.64) and section 987.162 of the Rules (7 C.F.R. § 987.162), by failing to file with the CDAC twelve reports of the acquisition and disposition of dates (CDAC Form No. 6), for crop year 1994-1995.

7. Respondents willfully violated section 987.61 of the Order (7 C.F.R. § 987.61) and section 987.161 of the Rules (7 C.F.R. § 987.161), by failing to file with the CDAC two reports of handler carryover (CDAC Form No. 5), for crop year 1995-1996.

8. Respondents willfully violated sections 987.62, 987.63 and 987.64 of the Order (7 C.F.R. §§ 987.62, 987.63, 987.64) and section 987.162 of the Rules (7 C.F.R. § 987.162), by failing to file with the CDAC twelve reports of the acquisition and disposition of dates (CDAC Form No. 6), for crop year 1995-1996.

Conclusions

The Secretary of Agriculture has jurisdiction in this matter. By reason of the facts set forth in the Findings of Fact above, the respondents have violated sections 987.61, 987.62, 987.63, 987.64, 987.72(a), 987.38 of the Order, and sections

987.138, 987.161 and 987.162 of the Rules, and the following order is authorized by the Act and is warranted under the circumstances.

Order

1. Respondents Torres Date Packing, Guadalupe E. Torres, Fernando Torres, José Luís Torres and Rogelio Torres their agents and employees, successors and assigns, directly or through any corporate or other device, shall comply with each and every provision of the Act and the Marketing Order and shall cease and desist from any violation thereof.

2. Respondents are hereby ordered to pay $14,359.53 in assessments due under section 987.72(a) of the Order, 7 C.F.R. § 987.72(a), for crop year 1994-1995.

3. Respondents are hereby assessed a civil penalty of $31,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

Copies of this decision shall be served upon the parties. Pursuant to sections 1.142 and 1.145 of the Rules of Practice, this decision will become final without further proceedings 35 days after service on the respondent. The provisions of this order shall become effective on the first day after this decision becomes final.

[This Decision and Order became final and effective March 22, 1997.-Editor]

ANIMAL QUARANTINE AND RELATED LAWS

In re: RENE L. PARANO.
A.Q. Docket No. 95-0032.
Decision and Order filed February 9, 1996.

Failure to file an answer - Importation of a finch into the United States from Cuba without the required permit or health certificate and without submitting to veterinary inspection - Civil penalty.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of birds from Cuba into the United States (9 C.F.R. §§ 92.100 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under §§ 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120) (Act), and the regulations promulgated thereunder, by a complaint filed on June 29, 1995, by the Acting Administrator of the Animal and Plant Health inspection Service, United States Department of Agriculture. The complaint alleges that on or about August 9, 1994, respondent brought a bird, namely a "finch", into the United States in violation of 9 C.F.R. § 92.102(a), as required. Also, on or about August 9, 1994, respondent brought a bird, namely a "finch", into the United States from Cuba, in violation 9 C.F.R. § 92.103, in that respondent did not first apply for and obtain an import permit for the bird which was intended for importation into the United States, as required. Moreover, on or about August 9, 1994, respondent offered for importation into the United States from Cuba, a bird, namely a "finch", in violation of 9 C.F.R. § 92.104(a), in that the bird was not accompanied by a veterinary health certificate, as required. Furthermore, on or about August 9, 1994, respondent imported a bird, namely "finch", into the United States from Cuba, in violation of 9 C.F.R. § 92.105(b), in that the bird was not subjected to inspection at the Customs port of entry by a veterinary inspector of the Animal and Plant Health Inspection Service, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under (7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing (7

C.F.R. § 1.139). Accordingly the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and the Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Rene L. Parano, is an individual with a mailing address of [redacted]

2. On or about August 9, 1994, respondent brought a bird, namely a "finch", into the United States in violation of 9 C.F.R. § 92.102(a), as required.

3. On or about August 9, 1994, respondent brought a bird, namely a "finch", into the United States from Cuba, in violation of 9 C.F.R. § 92.103, in that respondent did not first apply for and obtain an import permit for the bird which was intended for importation into the United States, as required.

4. On or about August 9, 1994, respondent offered for importation into the United States from Cuba, a bird, namely a "finch", in violation 9 C.F.R. § 92.104(a), in that the bird was not accompanied by a veterinary health certificate, as required. Furthermore, on or about August 9, 1994, respondent imported a bird, namely a "finch", into the United States from Cuba, in violation of 9 C.F.R. § 92.105(b), in that the bird was not subjected to inspection at the Customs port of entry by a veterinary inspector of the Animal and Plant Health Inspection Service, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated 9 C.F.R. §§ 92.100 *et seq.* Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00) ($125.00 per violation).[1] This penalty shall be payable to the

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[1]The respondent has failed to file an answer within the prescribed time, and under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, 49 Agric. Dec. 849 (1990).

"Treasurer of the United States" by certified check or money order, and shall be forwarded to:

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

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-32.

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

[This Decision and Order became final March 22, 1996.-Editor]

In re: LUIS ROSALES-CARRILLO.
A.Q. Docket No. 96-0013.
Decision and Order filed October 25, 1996.

Failure to file an answer - Importation of birds without a permit or health certificates - Failure to submit to verterinary inspection at the port of entry - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)(the Act), and the regulations promulgated thereunder (9 C.F.R. §§ 92.101 - 92.106)(the regulations).

This proceeding was instituted by a complaint filed against the respondent on August 1, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes,

for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Luis Rosales-Carrillo is an individual with a mailing address of [redacted]

2. On June 28, 1994, the respondent brought seven birds into the United States without an import permit.

3. On June 28, 1994, the respondent brought seven birds into the United States which were not accompanied by a health certificate.

4. On June 28, 1994, the respondent brought seven birds into the United States which were not inspected by a port veterinarian at the Customs port of entry.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (21 U.S.C. §§ 111, 122; 9 C.F.R. §§ 92.101 - 92.106).

Therefore, the following Order is issued.

Order

Luis Rosales-Carrillo is hereby assessed a civil penalty of three thousand dollars ($3,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 6, 1997.-Editor]

In re: GERMAN ANTONIO LOPEZ.
A.Q. Docket No. 96-0015.
Decision and Order filed November 8, 1996.

Failure to file an answer - Importation of birds into the United States without a permit or health certificates - Importation of birds into the United States without submitting to verterinary inspection at the port of entry - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)(the Act), and the regulations promulgated thereunder (9 C.F.R. §§ 92.101 - 92.106)(the regulations).

This proceeding was instituted by a complaint filed against the respondent on August 6, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. German Antonio Lopez is an individual with a mailing address of [redacted]

2. On September 7, 1992, the respondent brought five birds into the United States without an import permit.

3. On September 7, 1992, the respondent brought five birds into the United States which were not accompanied by a health certificate.

4. On September 7, 1992, the respondent brought five birds into the United States which were not inspected by a port veterinarian at the Customs port of entry.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (21 U.S.C. §§ 111, 122; 9 C.F.R. §§ 92.101 - 92.106).

Therefore, the following Order is issued.

Order

German Antonio Lopez is hereby assessed a civil penalty of three thousand dollars ($3,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 6, 1997.-Editor]

In re: CARLOS VERWAYNE.
A.Q. Docket No. 96-0011.
Decision and Order filed December 5, 1996.

Failure to file an answer - Importation of a bird without an import permit or health certificate - Failure to submit to veterinary inspection at the port of entry - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)(the Act), and the regulations promulgated thereunder (9 C.F.R. §§ 92.101 - 92.106)(the regulations).

This proceeding was instituted by a complaint filed against the respondent on August 1, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Carlos Verwayne is an individual with a mailing address of [redacted]

2. On August 26, 1995, the respondent brought one bird into the United States without an import permit.

3. On August 26, 1995, the respondent brought one bird into the United States which was not accompanied by a health certificate.

4. On August 26, 1995, the respondent brought one bird into the United States which was not inspected by a port veterinarian at the Customs port of entry.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (21 U.S.C. §§ 111, 122; 9 C.F.R. §§ 92.101 - 92.106).

Therefore, the following Order is issued.

Order

Carlos Verwayne is hereby assessed a civil penalty of one thousand, five hundred dollars ($1,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final Februay 21, 1997.-Editor]

In re: LOZARO GARI.
A.Q. Docket No. 96-0012.
Decision and Order filed December °, 1996.

Failure to file an answer - Importation of birds without a permit or health certificates - Failure to submit to verterinary inspection at the port of entry - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)(the Act), and the regulations promulgated thereunder (9 C.F.R. §§ 92.101 - 92.106)(the regulations).

This proceeding was instituted by a complaint filed against the respondent on August 1, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Lozaro Gari is an individual with a mailing address of [redacted]

2. On June 2, 1994, the respondent brought two birds into the United States without an import permit.

3. On June 2, 1994, the respondent brought two birds into the United States which were not accompanied by a health certificate.

4. On June 2, 1994, the respondent brought two birds into the United States which were not inspected by a port veterinarian at the Customs port of entry.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (21 U.S.C. §§ 111, 122; 9 C.F.R. §§ 92.101 - 92.106).

Therefore, the following Order is issued.

Order

Lozaro Gari is hereby assessed a civil penalty of two thousand, two hundred and fifty dollars ($2,250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final February 21, 1997.-Editor]

In re: JIMMY BELCHER.
A.Q. Docket No. 96-0017.
Decision and Order filed January 3, 1997.

Failure to file an answer - Movement of test eligible cattle interstate without a test for brucellosis 30 days prior and without a certifcate - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)(Act), and regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*)

This proceeding was instituted by a complaint filed against the respondent on August 16, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an

answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jimmy Belcher is an individual with a mailing address of

2. In February, 1995, respondent moved twelve test-eligible cattle from Tennessee to Kentucky without an official test for brucellosis within 30 days prior to such interstate movement.

3. In February, 1995, respondent moved twelve test-eligible cattle from Tennessee to Kentucky without a certificate.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (9 C.F.R. § 78.9(b)(3)(ii)).

Therefore, the following Order is issued.

Order

Jimmy Belcher is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 12, 1997.-Editor]

In re: RONALD J. HELLEN.
A.Q. Docket No. 95-0026.
Decision and Order filed February 20, 1997.

Failure to file an answer - Importation of ham by mail from Germany into the United States without a certificate - Civil penalty.

Jeffrey Kirmsse, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of cured or cooked meat into the United States (9 C.F.R. § 94.4 *et seq.*), hereinafter referred to as the regulations, in accordance with the rules of practice set forth in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on March 31, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ronald J. Hellen is an individual whose mailing address is [redacted]

2. On or about January 25, 1994, respondent imported one (1) ham by mail from Germany into the United States in violation of 9 C.F.R. § 94.4(a) and 94.4(b), because the cured or cooked meat product was not accompanied by a certificate, as required.

3. On or about January 25, 1994, respondent imported one (1) ham by mail from Germany into the United States in violation of 9 C.F.R. § 94.4(a) and 94.4(b), because no certificate for the cured or cooked meat product was presented to an authorized inspector at the port of arrival, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 94.4 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-26.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final May 9, 1997.-Editor]

In re: JOSE TALAVERA.
A.Q. Docket No. 96-0018.
Decision and Order filed December 9, 1996.

Failure to file an answer - Importation of a bird into the United States without an import permit or health certificate - Importation of a bird into the United States which was not inspected by a veterinarian at the port of entry - Importation of a bird into the United States at other than a designated port of entry - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order filed by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122) (the Act), and the regulations promulgated thereunder (9 C.F.R. §§ 92.101 - 92.106) (the regulations).

This proceeding was instituted by a complaint filed against the respondent on August 16, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jose Talavera is an individual with a mailing address of

2. On May 13, 1995, the respondent brought one bird into the United States without an import permit.

3. On May 13, 1995, the respondent brought one bird into the United States which was not accompanied by a health certificate.
4. On May 13, 1995, the respondent brought one bird into the United States which was not inspected by a port veterinarian at the Customs port of entry.
5. On May 13, 1995, the respondent brought one bird into the United States at other than a designated port of entry.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (21 U.S.C. §§ 111, 122; 9 C.F.R. I 92.101 - 92.106).

Therefore, the following Order is issued.

Order

Jose Talavera is hereby assessed a civil penalty of two thousand dollars ($2000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final June 5, 1997.-Editor]

ANIMAL WELFARE ACT

In re: MARTIN ESPANA dba EL GRAN CIRCO.
AWA Docket No. 96-0003.
Decision and Order filed November 1, 1996.

Failure to file an answer - Operating as an exhibitor without being licensed - Failure to provide adequate food - Failure to maintain primary enclosures in a clean and sanitary condition - Failure to provide a plan for environmental enhancement - Failure to provide a suitable method for elimination of excess water - Failure to provide adequate ventilation - Failure to provide sufficient space - Failure to maintain an effective program of pest control - Cease and Desist Order - License disqualification.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent Martin Espana, doing business as El Gran Circo, willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. §1.1 *et seq.*)(the "Regulations" and "Standards").

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Martin España is an individual doing business as El Gran Circo, whose address is [redacted]

2. From approximately April 22, 1994 to the present, respondent was operating as an exhibitor, as defined in the Act and regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

3. On April 22, April 25, May 2, June 7 and June 27, 1994, APHIS inspected the respondent's facility and found that respondent had failed to provide animals with food of sufficient quantity and nutritive value to maintain them in good health, in willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and sections 3.82(a) and 3.129(a) of the standards. (9 C.F.R. §§ 3.82(a) and 3.129(a)).

4. On May 2 and June 27, 1994, and January 8, 1995, APHIS inspected the respondent's facility and found that respondent had failed to keep primary enclosures for animals clean and sanitized, as required, in willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.131 of the standards (9 C.F.R. §§ 3.131).

5. On June 7, and June 27, 1994, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. A primary enclosure for a nonhuman primate was not kept clean and sanitized, as required (9 C.F.R. § 3.84); and

b. The respondent failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of a nonhuman primate (9 C.F.R. § 3.81).

6. On June 27, 1994, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. A suitable method was not provided to rapidly eliminate excess water from indoor housing facilities for animals (9 C.F.R. § 3.126(d)); and
b. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.126(b)).

7. On April 22, April 25, May 2, June 7, June 27, November 30 and December 2, 1994, APHIS inspected the respondent's facility and found that respondent had failed to construct and maintain primary enclosures for animals so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement, in willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.128 of the standards (9 C.F.R. § 3.128).

8. On January 8, 1995, APHIS inspected the respondent's facility and found that respondent had failed to establish and maintain an effective program for the control of pests, in willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.131(d) of the standards (9 C.F.R. § 3.131(d)).

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated section 4 of the Act (7 U.S.C. § 2134), section 2.1 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.1, 2.100(a)), and sections 3.81, 3.82(a), 3.84, 3.126(b), 3.126(d), 3.128, 3.129(a) and 3.131 of the Standards. (9 C.F.R. §§ 3.81, 3.82(a), 3.84, 3.126(b), 3.126(d), 3.128, 3.129(a), 3.131).

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

Order

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

2. Respondent is prohibited from becoming licensed under the Act for a period of five years.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final December 13, 1996.-Editor]

In re: ROBERT CHMIEL, d/b/a PET PARADISE.
AWA Docket No. 96-0052.
Decision and Order filed November 21, 1996.

Failure to file an answer - Operating as a dealer without being licensed - Failure to construct and maintain housing facilities for animals so that they are structurally sound and in good repair - Failure to store supplies of food and bedding so as to adequately protect them against contamination - Failure to establish and maintain programs of disease control and prevention enthanasia and adequate veterinary care - Failure to provide sufficient space for animals in primary enclosures - Failure to keep premises clean and free of debris or clutter -Failure to

construct structures which can be readily sanitized - Failure to construct sufficient elevated resting surfaces - Failure to provide opportunity for exercise - Failure to maintain appropriate plan for environmental enhancement - Failure to ensure that excreta and food waste are removed daily - Civil penalty - Cease and Desist Order - Suspension.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents violated the Act.

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon Respondent Robert Chmiel d.b.a. Pet Paradise, by the Hearing Clerk by certified mail on May 15, 1996. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted and set forth herein as Findings of Fact.

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

Findings of Fact

I

1. Robert Chmiel, hereinafter referred to as the respondent, is an individual doing business as Pet Paradise, whose address is [redacted]

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

II

From on or about December 9, 1994, and continuing until July 11, 1995, respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1).

III

1. On January 23, 1995, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

2. On January 23, 1995, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Supplies of food and bedding were not stored in a manner that protects them from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.1(e));

B. Primary enclosures for guinea pigs were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain them, and to keep predators out (9 C.F.R. § 3.28(a)); and

C. Primary enclosures for guinea pigs were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.28(b)).

IV

1. On February 5, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

2. On February 5, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75 of the regulations (9 C.F.R. § 2.75).

3. On February 5, 1996, APHIS inspected respondent's premises and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. Animal areas inside of housing facilities were not kept neat and free of clutter, including equipment, furniture, or stored material (9 C.F.R. § 3.75);

B. The surfaces of housing facilities were not constructed in a manner and made of materials that allowed them to be readily cleaned and sanitized and the interior surfaces and other surfaces coming in contact with animals were not free of excessive rust accumulation (9 C.F.R. §§ 3.1(c)(1), 3.1(c)(1)(i), 3.1(c)(2));

C. Supplies of food were not stored in a manner that protected the supplies from spoilage, contamination and vermin infestation (9 C.F.R. § 3.1(e));

D. Each primary enclosure housing cats did not contain an elevated resting surface or surfaces that, in the aggregate, were large enough to hold all the occupants of the primary enclosure at the same time comfortably (9 C.F.R. § 3.6(b)(4);

E. Each primary enclosure housing cats was not 24 inches high (9 C.F.R. § 3.6(b)(1)(A));

F. Each rabbit housed in a primary enclosure was not provided the minimum amount of floor space required, exclusive of the space taken up by food and water receptacles (9 C.F.R. § 3.53(c)(2));

G. The interior building surfaces for indoor housing facilities were not constructed and maintained so that they were substantially impervious to moisture and could be readily sanitized (9 C.F.R. §§ 3.26(d)), 3.51(d));

H. An appropriate plan to provide dogs with the opportunity for exercise was not made available to APHIS upon request (9 C.F.R. § 3.8); and

I. An appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates was not made available to APHIS upon request (9 C.F.R. § 3.81).

V

1. On February 29, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

2. On February 29, 1996, APHIS inspected respondent's premises and found that respondent had failed to maintain complete records showing the acquisition,

disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75 of the regulations (9 C.F.R. § 2.75).

3. On February 29, 1996, APHIS inspected respondent's premises and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. The surfaces of housing facilities coming in contact with nonhuman primates were not free of jagged edges or sharp points that might injure the animals (9 C.F.R. § 3.75(c)(ii);

B. Excreta and food waste were not removed from primary enclosures daily to prevent soiling of the animals contained in the primary enclosures (9 C.F.R. § 3.11(a);

C. During public exhibition, animals were not handled so as to insure 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 (9 C.F.R. § 2.131(b)(1);

D. Interior surfaces coming in contact with animals were not free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface (9 C.F.R. § 3.1((c)(1)(i)); and

E. Used primary enclosures were not sanitized as often as necessary to prevent an accumulation of dirt, debris, food waste, excreta and other disease hazards (9 C.F.R. § 3.11(b)(2)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act, as well as standards and regulations promulgated under the Act.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act

and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

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

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

(c) Failing to provide sufficient space for animals in primary enclosures;

(d) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(e) Failing to insure that animal areas inside of housing facilities are kept neat and free of clutter, including equipment, furniture, or stored material;

(f) Failing to insure that the surfaces of housing facilities are constructed in a manner and made of materials that allow them to be readily cleaned and sanitized and that interior surfaces and other surfaces coming in contact with animals are free of excessive rust accumulation;

(g) Failing to insure that each primary enclosure housing cats contains an elevated resting surface or surfaces that, in the aggregate, are large enough to hold all the occupants of the primary enclosure at the same time comfortably;

(h) Failing to insure that each primary enclosure housing cats is 24 inches high;

(i) Failing to insure that interior building surfaces for indoor housing facilities are constructed and maintained so that they are substantially impervious to moisture and can be readily sanitized;

(j) Failing to maintain an appropriate plan to provide dogs with the opportunity for exercise;

(k) Failing to maintain an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates;

(l) Failing to maintain complete records showing the acquisition, disposition, and identification of animals; and

(m) Failing to insure that excreta and food waste were removed from primary enclosures daily to prevent soiling of the animals.

3. The respondent is assessed a civil penalty of $3,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

4. The respondent's license is suspended for a period of 30 days and continuing thereafter until he demonstrates to APHIS that he is in full compliance with the Act

and the regulations and standards issued thereunder and this Order, including payment of the civil penalty assessed against him.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145. Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 2, 1997.-Editor]

In re: HERBERT GIFFIN d/b/a GIFFIN'S GAME FARM.
AWA Docket No. 97-0014.
Decision and Order filed January 21, 1997.

Failure to file an answer - Operating as a dealer without obtaining a license - Civil penalty - Cease and Desist Order.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent Herbert Giffin, doing business as Giffin's Game Farm, willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*)(the "Regulations").

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Herbert Giffin is an individual whose mailing address is [redacted] Mr. Giffin is a principal or sole proprietor of Giffin's Game Farm.

2. At all times mentioned herein, respondent Herbert Giffin was operating as a dealer, as that term is defined in the Act and the Regulations.

3. On or about November 9, 1994, respondent Herbert Giffin, without having obtained a license, sold a cougar for exhibition, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)).

4. On or about November 13, 1994, respondent Herbert Giffin, without having obtained a license, transported three hedgehogs for exhibition, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)).

5. On or about May 30, 1995, respondent Herbert Giffin, without having obtained a license, sold two coyotes for exhibition, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)).

6. On or about October 29, 1995, respondent Herbert Giffin, without having obtained a license, bought four sika deer and one cougar, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)).

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated section 2134 of the Act (7 U.S.C. § 2134) and section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)).

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

Order

1. Respondent Herbert Giffin, dba Giffin's Game Farm is assessed a civil penalty of $4,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act

and the regulations and standards issued thereunder, and in particular, shall cease and desist from buying, selling or transporting animals without being licensed to do so under the Act.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 5, 1997.-Editor]

In re: GAIL DAVIS d/b/a PERSONALITY PLUS POODLES.
AWA Docket No. 97-0001
Decision and Order filed February 13, 1997.

Failure to file an answer - Failure to maintain complete records showing the acquisition, disposition and identification of animals - Failure to equip housing facilities with adequate disposal and drainage facilities - Failure to provide primary enclosues which are structurally sound and in good repair - Failure to maintain a written program of disease control and prevention, enthansia, and adequate vetinary care- Failure to maintain primary enclosures in a clean and sanitary condition - Failure to keep the premises clean and in good repair - Civil penalty - Disqualification - Cease and Desist Order.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorthea Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served by the Hearing Clerk on the respondent Gail Davis on October 7, 1996. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Gail Davis has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

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

Findings of Fact and Conclusions of Law

I

1. Gail Davis is an individual doing business as Personality Plus Poodles whose address is [redacted]

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

3. On September 14, 1995, respondent willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)), by failing to maintain complete records showing the acquisition, disposition, and identification of animals.

4. On September 14, 1995, respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f));

(b) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals, (9 C.F.R. § 3.6(a)(2)(i));

(c) Primary enclosures for dogs were not constructed and maintained so that the floors protect the animals' feet and legs from injury (9 C.F.R. § 3.6(a)(2)(x));

(d) The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c));

(e) Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of excessive rust that prevents the required cleaning and sanitization and that affects the structural strength of the surface (9 C.F.R. § 3.1(c)(1)(i)); and

(f) Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a)).

5. On October 26, 1995, respondent willfully violated section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50), by failing to individually identify dogs.

6. On October 26, 1995, respondent willfully violated section 2.40 of the regulations (9 C.F.R. § 2.40), by failing to maintain a written program of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

7. On October 26, 1995, respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

(a) Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of excessive rust that prevents the required cleaning and sanitization and that affects the structural strength of the surface (9 C.F.R. § 3.1(c)(1)(i));

(b) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals, (9 C.F.R. § 3.6(a)(2)(i));

(c) Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests and odors (9 C.F.R. § 3.11(a));

(d) The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R § 3.11(c)); and

(e) Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f)).

Conclusions

1. The Secretary has jurisdiction in this matter.

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

Order

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

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

(b) Failing to provide a suitable method for the rapid elimination of excess water and wastes from housing facilities for animals

(c) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

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

(e) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(f) Failing to individually identify animals, as required.

2. Respondent is assessed a civil penalty of $5,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

3. Respondent is disqualified for a period of one hundred and twenty (120) days from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 26, 1997.-Editor]

In re: DAVID RICHTMAN d/b/a DAVID RICHTMAN'S BEARS.
AWA Docket No. 96-0081.
Decision and Order issued January 21, 1997.

Failure to file an answer - Failure to allow inspection - Failure to maintain appropriate program of veterinary care - Failure to provide structurally sound facilities maintained in good repair - Failure to provide adequate shelter from inclement weather - Civil penalty - Cease and Desist Order - Suspension.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law. Judge.

This proceeding was instituted under the Animal Welfare Act (Act), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint by the acting Administrator,

Animal and Plant Health Inspection Service, United States Department of Agriculture, filed on September 20, 1996, alleging that the respondents willfully violated the Act.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the respondent, David Richtman, d.b.a. David Richtman's Bears, by the Hearing Clerk by certified mail on October 4, 1996. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Since Respondent has failed to file an answer within the time prescribed in the Rules of Practice, the material facts alleged in the complaint are admitted by respondent's failure to file an answer. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

I.

A. David Richtman, hereinafter referred to as respondent, is an individual whose address is

B. The respondent, doing business as David Richtman's Bears, at all times material herein, was licensed and operating as an exhibitor as defined in the Act and the regulations.

C. When the respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

D. On November 30, 1995, respondent failed to allow APHIS officials to enter his facility and inspect the facility, property and animals to enforce the provisions of the Act, in willful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

E. On December 1, 1995, APHIS inspected respondent's premises and found that the respondent had failed to maintain an appropriate veterinary care program for his animals, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

F. On December 1, 1995, APHIS inspected respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the specified standards:

a. The housing facilities for the animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain them (9 C.F.R. §§ 3.125(a) and 3.75(a)).

b. Animals kept outdoors were not provided with adequate shelter from the sun and inclement weather (9 C.F.R. § 3.127).

G. On January 17, 1996, APHIS inspected respondent's premises and found that the respondent had failed to maintain an appropriate veterinary care program for his animals, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

H. On January 17, 1996, APHIS inspected respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the specified standards:

a. The housing facilities for the animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain them (9 C.F.R. §§ 3.125(a) and 3.75(a)).

b. Animals kept outdoors were not provided with adequate shelter from the sun and inclement weather (9 C.F.R. § 3.127).

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.
3. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations and standards issued under the Act. Therefore, the following Order is issued.

Order

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

a. Failing to allow APHIS officials to enter his facility and inspect the facility, property and animals to enforce the provisions of the Act;

b. Failing to maintain an appropriate veterinary care program for his animals;

c. Failing to have structurally sound and maintained in good repair housing facilities for the animals so as to protect the animals from injury and to contain them; and

d. Failing to provide animals kept outdoors with adequate shelter from the sun and inclement weather.

2. Respondent is assessed a civil penalty of FIVE THOUSAND TWO HUNDRED DOLLARS ($5,200.00), which shall be paid by a certified check or money order made payable to the Treasurer of the United States. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to A.W.A. Docket No. 96-81.

3. Respondent's license shall be suspended for a period of 30 days from the effective date of this Order.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 9, 1997.-Editor]

In re: BOBBY PACK.
AWA Docket No. 95-0032.
Decision and Order filed November 4, 1996.

Failure to file an answer - Failure to provide adequate shelter from inclement weather - Failure to ensure that housing facilities were structurally sound and maintained in good repair so as to protect the animals from injury - Failure to provide for the removal and disposal of animal waste so as to minimize vermin infestation, disease hazards and odor - Failure to establish and maintain an effective program for the control of pests - Failure to provide food of sufficient

quantity and nutritive value to maintain them in good health - Failure to keep primary enclosures clean - Civil penalty - Cease and Desist Order - License disqualification.

Frank Martin, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondent Bobby Pack willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. §1.1 *et seq.*)(the "Regulations" and "Standards").

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Bobby Pack is an individual whose mailing address is

2. At all times mentioned herein, the respondent was licensed and operating as a dealer as defined in the Act and the Regulations and Standards.

3. On August 9, November 22 and December 20, 1994, APHIS inspected the respondent's facility and found that the respondent had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to comply with the Standards, as follows:

a. The respondent failed to provide to animals adequate shelter from inclement weather, in violation of section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)); and

b. The respondent failed to ensure that outdoor housing facilities were structurally sound and maintained in good repair so as to protect the animals

from injury, in violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)).

4. On August 9 and November 22, 1994, APHIS inspected the respondent's facility and found that the respondent had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards, in violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

5. On November 22, 1994, APHIS inspected the respondent's facility and found that the respondent had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to establish and maintain an effective program for the control of pests, in violation of section 3.131(d) of the Standards (9 C.F.R. § 3.131(d)).

6. On November 22 and December 20, 1994, APHIS inspected the respondent's facility and found that the respondent had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to comply with the Standards, as follows:

a. The respondent failed to provide to animals food of sufficient quantity and nutritive value to maintain them in good health, in violation of section 3.129(a) of the Standards (9 C.F.R. § 3.129(a)); and

b. The respondent failed to ensure that primary enclosures were kept clean, as required, in violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated section 2.100(a) of the Regulations, and sections 3.125(a), 3.125(d), 3.127(b), 3.129(a), 3.131(a) and 3.131(d) of the Standards.

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

Order

1. Respondent Bobby Pack is assessed a civil penalty of $6,500, of which $500 shall be paid by a certified check or money order made payable to the Treasurer of the United States. The remaining $6,000 shall be suspended so long as respondent does not violate the Act or the Regulations and Standards.

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

3. Respondent is prohibited from becoming licensed under the Act for a period of five years.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 15, 1997.-Editor]

In re: CASH B. WILEY.
AWA Docket No. 96-0086.
Decision and Order filed March 20, 1997.

Failure to file an answer - Operating as a dealer without a license - Cease and Desist Order - Civil penalty - License disqualification.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Cash B. Wiley on September 5, 1996.[1] Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Cash B. Wiley has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

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[1] The Hearing Clerk attempted to serve a copy of the complaint and the Rules of Practice on the respondent by certified mail but the documents were returned marked unclaimed. Pursuant to section 1.147(c) of the Rules of Practice, the Hearing Clerk mailed a copy of the complaint and the Rules of Practice by regular mail to the respondent on October 28, 1996.

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

Findings of Fact and Conclusions of Law

I

1. Cash B. Wiley, hereinafter referred to as respondent, is an individual, whose address is

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

3. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations, without having obtained a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold and bought in commerce, animals on 6 occasions. The sale or attempt to sell of each animal constitutes a separate violation. Each violation occurred on or about the date listed in the following table:

DATE	ANIMALS	DATE	ANIMALS
04/94	1 water buffalo	01/20/95	8 Fallow deer 2 Axis deer
01/21/95	2 Lechwe	02/95	1 Arabian Oryx
01/22/95	1 Zebra	07/27/95	1 Camel
		12/23/95	1 Zoney

Conclusions

1. The Secretary has jurisdiction in this matter.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of $5,000 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 29, 1997.-Editor]

In re: MICHAEL FREWER dba WORLD WIDE FAUNA.
AWA Docket No. 96-0088.
Decision and Order filed March 7, 1997.

Failure to file an answer - Shipment of animals without disposition records - Cease and Desist Order - Civil penalty.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served by the Hearing Clerk on the respondent on October 2, 1996. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

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

Findings of Fact and Conclusions of Law

I

1. Michael Frewer, hereinafter referred to as the respondent, is an individual, doing business as World Wide Fauna, whose address is [redacted]

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

3. On or about May 15, 1995, willfully violated section 2.75(b)(3) of the regulations (9 C.F.R. § 2.75(b)(3)), by shipping animals (an armadillo and a sugar glider) without accompanying the shipment with disposition records.

4. On or about May 31, 1995, willfully violated section 2.75(b)(3) of the regulations (9 C.F.R. § 2.75(b)(3)), by shipping animals (an armadillo and a sugar glider) without accompanying the shipment with disposition records.

Conclusions

1. The Secretary has jurisdiction in this matter.

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

Order

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

2. Respondent is assessed a civil penalty of $500.00, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final May 2, 1997.-Editor]

PLANT QUARANTINE ACT

In re: GILBERTO MACIAS GALEANA.
P.Q. Docket No. 96-0021.
Decision and Order filed November 8, 1996.

Failure to file an answer - Importation of mangoes from Mexico into the United States - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on March 19, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about January 14, 1995, respondent imported 19 fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Gilberto Macias Galeana, respondent, is an individual with a mailing address of

2. On or about January 14, 1995, respondent imported 19 fresh mangoes from Mexico into the United States at Los Angeles International Airport, in violation of 7 C.F.R. § 319.56(c) which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Gilberto Macias Galeana, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-21.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final January 7, 1997.-Editor]

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[1]The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: JOSEFINA SERVIAN de VILLABOS.
P.Q. Docket No. 96-0022.
Decision and Order filed November 8, 1996.

Failure to file an answer - Imporatation of pitayha from Mexico into the United States without a permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrativeproceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on March 19, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about May 27, 1995, in Los Angeles, CA, respondent imported seventy pitayha from Mexico into the United States without a permit in violation of 7 C.F.R. § 319.56 which prohibits entry of pitayha into the United States without a permit.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Josefina Servian de Villalobos, respondent, is an individual with a mailing address of [redacted]

2. On or about May 27, 1995, in Los Angeles, CA, respondent imported seventy pitayha from Mexico into the United States without a permit in violation

of 7 C.F.R. § 319.56 which prohibits entry of pitayha into the United States without a permit.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Josefina Servian de Villalobos, is hereby assessed a civil penalty of two hundred fifty dollars ($250.00)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-22.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final January 7, 1997.-Editor]

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[1]The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: ELIZABETH GRACIELA LUNA.
P.Q. Docket No. 96-0023.
Decision and Order filed November 8, 1996.

Failure to file an answer - Imporation of apples, oranges, and mangoes into the United States from Mexico without a permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on March 19, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Àgriculture. This Complaint alleges that on or about March 18, 1995, in San Diego, CA, respondent imported eight oranges, four apples, and six mangoes from Mexico into the United States without a permit in violation of 7 C.F.R. § 319.56 which prohibits importation of such fruit into the United States without a permit.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Elizabeth Graciela Luna, respondent, is an individual with a mailing address of [redacted]

2. On or about March 18, 1995, in San Diego, CA, respondent imported eight oranges, four apples, and six mangoes from Mexico into the United States without

a permit in violation of 7 C.F.R. § 319.56 which prohibits importation of such fruit into the United States without a permit.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Elizabeth Graciela Luna, is hereby assessed a civil penalty of three hundred seventy-five dollars ($375.00)[1]. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-23.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final January 7, 1997.-Editor]

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[1]The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

In re: CALIXTO JIMENEZ-TACUBA.
P.Q. Docket No. 96-0037.
Decision and Order filed January 3, 1997.

Failure to file an answer - Importation of avocados from Mexico into the United States - Civil penalty.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on August 9, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Calixto Jimenez-Tacuba, herein referred to as the respondent, is an individual whose mailing address is

2. On or about June 24, 1995, at San Ysidro, California, respondent imported six hundred and thirteen (613) avocados from Mexico into the United States in violation of 7 C.F.R. §319.56 (b) and (c) because importation of avocados from Mexico is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-0037.

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

[This Decision and Order became final on February 12, 1997.-Editor]

In re: JEAN MERISIER.
P.Q. Docket No. 96-0018.
Decision and Order filed January 3, 1997.

Failure to file an answer - Importation of mangos from Haiti into the United States without a permit - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa - 150jj), and the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), and the regulations promulgated thereunder (7 C.F.R. § 319.56.)

This proceeding was instituted by a complaint filed against the respondent on February 22, 1996, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Finding of Fact

1. Jean Merisier is an individual with a mailing address of [redacted]

2. On April 30, 1995, the respondent imported 21 mangoes from Haiti into the United States without a permit.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (7 U.S.C. §§ 150aa-150jj, §§ 151-167), and 7 C.F.R. § 319.56).

Therefore, the following Order is issued.

Order

Jean Merisier is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section

Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 10, 1997.-Editor]

In re: RENE SALAZAR.
P.Q. Docket No. 96-0035.
Decision and Order filed February 19, 1997.

Failure to file an answer - Importation of six fresh quince fruit from Mexico into the United States without a permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Mexico to the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as regulations, in accordance with the Rules of Practice in 7 C.F.R. §§1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on November 1, 1996, by the Administrator of the Animal and Plant Health Inspection Service, united States Department of Agriculture. This Complaint alleges that on or about September 16, 1995, respondent, at Nogales, AZ, brought six fresh quince fruit from Mexico into the United Sates without a permit, in violation of 7 C.F.R. § 319.56(b).

The respondent has failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. §

1.136(c) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Rene Salazar, herein referred to as the respondent, is an individual with a mailing address of [redacted]

2. On or about September 16, 1995, respondent, at Nogales, AZ, brought six fresh quince fruit from Mexico into the United States without a permit, in violation of 7 C.F.R. § 319.56(b).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent, Rene Salazar, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-0035.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this

Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final March 31, 1997.-Editor]

In re: BORK TREE FARMS, INC., also d.b.a. B&S TREE, B&S TREE FARM, and B&S TREE CO., NORMANS TRUCK BROKERAGE, INC., LAFAVE RECYCLING, WINDY HILL FOLIAGE, INC., ZWEBER TRUCKING, GREEN ENTERPRISE LINES, MIDWEST TRANSPORTATION, INC., KEITH WRIGHT TRUCKING, P&H TRUCKING CO., HENSLEY, INC., ZEITNER & SONS, INC., KARL'S TRANSPORT, INC., ATI ENTERPRISES, LTD., and PYLE TRUCK LINE, INC.

P.Q. Docket No. 96-0027.

Decision and Order as to Green Enterprise Lines filed March 7, 1997.

Failure to file an answer - Interstate movement of trees from a gypsy moth generally infested area to a not generally infested area without a certificate or permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of trees from a gypsy moth generally infested area to or near a not generally infested area (7 C.F.R. § 301.81 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by an Amended Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Amended Complaint alleges that on or about April 12, 1994, respondent Green Enterprise Lines moved interstate approximately ninety-one (91) trees from a gypsy moth generally infested area at or near Sheridan, MI, to or near the not generally infested area of Maple Grove, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

The Respondent failed to file an answer to the Amended Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the Amended Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Green Enterprise Lines, respondent, is a business with a mailing address of [redacted], [redacted] SC [redacted].

2. On or about April 12, 1994, respondent Green Enterprise Lines moved interstate approximately ninety-one (91) trees from a gypsy moth generally infested area at or near Sheridan, MI, to or near the not generally infested area of Maple Grove, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. Therefore, the following Order is issued.

Order

Respondent Green Enterprise Lines is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-27.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 18, 1997.-Editor]

In re: BORK TREE FARMS, INC., also d.b.a. B&S TREE, B&S TREE FARM, and B&S TREE CO., NORMANS TRUCK BROKERAGE, INC., LAFAVE RECYCLING, WINDY HILL FOLIAGE, INC., ZWEBER TRUCKING, GREEN ENTERPRISE LINES, MIDWEST TRANSPORTATION, INC., KEITH WRIGHT TRUCKING, P&H TRUCKING CO., HENSLEY, INC., ZEITNER & SONS, INC., KARL'S TRANSPORT, INC., ATI ENTERPRISES, LTD., and PYLE TRUCK LINE, INC.

P.Q. Docket No. 96-0027.

Decision and Order as to Karl's Transport, Inc. filed March 7, 1997.

Failure to file an answer - Interstate movement of trees from a gypsy moth generally infested area to a not generally infested area without a certificate or permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of trees from a gypsy moth generally infested area to or near a not generally infested area (7 C.F.R. § 301.81 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by an Amended Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Amended Complaint alleges that on or about April 20, 1994, respondent Karl's Transport, Inc. moved interstate approximately sixty (60) trees from a gypsy moth generally

infested area at or near Kaleva, MI, to or near the not generally infested areas of Chanhassen, Inver Grove Hts., and S. St. Paul, MN, without a certificate or permit, as required.

The Respondent failed to file an answer to the Amended Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the Amended Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Karl's Transport, Inc., respondent, is a corporation with a mailing address of [redacted] WI [redacted]

2. On or about April 20, 1994, respondent Karl's Transport, Inc. moved interstate approximately sixty (60) trees from a gypsy moth generally infested area at or near Kaleva, MI, to or near the not generally infested areas of Chanhassen, Inver Grove Hts., and S. St. Paul, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. Therefore, the following Order is issued.

Order

Respondent Karl's Transport, Inc. is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334

Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-27.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 21, 1997.-Editor]

In re: BORK TREE FARMS, INC., also d.b.a. B&S TREE, B&S TREE FARM, and B&S TREE CO., NORMANS TRUCK BROKERAGE, INC., LAFAVE RECYCLING, WINDY HILL FOLIAGE, INC., ZWEBER TRUCKING, GREEN ENTERPRISE LINES, MIDWEST TRANSPORTATION, INC., KEITH WRIGHT TRUCKING, P&H TRUCKING CO., HENSLEY, INC., ZEITNER & SONS, INC., KARL'S TRANSPORT, INC., ATI ENTERPRISES, LTD., and PYLE TRUCK LINE, INC.

P.Q. Docket No. 96-0027.

Decision and Order as to Pyle Truck Lines, Inc. filed March 7, 1997.

Failure to file an answer - Interstate movement of trees from a gypsy moth generally infested area to a not generally infested area without a certificate or permit - Civil penalty.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of trees from a gypsy moth generally infested area to or near a not generally infested area (7 C.F.R. § 301.81 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by an Amended Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Amended

Complaint alleges that on or about April 21, 1994, respondent Pyle Truck Line, Inc. moved interstate approximately sixty-five (65) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Farmington, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

The Respondent failed to file an answer to the Amended Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the Amended Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Pyle Truck Line, Inc., respondent, is a corporation with a mailing address of [redacted] IA [redacted]

2. On or about April 21, 1994, respondent Pyle Truck Line, Inc. moved interstate approximately sixty-five (65) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Farmington, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. Therefore, the following Order is issued.

Order

Respondent Pyle Truck Line, Inc. is hereby assessed a civil penalty of two hundred fifty dollars ($250.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-27.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final April 21, 1997.-Editor]

In re: ANA GARCIA.
P.Q. Docket No. 95-0041.
Decision and Order filed February 19, 1997.

Failure to file an answer - Importation of mangoes from El Salvador into the United States without a permit - Civil penalty.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa-150jj), and the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. 151-167), and the regulations promulgated thereunder (7 C.F.R. § 319.56-2(e)).

This proceeding was instituted by a complaint filed against the respondent on June 6, 1995, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Ana Garcia is an individual with a mailing address of [redacted]

2. On September 16, 1994, the respondent imported 16 mangoes from El Salvador into the United States without a permit.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated the Act and the regulations (7 U.S.C. §§ 150aa-150jj, §§ 151-167, and 7 C.F.R. § 319.56-2(e)).

Therefore, the following Order is issued.

Order

Ana Garcia is hereby assessed a civil penalty of three hundred and seventy five dollars ($375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 9, 1997.-Editor]

In re: MR. & MRS. L. DAO.
P.Q. Docket No. 96-0038.
Decision and Order filed March 18, 1997

Failure to file an answer - Offering for shipment to a common carrier fresh avocados from Hawaii to the continental United States without a certificate or permit - Civil penalty..

James A. Booth, for Complaint.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Hawaii to the continental United States (7 C.F.R. § 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on March 19, 1996, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about November 1, 1995, respondents violated section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)) by offering for shipment to a common carrier, namely, the United States Postal Service, approximately four lbs. of fresh avocados from Hawaii to the continental United States, without a certificate or permit, as required.

The respondents failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Mr. and Mrs. L. Dao, [redacted] ondents, are individuals with a mailing address of [redacted]

2. On or about November 1, 1995, respondents violated section 318.13(b) of the regulations (7 C.F.R. § 318.13(b)) by offering for shipment to a common carrier, namely, the United States Postal Service, approximately four lbs. of fresh avocados from Hawaii to the continental United States, without a certificate or permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondents have violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 et seq.). Therefore, the following Order is issued.

Order

Respondents, Mr. and Mrs. L. Dao, are hereby assessed a civil penalty of seven hundred fifty dollars ($750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-0038.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final June 5, 1997.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

Consent Decision and Order as to Encarnacion Gonzalez. AMAA Docket No. 96-0004. 2/21/97.

Consent Decision and Order as to Warehouse Farms, Inc. AMAA Docket No. 96-0004. 5/1/97.

Consent Decision and Order as to Gary Garza. AMAA Docket No. 96-0004. 5/13/97.

Consent Decision and Order as to Mission Shippers, Inc. AMAA Docket No. 96-0004. 5/13/97.

ANIMAL QUARANTINE and RELATED LAWS

Randy Tooker, d/b/a Quality Plus. A.Q. Docket No. 96-0019. 1/3/97.

Seaboard Marine of Florida, Inc. A.Q. Docket No. 96-0021. 1/24/97.

Jerry Stokes, d/b/a Stokes Livestock Co. A.Q. Docket No. 96-0010. 1/28/97.

Jim Byrd, d/b/a Oak Lake Cattle Co. A.Q. Docket No. 97-0002. 3/27/97.

Juan Vargas-Solario and Pedro Mendoza. A.Q. Docket No. 97-0003. 3/27/97.

American Airlines, Inc. A.Q. Docket No. 97-0006. 4/3/97.

ANIMAL WELFARE ACT

City of Detroit, d/b/a Detroit Zoological Zoo. AWA Docket No. 96-0020. 1/3/97.

Otto Siebert, d/b/a Storyland Petting Zoo. AWA Docket No. 95-0025. 1/6/97.

Trans World Airlines, Inc., a Delaware Corporation. AWA Docket No. 96-0045. 1/6/97.

Joy Thomas and Lowell Thomas. AWA Docket No. 95-0016. 1/10/97.

Tommy Williams. AWA Docket No. 97-0013. 1/16/97.

Garry Garner and Sheila Garner. AWA Docket No. 95-0055. 1/28/97.

Antonio Alentado. AWA Docket No. 97-0008. 1/31/97.

United Airlines, Inc. AWA Docket No. 95-0008. 2/4/97.

Paul Kenis. AWA Docket No. 95-0040. 2/6/97.

Gloria Wippler, d/b/a Ojibway Kennels. AWA Docket No. 96-0068. 2/6/97.

City of Alexander City. AWA Docket No. 96-0075. 2/6/97.

Pearl Byrd and Homer Byrd, d/b/a Blue Mist Kennels. AWA Docket No. 96-0066. 2/11/97.

JoAnn Lohse. AWA Docket No. 96-0029. 2/14/97.

Donna Voeller. AWA Docket No. 96-0012. 2/26/97.

Ernest Yancy, d/b/a S & Y Kennel. AWA Docket No. 97-0004. 2/26/97.

Betty Hiatt, d/b/a Maple Valley Kennels. AWA Docket No. 96-0049. 3/17/97.

Myron Dale Pugh and Barbara Pugh, d/b/a Oshkosh Kennel. AWA Docket No. 95-0050. 3/24/97.

Vivian Box. AWA Docket No. 95-0001. 3/27/97.

James Uriell and Charlette Uriell, d/b/a Rocking U Kennel. AWA Docket No. 95-0028. 3/31/97.

Gordon Messinger and Boonslick Enterprises or Boonslick Enterprises, Incorporated. AWA Docket No. 95-0012. 4/1/97.

Daniel J. Malone, d/b/a Dan's Green House. AWA Docket No. 96-0078. 4/1/97.

Cheryl Hadaway and Dorpha Evans. AWA Docket No. 97-0005. 4/7/97.

County of Maui Department of Parks and Recreation d/b/a Maui Zoological an Botanical Garden. AWA Docket No. 96-0058. 4/9/97.

Jimmy Carter and Blair Carter, d/b/a Flavious, Inc. AWA Docket No. 96-0019. 4/18/97.

Lisa Hayungs, d/b/a Lishay Cattery. AWA Docket No. 96-0026. 4/23/97

Steven Kosier, d/b/a Strictly Endangered Animals. AWA Docket No. 96-0067. 4/23/97.

Lila Smith. AWA Docket No. 96-0082. 5/5/97.

Sharron Ann Griffin, d/b/a Dog-Gone Critters. AWA Docket No. 97-0018. 5/7/97.

Molokai Ranch, Ltd. d/b/a Molokai Ranch Wildlife Conservation Park. AWA Docket No. 97-0021. 5/7/97.

Christopher McDonald. AWA Docket No. 96-0028. 5/8/97.

David Richard Meeks and Lucia Fields-Meeks, d/b/a Hollywild Animal Park. AWA Docket No. 96-0069. 5/12/97.

Willard Kramer, d/b/a Vacationland Farm. AWA Docket No. 97-0002. 5/16/97.

Linda L. Hall, d/b/a Linda's Chihuahuas. AWA Docket No. 96-0077. 5/19/97.

Anita L. Krauter, Dale S. Schwartz, and Bina Schwartz. AWA Docket No. 96-0030. 5/30/97.

Sharon Marie Richards, d/b/a Dun-N-Black Ranch and Kennels. AWA Docket No. 97-0019. 5/30/97.

Vincent L. Melton, d/b/a Dun-N-Black Ranch and Kennels. AWA Docket No. 97-0019. 6/11/97.

Barbara Coleman, d/b/a Tombar Kennels. AWA Docket No. 96-0083. 6/17/97.

Richard Wilcox and Donna Wilcox. AWA Docket No. 96-0024. 6/19/97.

Charles Sokol and Carol Sokol, d/b/a Czech Kennels. AWA Docket No. 97-0003. 6/19/97.

Lorin Womack, d/b/a Land O'Lorin Exotics. AWA Docket No. 97-0017. 6/19/97.

Phyllis Jean Eskew, d/b/a Jean's House of Poodles. AWA Docket No. 96-0073. 6/25/97.

FEDERAL MEAT INSPECTION ACT

Chilli-o Frozen Foods, Inc. and Jeffrey L. Rothschild. FMIA Docket No. 96-0002. 3/24/97.

Champlain Beef Company, Inc. FMIA Docket No. 96-0009. 4/30/97.

Quality Meats, Inc. FMIA Docket No. 95-0004. 5/8/97.

Zenner's Quality Meat Products, Inc., a/k/a Zenner's Market. FMIA Docket No. 97-004. 6/20/97.

John Krusinski, d/b/a Krusinski's Finest Meats. FMIA Docket No. 97-002. 6/24/97.

HORSE PROTECTION ACT

Hubert Perry and Hubert Gregory. HPA Docket No. 97-0004. 2/26/97.

Scotty Bailess. HPA Docket No. 97-0006. 3/17/97.

Glen Dorsey and Lewis Eugene Burdette. HPA Docket No. 97-0002. 4/3/97.

Rodney English and Teresa Adams. HPA Docket No. 97-0003. 5/6/97.

Charles Michael (Mikey) Oppenheimer and Charles M. (Mose) Oppenheimer. HPA Docket No. 97-0001. 5/13/97.

Ronald Schneid. HPA Docket No. 97-0007. 6/19/97.

PLANT QUARANTINE ACT

Transmarine Navigation Corp. P.Q. Docket No. 96-0005. 1/24/97.

Sun Country Airlines, Inc., d/b/a Sun Country Airlines Inflight Services. P.Q. Docket No. 97-0007. 2/19/97.

POULTRY PRODUCTS INSPECTION ACT

Chilli-o Frozen Foods, Inc. and Jeffrey L. Rothschild.
PPIA Docket No. 96-0002. 3/24/97.

Quality Meats, Inc. PPIA Docket No. 95-0003. 5/8/97.

Zenner's Quality Meat Products, Inc., a/k/a Zenner's Market. PPIA Docket No. 97-004. 6/20/97.

John Krusinski, d/b/a Krusinski's Finest Meats. PPIA Docket No. 97-002. 6/24/97.

VETERINARY ACCREDIDATION ACT

Dr. Delvin Randolph, D.V.M. V.A. Docket No. 96-0001. 3/11/97.

AGRICULTURE DECISIONS

Volume 56

January - June 1997
Part Three (PACA)
Pages 853 - 1043

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

AGRICULTURE DECISIONS

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

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

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

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

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

MIDLAND BANANA & TOMATO COMPANY, INC. v. UNITED STATES DEPARTMENT AGRICULTURE.

No. 95-3552.

Decided January 7, 1997.

(Cite as: 104 F.3d 139).

Failure to make full payment promptly - Making false and misleading statements on a PACA application - Evidence of prior misdeeds admissible.

The court affirmed the decision of the Secretary which found that the petitioner Robert Heimann violated the PACA by failing to make full payment promptly for purchases of agricultural commodities and by making false and misleading statements on a PACA application. Petitioner challenged the Secretary's decision on the ground that the ALJ improperly admitted evidence of prior misdeeds. The court rejected the argument, finding that the admission of the evidence did not prejudice the ALJ or Judicial Officer so as to deny petitioner due process. The court was satisfied that the Secretary's decision was supported by substantial evidence and believed that the challenged evidence was admissible, at least to show motivation.

Before: RICHARD S. ARNOLD, Chief Judge, MAGILL, Circuit Judge, and SACHS, District Judge.*

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

SACHS, District Judge.

This petition for review stems from consolidated Department of Agriculture disciplinary proceedings under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* (PACA), as amended, in which petitioner Robert Heimann was found to have committed repeated violations of the Act by failing to make full and prompt payment for purchases of agricultural commodities and by making false and misleading statements on a PACA application. Heimann asserts that he was deprived of due process because the Department procedures, were tainted by irrelevant, prejudicial evidence which biased the decisionmakers and because there was blanket adoption of adverse claims, unsupported by evidence. We conclude that Heimann's contentions are lacking in support, and we affirm.

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*The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri, sitting by designation.

I.

The Perishable Agricultural Commodities Act, was enacted to regulate the marketing of fresh and frozen fruits and vegetables in interstate commerce. *See* H.R. Rep. No. 87-1546 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749. Under the Act, all commission merchants, dealers and brokers in the perishable commodities industry are required to be licensed by the Department. 7 U.S.C. § 499c. All are subject to the Act, which declare certain conduct by commission merchants, dealers and brokers to be unlawful.

On August 25, 1993, the Director of the Fruit and Vegetable Division of Agricultural Marketing Service, an agency within the Department of Agriculture, commenced a disciplinary proceeding against Royal Fruit Co., Inc. ("Royal") for alleged willful, repeated and flagrant violations of Section 2(4) of the Act, 7 U.S.C. § 499b(4), which makes it unlawful for any commission merchant, dealer or broker licensed under the Act to fail to make full and prompt payment in connection with any transaction in interstate commerce involving perishable agricultural commodities. On the same day, the Director commenced a disciplinary proceeding against Midland Banana & Tomato Co., Inc. ("Midland"), alleging that Midland violated Section 8(c) of the Act, 7 U.S.C. § 499h(c), which makes it unlawful for a PACA license applicant to make any false or misleading statements in a license application. The complaints against both companies alleged that both entities were "alter egos" of Robert Heimann, making Heimann individually responsible for the alleged violations.

The Royal and Midland cases were consolidated and on July 26, 1994, following a hearing, an administrative law judge (ALJ) found that Royal committed willful, flagrant, and repeated violations of the Act by failing to make full and prompt payment of over $500,000; that Royal was the alter ego of Heimann; that Midland had violated the Act by making false and misleading statements in the application for a PACA license; and that Midland was Heimann's alter ego.

Heimann (the only party now before us) appealed to the Department's Judicial Officer,[1] challenging the alter ego determinations in both cases. On August 16, 1995, in a lengthy and thorough opinion, Judicial Officer Donald A. Campbell adopted, with modifications, the ALJ's decision. This appeal followed.

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[1] The Secretary has delegated final administrative authority to the Judicial Officer to decide cases subject to 5 U.S.C. §§ 556 and 557. 7 C.F.R. § 2.35.

II.

In 1988, Robert Heimann purchased Royal, then a sole proprietorship, in an agreement that provided for Jeffrey Heimann, Robert's son, and Joseph Cali to manage the business.[2] Robert Heimann and his wife Beverly signed the contract for Royal's sale as purchasers. There is no evidence Robert Heimann ever gave or sold the business to Jeffrey Heimann or Joseph Cali.

Royal was licensed by PACA, however, as a partnership whose partners were identified as Joseph Cali, Jeffrey Heimann and Beverly Heimann. On November 21, 1988, Royal was incorporated and issued a new PACA license reflecting its corporate status. The listed directors, officers and shareholders were Cali, Jeffrey Heimann and Beverly Heimann. The license was terminated on December 1, 1992, due to Royal's failure to pay the required annual renewal fee.

In May 1989, Robert Heimann became a consultant for Royal. Heimann's $10,000 per month fee was paid to Continental Oil & Gas Corp. ("Continental"), a non-operating entity Robert Heimann owned. After Robert Heimann formally joined the firm, Royal's business increased substantially. In December 1989, Royal purchased a new, larger location. The funds for this purchase and for improvements to the property were provided through a Small Business Administration loan secured by a mortgage on Robert and Beverly Heimann's personal residence. The lenders took Robert Heimann's management experience into account when deciding to approve the loan.

Robert Heimann was actively involved in Royal's management. He negotiated the purchase and sale of produce and arranged for its transportation. He appeared, to individuals dealing with the company, to be the person in charge of Royal's operations. Royal carried a "key man" life insurance policy on Robert Heimann and not on any other Royal employees.

When Royal began experiencing financial difficulties at the end of 1991, Robert Heimann allowed Royal to reduce his consulting fee to help keep the business solvent. During the first few months of 1992, Robert Heimann, through checks from Continental, provided Royal with a number of short-term, interest-free loans to cover Royal's checking account when Royal needed to pay suppliers quickly.

Between July 1992 and November 1992, Royal failed to make prompt payment to 21 sellers for produce purchased in the amount of $500,370.54. Royal

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[2]Cali's role at Royal is referred to in related litigation. *Conforti v. United States*, 74 F.3d 838, 840-1 (8th Cir. 1996).

ceased operations on November 17, 1992. That same day, Midland was incorporated. Midland's PACA license application identified Susan Heimann, Robert's daughter, an inexperienced college student, as its sole officer, director and shareholder. The funds used for Midland's initial capitalization came primarily from two of Robert Heimann's friends. Susan Heimann invested $500 in the firm. Robert Heimann served as general manager and was essentially responsible for all aspects of the operation.

Midland and Royal had almost identical operations. Midland had the same address, telephone and facsimile numbers as Royal. It used Royal's office and warehouse equipment. It had the same customers as Royal and retained approximately one-third of Royal's employees.

Midland's PACA application asserted that Midland was not a successor to another firm. The Judicial Officer found, however, that Midland had succeeded Royal. He further found that Midland, in its application, had falsely denied that any employee had been the owner of a firm whose license is under suspension. The Judicial Officer found that the license of Gilbert Brokerage Co., a company Robert Heimann had owned and operated in the 1970s, was under "ongoing suspension." He additionally found the Midland application to be misleading because it concealed the identity of the true principal of the firm, Robert Heimann.

In concluding that Royal and Midland were alter egos of Robert Heimann, the Judicial Officer considered the witnesses' credibility to be critical. He found that the testimony of Robert, his family members, and Joseph Cali, was not credible. In so finding, he pointed to the fact that each of these individuals had misled authorities during the Department's investigation of the case. He concluded that Robert Heimann had the least credibility. To support this determination, he noted that Heimann had walked away from Gilbert Brokerage's disciplinary proceedings without producing required documents, had signed a number of fraudulent "State of Kansas Inspection Forms" while associated with another produce company, United KC, in the 1980s, and had structured a number transactions in a misleading manner, apparently in order to avoid financial responsibility. The Judicial Officer also found that Heimann's malfeasance prior to his involvement with Royal and Midland was relevant to the proceedings because it provided a motive for Heimann to disguise his true role in Royal's and Midland's operations.

Heimann asserts that consideration of these misdeeds was improper and tainted the opinions so that the ALJ and Judicial Officer were no longer neutral, unbiased decisionmakers. In support of this claim, Heimann contends the Judicial Officer uniformly credited the Agricultural Marketing Service position, even where the Department's findings were, he alleges, unsupported by or inconsistent

with the evidence.[3] As a result, Heimann argues, he was not afforded the fundamental due process to which he is entitled.

III.

We review federal constitutional questions de novo. *United States v. Bates,* 77 F.3d 1101, 1104 (8th Cir. 1996). Our determination is limited to whether introduction of the allegedly irrelevant evidence so prejudiced the Secretary that Heimann was denied the fundamental fairness required in administrative hearings by the due process clause of the Fifth Amendment. *See Beef Nebraska, Inc. v. United States,* 807 F.2d 712, 719 (8th Cir. 1986), quoting *Silverman v. Commodity Futures Trading Commission,* 549 F.2d 28, 33 (7th Cir. 1977).

This court has recognized the right to "a fair, unbiased, and impartial" administrative hearing. *Local No. 3, United Packinghouse Workers v. NLRB,* 210 F.2d 325, 330 (8th Cir. 1954), *cert. denied,* 348 U.S. 822, 75 S. Ct. 36, 99 L. Ed 648 (1954). Heimann considerably overplays his hand by suggesting that any uniform adoption of one party's proposed findings signifies "bias" and supports a conclusion that there has been a due process violation.[4] Heimann's argument relies on *NLRB v. Miami Coca-Cola Bottling Co.* 222 F.2d 341, 345 (5th Cir. 1955), in which the court stated that such a practice by a trial judge or hearing examiner "deprives his credibility findings of the weight usually afforded them." We agree that signs of superficial analysis invite closer scrutiny of the proceedings below; but this does not routinely or usually result in a reversal, much less a conclusion that there has been a violation of constitutionally mandated procedures.

There are occasions when the correct result is so obvious that a trial judge or hearing examiner may be less than completely thorough in express analysis. As we have observed, this did not occur here.

We are not compelled by petitioner's briefing to address whether the challenged evidence was properly admitted. Heimann simply assumes, without citation, that the evidence was inadmissible. Additionally, because Heimann's sole argument on appeal is that he was denied due process, we need not analyze the Secretary's findings under the "substantial evidence" test. We note, however, that

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[3]The contention is unsound. For example, there was a rejection of contention that Jeffrey B. Heimann was the alter ego of Midland and that the payment of bills through Continental amounted to check-kiting.

[4]Occasional wording in the 122-page opinion that suggest irritation was fairly induced by the evidence.

we are satisfied the Secretary's decision was well supported by substantial evidence and believe the challenged evidence was admissible at least to show motivation. Fed. R. Evid. 404(b).

While it is thus not necessary to determine whether the proceedings before the Department were error-free, we note that the Department successfully responds to two claims of error that are emphasized before us. With respect to whether Heimann was still under a cloud because of the Gilbert Brokerage affair in the 1970s he contends there was a two-year limit on the suspension because of the failure to pay suppliers. The Department contends, however, that there was an "ongoing suspension" pursuant to 7 U.S.C. § 499m(b) (last sentence) because Heimann never produced that company's records, and that such a suspension remains until and unless the records are produced. As the Judicial Officer concluded, Heimann had "good reason to worry" that the Gilbert Brokerage experience would prejudice a new application in his own name.

With respect to his personal falsification of inspection certificates during the United KC activities, proof of such conduct was made in this case and Heimann simply declined to meet the issue, although he could have done so without waiving his claim of irrelevance.

Nothing has been presented that would approach a denial of Heimann's right to due process.

Accordingly, we affirm the decision of the Secretary.

Affirmed.

COUNTY PRODUCE, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE
No. 119, Docket 96-4027.
Decided January 10, 1997.

(Cite as: 103 F.3d 263).

Responsible connection - Employment of a restricted individual - Sanctions.

The court affirmed the decision of the Secretary which revoked petitioner's license for employing a restricted person. Petitioner did not contest the Secretary's finding that it violated the PACA by employing a restricted individual; it only challenged the decision to revoke its license. Petitioner argued that the decision to revoke was an abuse of discretion because the Secretary failed to consider that it did not fail to pay its bills. The court rejected that argument finding that the Secretary did consider these circumstances and that good financial standing does not compel a reduced sanction.

*Before: MINER and PARKER, Circuit Judges, and RESTANI, JUDGE.**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PARKER, Circuit Judge.

Petitioner County Produce, Inc. ("County Produce") petitioned for review of the final order of the Secretary of Agriculture, which upheld the Administrative Law Judge's Initial Decision and Order revoking County Produce's license under the Pershiable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s. The issue is whether the Secretary's decision to uphold the revocation of County Produce's license was supported by substantial evidence. We deny the petition for review and affirm the Secretary's order.

I. BACKGROUND

A. *PACA*

Congress enacted PACA for the purpose of ensuring that produce growers and shippers receive payment for their perishable goods. To this end, PACA requires produce merchants, dealers, and brokers to obtain a licenses from the United States Department of Agriculture ("USDA"), and it provides penalties for PACA violations. *See George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 990 (2d Cir. 1974). Section 8(b) of PACA provides, in relevant part.

> Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–
>
> (1) whose license has been revoked or is currently suspended by order of the Secretary;
>
> (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title . . . .

7 U.S.C. § 499h(b). Pursuant to section 8(b), "[t]he Secretary may, after thirty

*The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section." *Id.* Congress felt that by barring "responsibly connected" individuals from employment with other licensed produce companies, those individuals would be prevented from causing further harm within the produce industry. *See Zwick v. Freeman,* 373 F.2d 110, 118 (2d Cir. 1967).

The term "employment" is defined by PACA as "any affiliation of any person with the business operations of a licensee, with or without compensation, including, ownership or self-employment," 7 U.S.C. § 499a(b)(10). The USDA has defined the term "any affiliation" to include "all kinds of affiliation-- whether minimum or maximum; whether deliberate or not." *In re Tri-County Wholesale Produce Co.,* 45 Agric. Dec. 286, 304 (1986).

B. *Facts*

County Produce, a produce dealer licensed under PACA, was formed by David Nyden in June 1992. Nyden owns eighty percent of County Produce and serves as its president.

Several years earlier, in 1988, Nyden made an offer to Linda Wright to work for him at a produce company called L. Bernstein and Sons ("L. Bernstein"). Wright accepted this offer. In 1989, Nyden sold his fifty-percent interest in L. Bernstein to Arthur Stollman, who acquired full ownership of the company. Stollman sold Wright fifty percent of the company; in return, she assured half of L. Bernstein's debts.

Initially, Wright only performed clerical duties at L. Bernstein. After receiving several complaints about Stollman's abusive personalty, however, she became more active in the company's operations, eventually handling all of L. Bernstein's Connecticut customers. Stollman's customer-relations problems continued, and he began issuing bad checks to produce suppliers. L. Bernstein closed and filed for bankruptcy in November 1991.

In August 1992, Wright received a formal complaint from the USDA alleging that L. Bernstein had committed repeated and flagrant violations of PACA by failing to pay $185,909.00 to sixteen produce sellers between January 1991 and August 1991. In June 1993, Wright agreed to sign a consent order wherein L. Bernstein admitted to these violations of PACA. As a result, any licensed produce company was barred from having "any affiliation" with Wright for at least one year. *See* 7 U.S.C. §§ 499a(b)(10), h(b).

Sometime during the summer of 1993--around the same time that Wright signed the consent order--she began helping Nyden set up his new company,

County Produce. According to Wright, she spent between two and twenty hours a week at County Produce doing clerical work. She claims that she was not paid for this work. Although Wright admits that she and her husband guaranteed a loan to County Produce on March 9, 1993, she asserts that this was done merely as a favor to Nyden.

Other evidence indicates that Wright's activities at County Produce included selling produce and serving customers. For example, two separate food purchasers testified that they had been dealing with Wright in making produce purchases from County Produce since November 1993. The chief executive officer for Emerald Financial Corporation, the bank making the loan to County Produce that Wright and her husband guaranteed, testified that it was his "perception" that Wright operated County Produce.

On August 8, 1993, PACA officially notified Wright by letter that because she had been an officer and stockholder in L. Bernstein, she could "not be employed by or affiliated with another licensee, in any capacity, until July 19, 1994."

On October 12, 1993, Nyden also received official notification of Wright's status as a "restricted individual". By letter, a PACA official informed Nyden that Wright was ineligible to be employed by or affiliated in any capacity with a PACA licensee until July 19, 1994. The letter explained that the terms "employ" and "employment" are defined by PACA to mean *any* affiliation, regardless of compensation. In addition, the letter stated:

> Pursuant to Section 8(b) of the Act, copy enclosed, notice is hereby given that after 30 days from the receipt of this letter, Ms. Linda Wright cannot continue her affiliation with County Produce, Inc. To continue such affiliation after that date will result in the suspension or revocation of its license.

On October 30, 1993, Nyden responded to the USDA with the following: "Ms. Linda Wright is not currently employed by County Produce, nor is she affiliated with this company through any form of ownership or self-employment, per section 8(b) of your act."

C. *Administrative Proceedings*

On June 13, 1994, the USDA filed a complaint against County Produce, which alleged the County Produce violated section 8(b) of PACA by continuing to employ Wright after being notified that Wright's continued employment was prohibited. A hearing was held on March 14, 1996. At the hearing, a USDA

official, Clare G. Jervis, recommended to the Administrative Law Judge ("ALJ") that County Produce's license be revoked. The ALJ filed an Initial Decision and Order, on July 17, 1995, revoking County Produce's license. In his Initial Decision and Order, the ALJ found that Wright continued to work for County Produce after Nyden was notified on October 12, 1993, that her affiliation with County Produce was prohibited. The ALJ found that Wright's affiliation with County Produce continued until at least February 1994.[1] As a result, the ALJ concluded that County Produce willfully and flagrantly violated section 8(b) of PACA.

County Produce appealed the ALJ's decision to the Judicial Officer ("JO") on August 24, 1995. The JO upheld the ALJ's decision to revoke County Produce's license. The JO's Decision and Order constitutes the final order of the Secretary of Agriculture. *See* 7 C.F.R. § 2.35.

II. DISCUSSION

County Produce does not challenge the Secretary's conclusion that by employing Wright beyond October 12, 1993--the date that Nyden was informed of Wright's status as a "restricted individual"--County Produce willfully and flagrantly violated section 8(b) of PACA. Rather, County Produce challenges the Secretary's decision to uphold the ALJ's revocation of County Produce's license.

This Court may not overturn the Secretary's choice of sanction unless it is "'unwarranted in law or . . . without justification in fact.'" *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186, 93 S. Ct. 1455, 1458, 36 L. Ed.2d 142 (1973) (alteration *Butz*) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13, 67 S. Ct. 133, 146, 91 L. Ed. 103 (1946)); *see Harry Klein Produce Corp. v. United States Department of Agriculture.*, 831 F.2d 403, 406 (2d Cir. 1987). County Produce does not contend that the Secretary's choice of sanction is "unwarranted in law."[2] Therefore, as long as the Secretary's choice is not "so 'without justification in fact' 'as to constitute an abuse of [the Secretary's] discretion,'" the Secretary's final order must be affirmed. *Butz*, 411 U.S. at 188, 93 S. Ct. at 1459 (alteration in *Butz*) (quoting *American Power & Light Co.* 329

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[1] The ALJ noted that there was evidence indicating that Wright still worked for County Produce at the time of the March 15, 1995 hearing.

[2] Section 8(b) of PACA expressly grants the Secretary the authority to "suspend or revoke the license of any licensee" who continues to employ "any person" in violation of PACA. 7 U.S.C. § 499h(b).

U.S. at 115, 67 S. Ct. at 147); *see Harry Klein Produce Corp.* 831 F.2d at 406-07.

County Produce argues that the Secretary's choice of sanction constitutes an abuse of discretion because the Secretary failed to consider all of the relevant mitigating facts and circumstances. Specifically, County Produce contends that the Secretary failed to consider that none of County Produce's bills went unpaid; therefore, nobody suffered the harm that PACA was designed to prevent.

At the outset, we disagree with County Produce's contention that the Secretary "failed to consider" these circumstances. The record indicates that these circumstances were in fact considered although ultimately rejected by the Secretary. *Cf. Norinsberg Corp. v. United States Department of Agriculture*, 47 F.3d 1224, 1227 (D.C. Cir.), *cert. denied*, -- U.S. --, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995).

In support of its argument that the good financial standing of County Produce compels a reduced sanction, County Produce relies on *Conforti v. United States*, 69 F.3d 897 (8th Cir. 1995), *amended and superseded upon denial of reh'g*, 74 F.3d 838 (8th Cir.), *cert. denied*, -- U.S. --, 117 S.Ct. 49, 136 L.Ed.2d 14 (1996), and *ABL Produce, Inc. v. United States Department of Agriculture*, 25 F.3d 641 (8th Cir. 1994). In both cases, the Eighth Circuit held that in light of PACA's purpose to protect produce suppliers, the Secretary erred by refusing to consider the good financial standing of the produce dealers. *See Conforti*, 74 F.3d at 842; *ABL Produce*, 25 F.3d at 646-47.

As the Secretary correctly noted, however, County Produce's reliance on *Conforti* and *ABL Produce* is misplaced. Both cases are factually distinguishable from the instant case. For example, once the produce dealer in *Conforti*, received notification that the USDA could suspend the company's license for continuing to employ a restricted individual, the dealer diligently tried to obtain a bond securing that individual's employment.[3] *See* 74 F.3d at 841, 843. Once the produce dealer in *ABL Produce* was notified that he was employing a "restricted individual", he immediately tried to prevent that individual from involving himself in the company's activities. *See* 25 F.3d at 646. In addition the *ABL Produce* Court considered it to be a "most compelling and unique circumstances" that the "restricted individual" engaged in deceptive acts to hide his activities from the produce dealer. *See id.*

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[3]Section 8(b) of PACA provides that the Secretary may approve the employment of a restricted individual "after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furbishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter." 7 U.S.C. § 499h(b).

In contrast, although Nyden was warned that he would lose his license if he continued to employ Wright, he never attempted to limit Wright's involvement in County Produce. Nor was Nyden unaware of the extent of Wright's involvement with the company. On the contrary, Wright testified that she took her instructions while at County Produce directly from Nyden.

Moreover, in arguing that the *Conforti* and *ABL Produce* decisions compel a conclusion that the Secretary's choice of sanction was unwarranted, County Produce ignores the fundamental principle that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] the relation of remedy to policy is peculiarly a matter for administrative competence,'" *Butz*, 411 U.S. at 185, 93 S. Ct. at 1458 (quoting *American Power & Light Co.* 329 U.S. at 112, 67 S. Ct. at 145) (internal quotation omitted). In the instant case, Clare G. Jervis, a USDA official, testified that revocation of County Produce's license would be the only meaningful sanction. She reasoned that this sanction was warranted in light of the serious nature of County Produce's PACA violation, and also because of the deterrent effect that this sanction would have on County Produce and the produce industry.

The Secretary agreed with this reasoning stating:

> It is unfortunate, and I believe incorrect, that the *ABL Produce* Court used as relevant and mitigating circumstances that there were no unpaid bills and no apparent harm to anybody, as reason to lessen the sanction against [petitioner], because such an interpretation contains the potential for great harm to the PACA's deterrent effect envisioned by Congress.

We must defer to the agency's judgment as to the appropriate sanctions for PACA violations. *See Butz*, 411 U.S. at 185-86, 93 S.Ct. at 1457-58; *American Power & Light Co.* 329 U.S. at 112-13, 67 S.Ct. at 145-46; *Harry Klein Produce Corp*, 831 F.2d at 406-07. The USDA is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to be requirements of PACA. *See American Power & Light Co.*, 329 U.S. at 112, 67 S.Ct. at 145-46. We may not substitute our judgment for that of the agency with respect to what sanction will best further the policies of PACA. *See American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373 (5th Cir. 1980).

In light of the deference that we must give to the agency's expertise in determining appropriate sanctions, and the fact that the Secretary appropriately considered the relevant evidence, we may not say that the Secretary erred in rejecting County Produce's argument that certain "mitigating" circumstances

compelled a reduction in sanction.

III. CONCLUSION

We conclude that the Secretary's decision to uphold the ALJ's revocation of County Produce's license was not an abuse of discretion. In continuing to employ Wright beyond October 12, 1993--the date that Nyden was informed that Wright's employment was prohibited--County Produce willfully and flagrantly violated section 8(b) of PACA. The Secretary did not err when he failed to reduce this penalty on the basis of County Produce's good financial standing. Accordingly, the petition for the review is denied, and the Secretary's final order is affirmed.

PRODUCE PLACE v. DEPARTMENT OF AGRICULTURE, et al.
No. 96-973.
Decided February 18, 1997.

(Cite as: 117 S. Ct. 959).

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

PEGGY A. HART v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 96-1187.
Decided May 16, 1997.

(Cite as: 112 F.3d 1228).

Responsibly connected - Rebuttable presumption - Alter ego - Remand.

Petitioner appealed the Secretary's determination that she was responsibly connected to a corporation which had flagrantly and repeatedly violated the PACA, and was, therefore, subject to employment restrictions under the PACA. The United States Court of Appeals for the District of Columbia Circuit granted the petition for review and remanded the case for further proceedings. There is a rebuttable presumption that an officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is responsibly connected to that corporation. Petitioner argued that the Presiding Officer incorrectly applied a per se standard and failed to consider evidence she submitted in rebuttal. The court could not determine

from the record whether the Presiding Officer applied the correct legal standard in reaching his decision. Accordingly, the case was remanded for the Presiding Officer to articulate his findings and explain his conclusions.

Before GINSBURG, SENTELLE, and HENDERSON.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

GINSBURG, Circuit Judge:

Peggy A. Hart petitions for review of the Secretary of Agriculture's determination that she was "responsibly connected" to the M&M Banana Company as an officer and director when that company violated the Perishable Agricultural Commodities Act of 1930. 7 U.S.C. §§ 499a-499s. Hart contends that the Secretary did not apply the correct legal standard to her case and that she in fact rebutted the statutory presumption that she was responsibly connected to M&M Banana. Because we cannot determine from the present record whether the Secretary applied the correct legal standard, we grant the petition for review and remand this matter for further proceedings consistent with this opinion.

I. BACKGROUND

In June 1993 the Deputy Director of the Fruit and Vegetable Division of the Agricultural Marketing Service filed a complaint alleging that M&M Banana had flagrantly and repeatedly violated the PACA by failing to pay for produce purchased in 1992 and 1993. At the same time the Chief of the PACA Branch of the Fruit and Vegetable Division informed Hart that, as an officer and director of M&M Banana, she was a responsibly connected individual subject to the employment restrictions of the PACA; as a result she would be prohibited from working for any PACA licensee for a period of at least one year. *See* 7 U.S.C. § 499h(b).

Hart responded by letter that she could not be deemed responsibly connected to the company because she was only a nominal director and officer of the corporation: he had "made no policy decisions," and had "merely [done] as [she] was instructed by the company's owner," who was also her father. The Branch Chief treated Hart's response as a formal request for a determination of her status and in December 1993 informed Hart that she had been found responsibly connected and would be subject to the employment restrictions of the PACA. Hart petitioned the Administrator of the AMS for review of that decision and requested

a hearing.

The Administrator designated a Presiding Officer, who held a hearing in July 1994. Because the transcript of that hearing disappeared under circumstances that remain a mystery, a second hearing was held in May 1995. Both sides put on witnesses and the agency also put into evidence a variety of corporate records.

The PO issued his decision in January 1996. He found, among other things, that: (1) Hart alone signed the "1991 Domestic Corporation Annual Report," which is required by state law to be signed "by one officer or two directors"; (2) Hart was authorized by the Board in her capacity as Treasurer to deal with the corporation's bank; (3) Hart attended monthly meetings of the Board of Directors at which were discussed a credit approval made by Hart, a corporate name change, the possibility of obtaining loans for new trucks, a new computer system, a reduction in the amount of M&M's debt, reduction of overtime and salaries, the effect of bankruptcy on the company, and a reorganization plan. The PO also observed that Hart's sister, Patrice McCoy, had testified that, at board meetings: "we would all bring up issues, things that were going on. And of course, we would discuss them. You know, we are his daughters; we had opinions about what was going on. But the ultimate decision was always made by him."

Based upon these findings the PO concluded that Hart had been responsibly connected to M&M Banana during the relevant period. The PO supported his decision for the most part with references to the case law of circuits that apply a per se rule that has been expressly rejected by this Circuit. He did go on to acknowledge, however, that this court had held in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), that an officer or director "should be afforded the opportunity to rebut the Agency determination" that she is responsibly connected to the violator, "but clearly placed the burden of proof on the petitioner." The PO then concluded that Hart had:

> failed to sustain that burden. The official file and testimony indicate that [Hart and McCoy] were officers and directors of M&M Banana Co., Inc. during the period material to these issues . . . and that M&M Banana Company, Inc., was a valid corporation . . . [and] that [Hart and McCoy] had an actual significant nexus with M&M Banana Co., Inc. during the period of April 1992 through February 1993.

Thereafter the Administrator of the AMS issued a final order on behalf of the Secretary affirming the PO"s decision. Hart then filed her petition for review with this Court.

II. ANALYSIS

An officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is presumed, pursuant to § 499a(b)(9) of the PACA, to be "responsibly connected" to that corporation. 7 U.S.C. § 499a(b)(9). For many years the circuits were divided over whether the presumption of § 499a(b)(9) is irrebuttable, *see Birkenfield v. U.S.*, 369 F.2d 491 (3d Cir. 1996); *Pupillo v. U.S.*, 755 F.2d 638 (8th Cir. 1985); *Faour v. USDA*, 985 F.2d 217 (5th Cir. 1993), or, as we held, rebuttable. *See Quinn v. Butz*, 510 F.2d, at 757. In 1995 the Congress amended § 499a(b)(9) to make it clear that the presumption is rebuttable:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an 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), *as amended by* Pub. L. No. 104-408, § 12(a), 109 Stat. 430 (Nov. 15 1995).

Prior to the amendment of § 499a(b)(9) we held that an officer, director, or ten percent shareholder could rebut the presumption against her by showing either that the corporate violator is nothing more than the alter ego of its owner or that she was only a nominal officer, director, or shareholder of that corporation. *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). In order to prove that the corporation is the alter ego of its owner one must show that the owner so dominated the corporation as "to negate its separate personality." *Quinn*, 510 F.2d, at 758. In order to prove that one was only a nominal officer or director, one must establish that one lacked any "actual, significant nexus with the violating company" and, therefore, neither "knew [n]or should have known of the [c]ompany's misdeeds." *Minotta v. USDA*, 711 F.2d 406, 408-409 (D.C. Cir. 1983). *See Also Quinn*, 510 F.2d, at 756, n. 84 (observing that situation in which "the affiliation is purely nominal and the so-called officer had no powers at all" is "radically different" from one in which a genuine officer simply "does not use the powers of his office.")

Hart argues that the AMS failed to apply the correct legal standard when assessing the evidence and testimony that she offered in order to rebut the

presumption that she was responsibly connected to M&M. The PO, according to Hart, failed even to consider whether she proved that she was only a nominal officer because he applied the per se rule followed in other circuits. Hart maintains that the PO required her to show not merely that she was an officer and director on paper only, but rather that she was not an officer or director even on paper--contrary to the law of this circuit and, in light of the recent amendment to the PACA, contrary to the law of the land.

The AMS responds, first, that the Congress did not intend that the PACA amendment be applied retroactively; in the alternative, the AMS maintains that the PO fully conformed to the amendment because he afforded Hart the opportunity to rebut the presumption against her. For the same reason, the agency contends that the PO applied the law of this Circuit as stated in *Quinn:* Hart was given a hearing at which she was allowed to present her case. Hart's problem, according to the Government, is not that the PO applied the per se rule but that when he weighed the evidence he concluded that Hart had not rebutted the presumption against her.

We do not think the decision of the PO is as clear as either party would have us believe. In response to Hart's contention that she was but a nominal officer, the PO did no more than to note that "[t]he official file and testimony indicate that [Hart and McCoy] were officers and directors of M&M Banana Co., Inc. during the period material to these issues." This conclusory statement does not reveal whether the PO understood that Hart had the burden of proving only that she was a nominal officer and director, not the burden of proving that she was not even formally an officer and director. On remand, therefore, the PO should explain his reason for concluding--if he did so conclude--that Hart was more than a nominal officer or director of M&M.

We find the PO's determination that M&M was not the alter ego of its owner to be similarly lacking in reasoned analysis. In announcing his decision, the PO stated only that M&M "was a valid corporation, having been incorporated in 1956, and corporate records support that conclusion." This is not enough. Even a "valid corporation" may be so dominated by its principal shareholder as to lose its separate personality. *Bell*, 39 F.3d at 1201. Does M&M fit that description? The PO will have another opportunity not only to answer yea or nay but, more important, to say why.

III. CONCLUSION

The Presiding Officer did not adequately explain his determination that the petitioner failed to rebut the presumption that she was responsibly connected to

M&M Banana. We therefore grant the petition for review and remand this matter for the AMS to explain its decision.

BAMA TOMATO COMPANY v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 95-6778.
Decided May 29, 1997.

(Cite as: 112 F.3d 1542).

Violation of employment restriction - Responsible connection - License suspension.

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the Secretary which found that Petitioner violated the employment bar provision of the PACA, and suspended its license for thirty days. The court found that the employment bar provision of PACA is not unconstitutionally vague or overbroad; Petitioner was not entitled to challenge the Secretary's determination of responsible connection because the finding was not previously contested by the employee; and the thirty-day suspension imposed by the Secretary was warranted in law and fact.

Before BIRCH, BLACK and CARNES, Circuit Judges.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

BIRCH, Circuit Judge:

In this appeal from a decision and order of the Secretary of Agriculture, we decide three issues related to the employment bar provision of the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. § 499h(b): (1) whether the employment bar provision is unconstitutionally vague and overboard; (2) whether a licensed employer can challenge a previous determination that an employee is barred from employment by a licensee; and (3) whether a thirty-day suspension of the employer's license was legally warranted and factually justified. The Secretary, through a judicial officer, approved the administrative law judge's conclusion that Bama Tomato Company had violated the employment bar provision but increased the fourteen-day suspension imposed by the administrative law judge to a thirty-day suspension. We affirm.

I. BACKGROUND

The Secretary of Agriculture ("Secretary"), through a judicial officer, issued a decision and order in October 1992 in which he determined that Mims Produce, Inc. had failed to make full payment promptly to sellers and brokers as required by the Perishable Agricultural Commodities Act, 1930 ("PACA"), 7 U.S.C. §§ 499s. The judicial officer found repeated and flagrant violations of 7 U.S.C. § 499b and revoked the license of Mims Produce. Jimmy Mims ("Mims") subsequently was notified that the Secretary had determined him to be "responsibly connected"[1] with Mims Produce during the relevant violations. The United States Department of Agriculture ("USDA") further informed Mims that he was barred from employment in any capacity by another licensee until November 1993 and thereafter only with prior approval of the Secretary and the posting of a satisfactory bond.[2] Neither Jimmy Mims nor Mims Produce challenged these employment restrictions.[3]

In 1992, Mims began working for Bama Tomato Company ("Bama"), an Alabama produce dealer and a PACA licensee,[4] as the supervisor of its repacking crew. In January 1993, the USDA first notified Bama that Mims could not

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[1]"Responsibly connected" is defined by statute as "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).

[2]The parties agree that Mims was notified of his employment restrictions. The parties disagree, however, as to Mims' status as "responsibly connected." *See* 7 U.S.C. § 499a(b)(9). Although Mims was listed as a vice president and director of Mims Produce on license renewal applications, Mims contends that he was not responsibly connected with Mims Produce because it was run as a sole proprietorship by his father.

[3]In a notification letter dated May 1991, the USDA informed Mims that he was deemed to be a vice president and director of Mims Produce and that a disciplinary complaint was filed against the company. The letter further explained that he could be subject to employment restrictions because he was responsibly connected with the company but that he could challenge the determination within 30 days of receipt of the letter.

[4]Randy Griffin, the president of Bama, is Mims' cousin.

continue to be employed by Bama after February 1993.[5] The parties stipulated that Bama removed Mims from the payroll but that, during the period from February 1993 until March 1994, he continued to work, at least sporadically, with Bama's repacking and shipping operations.[6] Also during that period, Mims signed, in the absence of Bama's president, at least twenty-two checks for Bama and executed a lease renewal for Bama's business premises. In July 1994, the USDA filed a complaint against Bama, which alleged that bama was violating section 499h(b) by continuing to employ Jimmy Mims from February 1993 to March 1994.[7]

An administrative law judge ("ALJ") concluded that Bama had violated the employment bar provisions and assessed a fourteen-day suspension of Bama's license as a sanction for the violation. Although the ALJ noted that a thirty-day suspension would be appropriate, he considered several mitigating factors, including Bama's record as a financially responsible company and the effect of a suspension on Bama's employees, and reduced the suspension to fourteen days. The USDA appealed the ALJ's ruling to the Secretary and Bama cross-appealed. The Secretary, through a judicial officer, affirmed the ALJ's determination that Bama had violated section 499h(b) by continuing to employ Mims after notification that his employment was illegal.[8] The judicial officer, however, rejected the ALJ's consideration of mitigating factors and increased Bama's

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[5]In the letter of notification, the USDA provided a 30-day grace period for the last day that Jimmy Mims could be employed by Bama. The notification also addressed the status of Mims' brother, Michael Mims, as an officer, director, and 50-percent shareholder of Bama. Michael Mims subsequently sold his stock in Bama to Rebecca Mims, Jimmy Mims' wife. Since the Secretary does not argue that the stock transaction was inappropriate in view of Jimmy Mims' employment restriction, we do not address the issue here.

[6]Bama made unsuccessful efforts during that time to secure a bond that would allow Mims to work for the company after November 1993. Bama also claims that Randy Griffin repeatedly told Mims to leave the premises until his period of ineligibility was over.

[7]Before filing the complaint, the USDA sent a total of four notification letters to Bama informing Bama of the possibility that continuing to employ Mims could result in suspension or revocation of its license.

[8]The judicial officer noted that the ALJ incorrectly determined that the violation ended on November 8, 1993. Although Mims was eligible for employment by a licensee on November 8, 1993 with approval and a bond, Bama continued to employ Mims without approval or bond until March 4, 1994. Thus, the judicial officer determined the period of violation to be from February 1993 until March 1994.

suspension of thirty days.[9] Bama appeals the decision and order of the judicial officer.

II. DISCUSSION

Congress enacted the PACA in 1930 to prevent unfair business practices and promote financial responsibility in the interstate commerce of shipping and handling of perishable agricultural commodities, like fresh fruits and vegetables. *George Steinberg and Son, Inc. v. Butz,* 491 F.2d 988, 990 (2d Cir. 1974). The statute requires that brokers and dealers be licensed by the Secretary, 7 U.S.C. §§ 499c-499d, and that licensees refrain from unfair business conduct, 7 U.S.C. § 499b(4). The PACA also provides a system of penalties for these violations. The Secretary may revoke or suspend the license of a licensee who fails to "make full payment promptly" for perishable shipments. 7 U.S.C. § 499b(4); *see* 7 U.S.C. § 499h(a). Furthermore, section 499h(b) empowers the Secretary to restrict employment within the industry of "any person who is or has been responsibly connected with" such a violator. "Employment" is defined broadly as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." 7 U.S.C. § 499a(b)(10).

We uphold a USDA decision under the PACA unless we find the decision to be unconstitutional, arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. 5 U.S.C. § 706(2). We uphold the USDA's factual findings if they are supported by substantial evidence. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists,* 476 U.S. 447, 454, 106 S. Ct. 2009, 2015-16, 90 L.Ed.2d 445 (1986). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct 206, 217, 83 L.Ed. 126 (1938). We review legal issues *de novo* but "even in judgment." *Indiana Fed'n of Dentists,* 476 U.S. at 454, 106 S.Ct. at 2015.

Bama voices three challenges to the Secretary's decision. First, Bama contends that section 499h(b) is unconstitutional on its face. Second, Bama argues that Mims was not responsibly connected with Mims Produce and, therefore, should not be subject to employment restrictions. Third, Bama argues that the Secretary erred in ignoring mitigating factors and imposing a disproportionately

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[9]The judicial officer based his decision to suspend Bama's license for 30 days on the numerous warnings that Bama received from the USDA, the duration of Bama's violative conduct, and the fact that Mims was employed by Bama during the period he was ineligible to work even with a bond. He further reasoned that considering hardship to the employees was inappropriate in view of the broader public interest in deterring future violations.

harsh sanction.

A. Constitutionality of the Employment Bar Provision

The employment bar provision of the PACA has survived numerous constitutional challenges. *See, e.g., Siegel v. Lyng*, 851 F.2d 412, 416-18 & n. 12 (D.C. Cir. 1988) (rejecting claims that the employment bar provision violates the Due Process Clause or the prohibition of bills of attainder); *Zwick v. Freeman*, 373 F.2d 110, 117-20 (2d Cir. 1967) (finding no violation of the Fifth Amendment right to earn a livelihood or the Eighth Amendment right to be free from cruel and unusual punishment and rejected the claim that the employment bar is a bill of attainder); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (finding no violation of the Due Process Clause when a person, falling within the statutory definition of "responsibly connected," is barred from employment without a hearing). Bama, however, raises an issue of first impression by alleging that the provision is unconstitutionally vague and overboard on its face. Specifically, Bama contends that the statutory definition of "employment" as "any affiliation" implicates First Amendment rights of free speech and association and should be found unconstitutional.

The Supreme Court set forth the proper analysis for such a facial challenge in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct 1186, 71 L.Ed.2d 362 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Id. at 494-95, 102 S.Ct. at 1191 (footnotes omitted). Thus, we first determine whether the employment bar provision reaches First Amendment rights.

To determine whether the employment bar provision reaches "a substantial amount of constitutionally protected activity," we consider both the ambiguous and unambiguous scope of the provision. *See id.* at 494 n. 6, 102 S. Ct., at 1191 n. 6. The Secretary argues that the provision does not implicate the First Amendment at all and instead regulates employment practices that are outside the reach of the First Amendment. The challenged provision defines "employment" as "any

affiliation . . . with the business operations of a licensee, with or without compensation, including ownership or self employment." 7 U.S.C. § 499a(b)(10) (emphasis added). Thus, employment and employment-like activity are unambiguously prohibited because they involve affiliation with "business operations." We find this unambiguous restriction to be constitutional. *See Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 512, 78 L.Ed. 940 (1934) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.").

Bama argues that the employment bar provision, because of its ambiguity, chills free speech and association because a licensee and a person who is barred from employment could be found to violate the provision by simply "affiliating"[10] with each other.[11] In making this argument, Bama overlooks the language in the statute that restricts the definition of "employment" to "any affiliation . . . with the business operations of a licensee." 7 U.S.C. § 499a(b)(10) (emphasis added). "Any affiliation . . . with the business operations of a licensee" is less ambiguous than "any affiliation . . . with . . . a licensee, " the language upon which Bama seems to base its argument. A person barred from employment could still affiliate with Bama and Bama employees so long as he did not affiliate himself with Bama's "business operations." The term "business operations," in laymen's terms means the day-to-day activities of a business. "Any affiliation . . . with the business operations of a licensee" could include owning the business, working for the business, managing the business, selling to the business, buying from the business, negotiating for the business, or consulting with the business--with or without compensation. Thus, based on the restrictive language of the provision, the definition of "employment" arguably extends as far as to cover the relationship between a customer and a licensee. Restricting affiliation with the business operations, even if such restriction includes customers of a business, does not implicate substantial First Amendment rights. Thus, we find employment bar provision fails to implicate "a substantial amount of constitutionally protected conduct" under the First Amendment. *See Village of Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. at 1191.

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[10]A broad definition of "affiliate" is "to associate oneself." Random House Dictionary of the English Language 33 (2d ed. unabridged 1983).

[11]Bama suggests that speech and association with family members and friends could be reached. For example, Bama contends that Mims might be found to be "affiliating" with Bama if he asked his cousin, Randy Griffin, at a family gathering,"How is business?" or if he visited Bama's business premises for social reasons.

Because we find that the employment bar provision fails to "reach[] a substantial amount of constitutionally protected conduct," *id.*, we summarily reject the overbreadth challenge and examine only Bama's vagueness challenge. Bama argues that the broad definition of employment as "any affiliation" is vague because it is unclear what type of activities are prohibited. A statute is vague if it fails to afford a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct.2294, 2298-99, 33 L.Ed.2d 222 (1972). Thus, "[v]ague laws are objectionable as transgressions of due process guarantees on two grounds: (1) they fail to provide fair warning to citizens charged with their observance, and (2) by failing to provide clear guidelines, they led themselves to arbitrary applications by those charged with their enforcement." *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 n. 8 (5th Cir. 1980) (citing Grayned, 408 U.S., at 108-09, 92 S. Ct., at 2298-99). Were "employment" defined as merely "any affiliation with a licensee," it indeed might have been too vague to put licensees on notice as to prohibited conduct or to provide sufficient direction to the USDA; however, the statutory definition, "any affiliation . . . with the business operations of a licensee," refers to an actual involvement with those operations. Restricting such involvement is a clear application of the statute. Consequently, we cannot say that the employment bar provision "is impermissibly vague in all of its applications," *Village of Hoffman Estates*, 455 U.S. at 495, 102 S. Ct. at 1191.

We further note that, in the absence of the implication of constitutionally protected conduct, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it [facially] for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L.Ed.2d 439 (1974). We find that the definition of "employment" is sufficiently precise to preclude the type of activities that Mims performed at Bama--including working in the repacking operation and signing business checks and leases. Because Mims' activities fall squarely within the conduct precluded by the statute and because the employment bar is not vague in all its applications, we reject Bama's vagueness of the employment bar provision of the PACA.

B. Challenge of Mims' Status as "Responsibly Connected" with Mims Produce

The Secretary had determined previously that Mims Produce violated the PACA and that Mims, as a vice president and director, was "responsibly connected" with the company. "Responsibly connected" is defined as "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). Bama contends that Mims should not be barred from its employment because he was not "responsibly connected" with Mims Produce. In support of this conclusion, Bama points to case law from the District of Columbia Circuit which holds that a director's status as "responsibly connected" can be rebutted if he shows that he had only a nominal role in the operations of the business.[12] *See, e.g., Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983). The circuits have split, however, on whether the statutory definition of "responsibly connected," as it existed prior to the 1996 amendment, was a per se rule or a rebuttable presumption. *Compare, e.g., Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (allowing a person to prove that he was not at fault or in control of those at fault to avoid the employment bar provision) *with Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985) (holding that the statutory definition of "responsibly connected" provided a per se rule). We need not reach the issue here, however, because neither Mims nor Mims Produce previously challenged the Secretary's conclusion that Mims was "responsibly connected," despite the notification sent by the USDA to Mims which indicated that he could raise such a challenge. Mims, therefore, waived his right to contest the issue of whether he was responsibly connected to Mims Produce by failing to challenge directly the determination. *See Farley and Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 969 (9th Cir. 1991) (holding that failure to respond to notices from the USDA constitutes a waiver of the right to a hearing to contest the issue of whether a person is responsibly connected with a PACA violator). Thus, Bama cannot step into Mims' shoes and challenge the final determination that Mims is subject to the employment bar provisions of the PACA.

C. Challenge of the Imposed Sanctions

Bama also argues that the Secretary erred in increasing the period of suspension from fourteen days to thirty days. "[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy," however, our review is limited. *Butz v. Glover Livestock*

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[12]Bama also points to section 499a(b)(9), as amended in 1996, in support of the argument that status as an officer or director does not render an individual per se "responsibly connected." 7 U.S.C.A. § 499a(b)(9) (Supp. 1997) (requiring that a "responsibly connected" person have active involvement in the PACA violations and status as more than a nominal officer, director, or shareholder). The definition of "responsibly connected" was amended after the violations of both Mims Produce and Bama and is not controlling in this case.

Comm'n Co., 411 U.S. 182, 185, 93 S. Ct. 1455, 1458, 36 L.Ed.2d 142 (1973) (internal quotation marks omitted). "We cannot disturb the action of the Secretary, as accomplished through the judicial officer, so long as the proceedings were properly conducted in accordance with constitutional and statutory standards, unless the judgment is 'unwarranted in law or . . . without justification in fact.'"[13] *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (quoting *Glover Livestock*, 411 U.S. at 185-86, 93 S. Ct. at 1458).

A thirty-day suspension for violation of the employment bar provision is warranted under section 499h(b) of the PACA.[14] In fact, even revocation of Bama's license would have been warranted in law. See 7 U.S.C. § 499h(b) ("The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section."). Because we find that the suspension imposed by the Secretary was warranted in law, we turn to whether the facts of this case justified a thirty-day suspension.

The ALJ took into account several mitigating factors when he imposed a reduced suspension of fourteen days. Specifically, the ALJ considered Bama's record as a financially responsible company and the effect of a suspension on Bama's employees. The judicial officer considered the same factors and explicitly rejected them. Instead, the judicial officer considered the duration of the violation,[15] the numerous warnings that Bama received, and the fact that Mims worked for Bama during the period of time when he was ineligible to work, even with approval and a bond. The judicial officer also rejected explicitly Bama's contention that it had made numerous efforts to prevent Mims from continuing to work during the period of violation.

Bama contends that the judicial officer erred in failing to give weight to the mitigating factors considered by the ALJ and in failing to consider other factors, including Bama's efforts to prevent Mims' employment and the sporadic nature of

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[13]Since Bama does not challenge the nature of the proceedings, we examine only whether the sanctions were warranted in law or justified in fact.

[14]We dismiss without discussion Bama's contention that the judicial officer erroneously imposed the "strict sanction" policy which had been rejected previously by the agency. The judicial officer sufficiently addressed the sanction policy in his opinion and we defer to his interpretation of agency policy.

[15]The judicial officer determined that the period of violation was four months longer than the ALJ had originally determined it to be.

Mims' presence at Bama during the period of alleged violation.[16] We disagree. "Although the Secretary could permissibly have given weight to these factors, we think it clear that their presence cannot preclude a [thirty-] day suspension." *Maine Potato Growers, Inc. v. Butz,* 540 F.2d 518, 524 (1st Cir. 1976). Thus, we find that the thirty-day suspension is warranted in law and justified by the facts of the case.

III. CONCLUSION

In this appeal from a decision and order of the Secretary of Agriculture, Bama challenges the constitutionality of the employment bar provision of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499h(b), and further contends that the Secretary erred in applying the provision to Bama and in suspending Bama for thirty days. We determine that the statutory definition of "employment" does not implicate substantial constitutional rights and is neither vague nor overbroad. We also decide that Bama is barred from challenging the previous determination that Mims was "responsibly connected" with Mims Produce, and, therefore, the Secretary properly applied the employment bar provision to Bama. Furthermore, we find that the thirty-day suspension was warranted in law and justified by the facts of the case. We AFFIRM.

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[16]Bama also argues that the judicial officer should have taken into consideration that Mims was not "responsibly connected" with Mims Produce. As discussed previously in this opinion, we find that Bama cannot challenge Mims status as "responsibly connected." Thus, we need not address this argument in the context of the appropriateness of the sanction. In addition, Bama argues that a suspension of Bama is inconsistent with PACA's goal of promoting financial responsibility because the suspension will harm an otherwise financially responsible, company. We reject this argument in view of policy concerns that financially responsible companies would be encouraged to ignore the strict employment bar provision of the PACA if they were exempt from suspension.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: FIVE STAR FOOD DISTRIBUTORS, INC.
PACA Docket No. D-96-0521.
Decision and Order filed January 23, 1997.

Default — Admissions — Official notice of bankruptcy petition - Willful, flagrant, and repeated violations — Publication of facts and circumstances.

The Judicial Officer affirmed Judge Baker's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. The ALJ's taking of official notice of documents Respondent filed in a bankruptcy proceeding is in accord with the Administrative Procedure Act, (5 U.S.C. § 556(e)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(6)); the Rules of Practice, (7 C.F.R. § 1.145(i)), require the Judicial Officer to rule on appeals, upon the basis of and after due consideration of the record and any matter of which official notice is taken; and documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings. Respondent has had ample time to obtain documents for its defense and the recent illness of one of Respondent's employees, who is knowledgeable of the documents, is not a basis for setting aside the ALJ's decision and remanding the matter to the ALJ for further proceedings. Publication of the facts and circumstances of a violation of 7 U.S.C. § 499b is not dependent on finding that the violation was willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 11 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

Jane McCavitt, for Complainant.
Constantine N. Kangles, Chicago, IL, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on March 21, 1996.

The Complaint alleges, *inter alia*, that: (1) on May 26, 1995, Five Star Food Distributors, Inc. (hereinafter Respondent), filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §§ 1100-1174), in the United States Bankruptcy Court for the Northern District of Illinois, which case was

converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 21, 1995, (Complaint at 2, ¶ III); and (2) during the period May 1994 through March 1995, Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent purchased, received, and accepted in interstate commerce, (Complaint at 3-9, ¶¶ IV, V).

Respondent filed an Answer on July 5, 1996: (1) admitting that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code, (Answer ¶ III); and (2) denying that it failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent purchased, received, and accepted in interstate commerce, (Answer ¶¶ I, IV, V).

On October 1, 1996, Complainant filed a Request for Official Notice to be taken of the pleadings filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); a Motion for a Decision Based Upon Admissions; a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision; and a Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any response to Complainant's October 1, 1996, filings. On November 7, 1996, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Admissions in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), in which the ALJ: took official notice of documents filed by Respondent in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); found that Respondent admitted in the documents it filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) that Respondent owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full; found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)); and ordered the publication of the facts and circumstances of the violation. (Decision Without Hearing by Reason of Admissions at 1-3.)

On December 6, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557.

(7 C.F.R. § 2.35.)* On December 26, 1996, Complainant filed Complainant's Objection to Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Complainant's Response). On December 26, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I have adopted the ALJ's Decision Without Hearing by Reason of Admissions as the final Decision and Order. Additions or changes to the Decision Without Hearing by Reason of Admissions are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

Applicable Statutory Provisions and Regulations

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect

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

of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

7 U.S.C. § 499b(4).

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. § 499h(a).

7 C.F.R.:

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the [PACA] shall have the same meaning as stated therein. Unless otherwise defined, the following terms

whether used in the regulations, in the [PACA], or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for purpose of determining violations of the [PACA], means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

ADMINISTRATIVE LAW JUDGE'S DECISION WITHOUT HEARING BY REASON OF ADMISSIONS (AS MODIFIED)

. . . [T]he Complaint [alleges] that during the period of May 1994 through March 1995, Respondent purchased, received, and accepted, in interstate commerce from 14 sellers, 174 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $238,374.08. The Complaint also [alleges] that on May 26, 1995, Respondent filed a voluntary petition in the United States Bankruptcy Court for the Northern District of Illinois pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §[§] 1100[-1174]).

A copy of the Complaint was served upon Respondent, which filed an Answer in which [Respondent] admit[s] filing for bankruptcy but denie[s] that it had failed to make full payment promptly as alleged in the Complaint. Complainant . . . has filed a motion for a decision based upon Respondent's admission in its bankruptcy pleadings[1]. Respondent has admitted in documents filed in connection with its Chapter 11 Bankruptcy proceeding entitled *Schedule D - Creditors Holding Secured Claims, Schedule F- Creditors Holding Unsecured*

[1]Official notice is taken of the pleadings filed by Respondent in . . . [*In re Five Star Food Distributors, Inc.*,] No. 95-10746 [(Bankr. N.D. Ill. filed May 26, 1995)].

Nonpriority Claims and *List of Creditors Holding 20 Largest Unsecured Claims* that it owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full. . . . Therefore, upon the motion of the Complainant for the issuance of an order based upon admissions, [this] Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Five Star Food Distributors, Inc., is a corporation organized and existing under the laws of the State of Illinois. Its business mailing address is [redacted], Illinois [redacted].

2. Pursuant to the licensing provisions of the PACA, license number [redacted] was issued to Respondent on August 7, 1985. This license was suspended May 3, 1995, . . . and was terminated on August 7, 1995, 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 May 26, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code, (11 U.S.C. §[§] 1100[-1174]), in the United States Bankruptcy Court for the Northern District of Illinois. The case was converted to a [proceeding under] Chapter 7 [of the Bankruptcy Code] on June 21, 1995.

4. As more fully set forth in paragraph IV of the Complaint, Respondent, during the period May 1994 through March 1995, failed to make full payment promptly to 14 sellers of the agreed purchase prices, or balances thereof, in the total amount of $238,374.08 for 174 lots of perishable agricultural commodities, which [Respondent] purchased, received, and accepted in interstate commerce.

Conclusions [of Law]

Respondent's failure to make full payment promptly with respect to the transactions [referenced] in Finding of Fact No. 4,[*supra*], constitutes willful, repeated, and flagrant violations of section 2[(4)] of the [PACA], (7 U.S.C. § 499b[(4)]), for which the Order [in this Decision and Order] is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent asserts in Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Respondent's Appeal Petition) that:

1. The allegations are that through a period of May, 1994 through to March, 1995, [R]espondent purchased from the sellers perishable agricultural commodities and failed to make payment therefor. These allegations are not true, inasmuch as [R]espondent, during the period of May, 1994 and prior thereto and through to March, 1995, the period alleged, purchased items on suppliers' terms and paid for them. The agreement between [R]espondent and the suppliers was that purchases by [R]espondent were to be made on a COD basis or payment on delivery. The payments were made by check, except when credit was extended, and by reason of the bankruptcy, the records of the [R]espondent were placed with the Trustee Bankruptcy Court and on various occasions produced and left with various Courts on subpoenas.

To make matters more difficult John Zois, who is knowledgeable as to these transactions, has been seriously ill and even just recently has in October, November and on December 4, 1996 been hospitalized or admitted to emergency treatment by at least the Christ Hospital and Silver Cross Hospital and Silver Cross Emergency Room. On December 3, 1996 we learned through an aid of the Bankruptcy Court Trustee that the checks and documents we had been looking for covering this period were in the hands of an auditing branch in a[] near suburb and would be made available to us. Unfortunately, however, John Zois has been unavailable for the examination and duplication of these records.

Respondent's Appeal Petition ¶ 1.

Respondent requests that:

[T]he [Decision Without Hearing by Reason of Admissions] entered herein not become final, that it be withdrawn, and that this [R]espondent be granted a period of 35 days to enable John Zois or some substitute party to examine these newly discovered records and to file documents and affidavits in support of [R]espondent's position. Respondent further requests and in the event that [R]espondent's request is denied, that [R]espondent be granted a period of 35 days to file pleadings supported by affidavit to reopen these proceedings. In the event all requests of [R]espondent are denied, then [R]espondent asks that these allegations be construed and held to be [R]espondent's appeal.

Respondent's Appeal Petition at unnumbered last page.

While I sympathize with Mr. Zois, the difficulty his illness has recently caused Respondent with respect to its quest to obtain documents related to this case is not a sufficient basis for setting aside the ALJ's Decision Without Hearing by Reason of Admissions and remanding the case to the ALJ for further proceedings, or in any way delaying this proceeding. The record reveals that, since April 1996, Respondent has perceived a need for and has known of the approximate location of the checks and documents which Respondent asserts could now be examined and duplicated but for Mr. Zois' unavailability due to his illness. (Respondent's Appeal Petition ¶ 1.)

Respondent was served with the Complaint in this proceeding on April 4, 1996. (April 4, 1996, Memorandum to File from Joyce A. Dawson.) On April 22, 1996, Respondent requested a 45-day extension of time within which to file its Answer, based on Respondent's need "to obtain information from the Bankruptcy Trustee and from the former accountant of Five Star Food Distributors Inc." (April 22, 1996, filings by John Zois, George Zois, and Perry Zois.) Chief Administrative Law Judge Victor W. Palmer granted Respondent an extension to June 7, 1996, to file its Answer, a 44-day extension of time. (Extension of Time filed April 24, 1996.)

On June 7, 1996, Constantine N. Kangles of the Law Offices of Constantine N. Kangles, Ltd., filed a request for an additional 60 days in which to file an Answer on behalf of Respondent. (June 7, 1996, filing by Constantine N. Kangles.) Constantine Kangles explained the basis for this second request for an extension of time to file an Answer on behalf of Respondent, as follows:

> . . . [W]e . . . have commenced a review of such documents as are presently available. We have similarly contacted Trustee Newman of the United States Bankruptcy Court concerning documents in his possession that are of evidentiary importance. The Trustee has indicated that it would be difficult to prepare copies of these documents but might allow one of our attorneys the opportunity to review these documents and to make copies of relevant documentation. We have been further advised a prior extension had been requested by the individual parties, and we hasten to advise the Department of our position and of our request for a period of time to review some 10 years of records, encompassing the dealings of these various parties, as well as the factual position of each of these parties and their acts or actions with regard to the matters in question.

> Accordingly, we most respectfully request we be granted a period of 60 days in which to assemble our documentation and prepare a formal response to the Department's allegations . . . .

Respondent's June 7, 1996, filing at 1.

The ALJ granted Respondent an extension to July 5, 1996, to file its Answer, a 28-day extension of time. (Time Extended to Answer filed June 14, 1996.) On July 5, 1996, Respondent filed an Answer attached to which is a letter from Respondent's counsel which states:

> July 2, 1996
>
> United States Department of Agriculture
> Office of the Hearing Clerk
> Room 1081, South Building
> Washington, D.C. 20250-9200
>
> RE: FIVE STAR FOOD DISTRIBUTORS, INC.,
> Respondent
> PACA Docket No. D-96-521
>
> Attn: Dorothea A. Baker
> Administrative Law Judge
>
> Dear Ms. Baker:
>
> We are enclosing herewith the reply of [R]espondent.
>
> . . . .
>
> We also request all hearings hereon be held in your Chicago office, which is the location of the sellers, the [R]espondent, the Bankruptcy Trustee, his store of [R]espondent's company records and all interested parties.

July 2, 1996, letter from Constantine N. Kangles to Office of the Hearing Clerk.

Section 1.139 of the Rules of Practice provides:

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

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

7 C.F.R. § 1.139.

On October 1, 1996, Complainant filed a Motion for a Decision Based Upon Admissions, a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, a Proposed Decision Without Hearing by Reason of Admissions, and a Request for Official Notice. Complainant requested that the ALJ take official notice of the pleadings[2] filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), and asserted that Respondent admits in documents, which it filed in the bankruptcy proceeding, that it owes more than the $238,374.08 alleged in the Complaint as being past due and unpaid to 14 sellers from whom Respondent purchased but failed to pay for produce during the period May 1994 through March 1995. (Request for Official Notice at 1; Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 2-3.) Complainant compared the amounts alleged to be owed to 14 sellers of perishable agricultural commodities in paragraph IV of the Complaint to amounts Respondent admits to owing these same 14 sellers in documents Respondent filed in *In re Five Star*

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[2]While Complainant requested that the ALJ take official notice of "the pleadings" in *In re Five Star Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995), Complainant requested in particular that the ALJ take official notice of the following documents, copies of which Complainant attached to Complainant's Request for Official Notice: (1) Voluntary Petition Under Chapter 11; (2) Summary of Schedules; (3) List of Creditors Holding 20 Largest Unsecured Claims; (4) Schedule B, Personal Property; (5) Schedule D, Creditors Holding Secured Claims; (6) Schedule E, Creditors Holding Unsecured Priority Claims; and (7) Schedule F, Creditors Holding Unsecured Nonpriority Claims. (Complainant's Request for Official Notice at 1, and attachments.)

Distributors, Inc., No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), as follows:

Seller	Complaint	Bankruptcy
Garnand Mktg, Inc.	$ 27,727.60	$ 27,727.60
Miles Produce, Inc.	6,010.00	6,010.00
Mandolini Co	11,185.00	11,105.50
Anthony Marano Co.	27,477.55	28,191.55
Vitro & Pecararo Co., Inc.	16,688.75	18,893.70
Art Kramer's Produce	28,459.00	28,459.35
Ucon Produce	15,736.25	15,736.25
Michael J. Navilio, Inc.	7,265.12	7,265.12
Rancho Del Sol	6,456.20	6,618.20
Chapman Fruit Co., Inc.	6,004.75	6,004.75
Victory Spud Service, Inc.	13,038.40	35,305.90
Andershock's Fruitland, Inc	.4,887.00	4,887.00
Strube Celery & Vegetable Co.	40,398.16	40,398.16
C.H. Robinson Co.	27,049.30	27,526.05
	$238,374.08	$264,129.13

Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 3.

A copy of Complainant's Motion for Decision Based Upon Admissions, a copy of Complainant's Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, a copy of Complainant's Proposed Decision Without Hearing by Reason of Admissions, and a letter dated October 2, 1996, from the Office of the Hearing Clerk, were served on Respondent by certified mail on October 11, 1996. The October 2, 1996, letter from the Office of the Hearing Clerk states, as follows:

October 2, 1996

Ms. Constantine N. Kangles
Attorney at Law
[redacted]t
[redacted])
[redacted], Illinois [redacted]

Dear Ms. Kangles:

Subject: **In re: Five Star Distributors, Inc., Respondent - PACA Docket No. D-96-0521**

Enclosed is a copy of Complainant's Motion for a Decision Based Upon Admissions, together with a copy of the Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision and the Proposed Decision, which have been filed with this office in the above-captioned proceeding.

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

October 2, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Constantine N. Kangles.

Respondent failed to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions within 20 days, as provided in 7 C.F.R. § 1.139.

On November 7, 1996, the ALJ filed a Decision Without Hearing by Reason of Admissions in which the ALJ took official notice of documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995). (Decision Without Hearing by Reason of Admissions at 2 n.1). The ALJ found that Respondent admits, in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

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

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e)

Sections 1.141(h)(6) and 1.145(i) of the Rules of Practice provide:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence.*

. . . .

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

. . . .

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. . . .

7 C.F.R. § § 1.141(h)(6), .145(i).

Federal courts may take judicial notice of proceedings in other courts if those

proceedings have a direct relation to matters at issue.[3] Therefore, under section 1.141(h)(6) of the Rules of Practice, (7 C.F.R. § 1.141(h)(6)), an ALJ presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Moreover, under section 1.145(i) of the Rules of Practice, (7 C.F.R. § 1.145(i)), the Judicial Officer shall rule on any appeal on the basis of and after due consideration of any matter of which official notice is taken, as well as the record of the proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.[4]

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[5] Respondent has shown no

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[3]*Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), *cert. denied*, 117 S.Ct. 49 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1549 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. Du Pont De Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (per curiam); *Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

[4]*In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), *printed in* 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric.
Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

[5]*In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. ___ (Nov. 21, 1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42

basis for setting aside the Decision Without Hearing by Reason of Admissions here. The record clearly establishes that the documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995) were properly noticed by the ALJ and that Respondent admits in those documents that it owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

The Rules of Practice, a copy of which was served on Respondent on April 4, 1996, and the Office of the Hearing Clerk's October 2, 1996, letter clearly provide that Respondent must file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions within 20 days. (7 C.F.R. § 1.139.) Respondent had ample opportunity during this 20-day period to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions and to show that the facts to be noticed are erroneous. Moreover, Respondent has had ample opportunity to obtain the documents that Respondent has asserted since its first filing in this proceeding, April 22, 1996, would show that the allegations in paragraph IV of the Complaint are not true. In view of Respondent's admissions in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476, (Bankr. N.D. Ill. filed May 26, 1995), there is no material issue of fact that warrants holding a hearing. Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.[6] The same order would be issued in this case

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

[6]The Complaint alleges that Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent purchased, received, and accepted in interstate commerce. (Complaint ¶ IV.) Respondent admits in its bankruptcy filings that it owes these same 14 sellers $264,129.13. Respondent admits in its bankruptcy filings that it owes the same amount as alleged in paragraph IV of the Complaint to seven of these sellers: Garnand Marketing, Inc.; Miles Produce, Inc.; Ucon Produce; Michael J. Navilio, Inc.; Chapman Fruit Co., Inc.; Andershock's Fruitland, Inc.; and Strube Celery & Vegetable Co. Respondent asserts in its bankruptcy filings that it owes more than the amount alleged in paragraph IV of the Complaint to six of these sellers: Anthony Marano Co.; Vitro & Pecararo Co., Inc.; Art Kramer's Produce; Rancho Del Sol; Victory Spud Service, Inc.; and C.H. Robinson Co. Respondent asserts in its bankruptcy filings that it owes $79.50 less than the amount alleged in paragraph IV of the Complaint

unless the proven violations are *de minimis*.[7]

Respondent's violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), are willful, repeated, and flagrant, as a matter of law. Respondent's violations are "repeated" because repeated means more than one. 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.[8]

Willfulness is not a prerequisite to the publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondent's violations of 7 U.S.C. § 499b(4) were willful.

Since Respondent violated express requirements of the PACA, (7 U.S.C. § 499b), by failing to make full payment for perishable agricultural commodities promptly, the ALJ's finding of willfulness is correct. *See Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc., supra*, 52 Agric. Dec. at 1612; *In re The Caito Produce Co., supra*, 48 Agric. Dec. at 643-53.

($11,185) to Mandolini Co. (Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision at 3.)

[7] *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

[8] *See, e.g., Melvin Beene Produce Co. v. Agricultural Marketing Service*, 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 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 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 the 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 New York Corp.*, 55 Agric. Dec. ___ (Nov. 15, 1996) (Respondent Havana Potatoes of New York Corporation'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 willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); Respondent Havpo, Inc.'s, failure to pay six sellers $101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___ (Sept. 12, 1996) (Respondent Andershock Fruitland, Inc.'s, failure to pay 11 sellers $245,873.41 for 113 lots of perishable agricultural commodities during the period of May 1994 through May 1995 constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)).

A violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 560 (1991); *Finer Foods Sales Co. v. Block, supra*, 708 F.2d at 777-78; *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Havana Potatoes of New York Corp., supra*, slip op. at 16; *In re Andershock Fruitland, Inc., supra*, slip op at 36; *In re Hogan Distrib., Inc., supra*, 55 Agric. Dec. at 626; *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc., supra*, 54 Agric. Dec. at 1378; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, No. 95-3552 (8th Cir. Jan. 7, 1997); *In re National Produce Co., supra*, 53 Agric. Dec. at 1625; *In re Samuel S. Napolitano Produce, Inc., supra*, 52 Agric. Dec. at 1612.[9] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'").

Respondent failed to make full payment of the agreed purchase prices promptly to 14 sellers for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent had purchased, received, and

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[9] The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations would still be willful in view of Respondent's gross neglect of the express provisions of the PACA known by Respondent to require prompt payment.

accepted in interstate commerce. These failures to pay took place over the period May 1994 through March 1995, a period of 11 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved. Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 11-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful. *In re Hogan Distrib., Inc., supra*, 55 Agric. Dec. at 630; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Accordingly, the Decision Without Hearing by Reason of Admissions was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). There is no basis for allowing Respondent to present matters by way of defense at this time.

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

Order

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and the facts and circumstances set forth in this Decision and Order shall be published.

In re: FIVE STAR FOOD DISTRIBUTORS, INC.
PACA Docket No. D-96-0521.
Order Denying Petition for Reconsideration filed March 19, 1997.

Admissions — Official notice of bankruptcy petition — Publication of facts and circumstances.

The Judicial Officer denied Respondent's Petition for Reconsideration. Respondent has had approximately 11 months to obtain documents for its defense and there is no basis for providing Respondent with an additional 20 days within which to submit records which Respondent believes will show that Respondent did not violate the PACA. Respondent admits in documents that it filed in a bankruptcy proceeding, *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least $238,374.08 to the 14 produce sellers which Complainant alleges Respondent has failed to pay promptly and in full, in accordance with the PACA. Respondent has provided no basis for its contention, which it makes for the first time in its Petition for Reconsideration, that its bankruptcy filings are false.

Jane McCavitt, for Complainant.
Constantine N. Kangles, Chicago, IL, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service (hereinafter Complainant), instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on March 21, 1996.

The Complaint alleges, *inter alia*, that: (1) on May 26, 1995, Five Star Food Distributors, Inc. (hereinafter Respondent), filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100-1174) in the United States Bankruptcy Court for the Northern District of Illinois, which case was converted to a proceeding under Chapter 7 of the Bankruptcy Code on June 21, 1995 (Complaint ¶ III); and (2) during the period May 1994 through March 1995, Respondent failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent purchased, received, and accepted in interstate commerce (Complaint ¶¶ IV, V).

Respondent filed an Answer on July 5, 1996: (1) admitting that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code (Answer ¶ III); and (2) denying that it failed to make full payment promptly to 14 sellers of the agreed purchase prices for 174 lots of perishable agricultural commodities in the total amount of $238,374.08, which Respondent purchased,

received, and accepted in interstate commerce (Answer ¶¶ I, IV, V).

On October 1, 1996, Complainant filed a Request for Official Notice to be taken of the pleadings filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); a Motion for a Decision Based Upon Admissions; a Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision; and a Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any response to Complainant's October 1, 1996, filings. On November 7, 1996, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) issued a Decision Without Hearing by Reason of Admissions in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: took official notice of documents filed by Respondent in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995); found that Respondent admitted in the documents it filed in *In re Five Star Food Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) that Respondent owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full; found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and ordered the publication of the facts and circumstances of the violation (Decision Without Hearing by Reason of Admissions at 1-3).

On December 6, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35). [1]On December 26, 1996, Complainant filed Complainant's Objection to Respondent's Plea to Reopen, Continue for 35 Days, or Stand as Respondent's Appeal (hereinafter Complainant's Response). On December 26, 1996, the case was referred to the Judicial Officer for decision. On January 23, 1997, I issued a Decision and Order adopting the ALJ's Decision Without Hearing by Reason of Admissions. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___ (Jan. 23, 1997). On February 12, 1997, Respondent filed a Petition for Reconsideration, and on March 7, 1997, Complainant filed Objection to Respondent's Petition for Reconsideration. On March 10, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises two issues in its Petition for Reconsideration. First,

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

Respondent asserts that it has located "a good portion of all of the raw records substantiating [Respondent's] position" that Respondent did not violate the PACA as alleged in the Complaint, and Respondent requests 20 days to document fully that Respondent did not violate the PACA (Respondent's Petition for Reconsideration ¶¶ 1-3, 5).

As fully discussed in the Decision and Order, since April 1996, Respondent has perceived a need for, and has known of, the approximate location of the records which Respondent contends will show that it did not violate the PACA. *In re Five Star Distributors, Inc., supra,* slip op. at 7-10. Respondent has had approximately 11 months in which to locate and submit the records which Respondent believes will show that it did not violate the PACA. I find no basis in Respondent's Petition for Reconsideration for providing Respondent with an additional 20 days within which to submit records which Respondent believes will show that it did not violate the PACA.

Second, Respondent contends that its admissions in documents which Respondent filed in *In re Five Star Distributors, Inc.*, No. 95-10746 (Bankr. N.D. Ill. filed May 26, 1995) are "in fact false" (Respondent's Petition for Reconsideration ¶ 4).

Respondent admitted in its Answer that it filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 1100-1174) and converted the voluntary petition to a proceeding under Chapter 7 of the Bankruptcy Code (Answer ¶ III). Respondent admits in documents filed in connection with Respondent's Chapter 11 Bankruptcy proceeding entitled *Schedule D - Creditors Holding Secured Claims, Schedule F - Creditors Holding Unsecured Nonpriority Claims* and *List of Creditors Holding 20 Largest Unsecured Claims* that it owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full, in violation of the PACA.

On October 1, 1996, Complainant filed a request that the ALJ take official notice of the pleadings filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) (Request for Official Notice at 1). A copy of Complainant's Motion for Decision Based Upon Admissions, a copy of Complainant's Memorandum of Points and Authorities in Support of Complainant's Motion for a Decision, and a copy of Complainant's Proposed Decision Without Hearing by Reason of Admissions were served on Respondent by certified mail on October 11, 1996. In accordance with the Rules of Practice (7 C.F.R. §1.139), Respondent was given 20 days within which to file objections to Complainant's Motion for a Decision Based Upon Admissions and Complainant's Proposed Decision Without Hearing by Reason of Admissions. Respondent did not file any objection, and on November 7, 1996, the ALJ filed a

Decision Without Hearing by Reason of Admissions in which the ALJ took official notice of documents filed by Respondent in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) (Decision Without Hearing by Reason of Admissions at 2 n.1). The ALJ found that Respondent admits, in the documents which it filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), that it owes at least $238,374.08 to the 14 sellers which Complainant alleges Respondent has failed to pay promptly and in full.

Respondent appealed the ALJ's Decision Without Hearing By Reason of Admissions, but did not indicate in its appeal that the documents that it filed in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995) are false. Further, Respondent's president, John Zois, signed many of the documents filed in the bankruptcy petition under penalty of perjury, including a declaration, under penalty of perjury, that he had read the Summary and Schedules filed in the bankruptcy proceeding and that they are correct to the best of his information and belief (Complainant's Objection to Respondent's Petition for Reconsideration, attachments). Moreover, Respondent has offered nothing in its Petition for Reconsideration to support its assertion that its bankruptcy filings are false. Under these circumstances, I find no basis for finding that Respondent's admissions in *In re Five Star Distributors, Inc.*, No. 95-10476 (Bankr. N.D. Ill. filed May 26, 1995), are false.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 23, 1997, *In re Five Star Distributors, Inc., supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[2] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on January 23, 1997. Therefore, since Respondent's Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed January 23, 1997, is reinstated, with allowance for time passed, as follows:

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[2] *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 1 (Oct. 29, 1996) (Order Denying Petition for Reconsideration).

Order

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the facts and circumstances set forth in this Decision and Order shall be published.

This Order shall take effect 30 days after service of this Order Denying Petition for Reconsideration on Respondent.

In re: RUMA FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-94-0565.
Decision and Order on Remand filed February 6, 1997.

Suspension of license — Civil penalties.

The Judicial Officer affirmed Judge Baker's (ALJ) decision assessing Respondent a civil penalty of $12,400 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. For the reasons set forth in *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 642 (1996), the record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) and the suspension of Respondent's PACA license for 45 days. Section 8(e) of the PACA (7 U.S.C. § 499h(e)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, the size of the business, the number of employees, and the seriousness, nature, and amount of the violation must be given due consideration. The violator's net profits, ability of the violator to pay the civil penalty, and ability of the violator to continue to conduct business after the civil penalty is assessed are not required to be considered when determining the amount of the civil penalty. Respondent's request that the parties be required to mediate an agreement to a payment plan is denied.

Andrew Y. Stanton, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Initial decision pursuant to remand issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

The Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this disciplinary proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. §§ 499a-499s) (hereinafter the PACA); the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice), by filing a Complaint on August 25, 1994.

The Complaint alleges that Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), by employing Mr. Dean W. Hopkins from November 23, 1993, through March 7,

1994, without posting a surety bond meeting the approval of the Secretary, and requests the suspension of Respondent's PACA license for 45 days as a result of Respondent's willful violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)). (Complaint at 3-4.)

On September 16, 1994, Respondent filed an Answer in which it denied violating section 8(b) of the PACA and asserted several affirmative defenses. On February 28, 1995, Administrative Law Judge Dorothea A. Baker (hereinafter ALJ) presided over a hearing in Boston, Massachusetts, during which Complainant was represented by Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., and Respondent was represented by Stephen P. McCarron, McCarron & Associates, Washington, D.C.

The ALJ filed an Initial Decision and Order on August 3, 1995, in which the ALJ found that Respondent willfully violated section 8(b) of the PACA, (7 U.S.C. § 499h(b)), and suspended Respondent's PACA license for 45 days.

On October 4, 1995, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557, (7 C.F.R. § 2.35).[1] On October 24, 1995, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on October 26, 1995, the case was referred to the Judicial Officer for decision.

On April 1, 1996, Respondent filed Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer, in which Respondent requested the opportunity to demonstrate the applicability of section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)),[2] to this proceeding. On April 18, 1996, Complainant filed

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

[2]Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty

Complainant's Response to Respondent's Motion for Oral Argument and/or Further Briefing Before the Judicial Officer in which Complainant agreed with Respondent that the Judicial Officer has authority to impose a civil penalty in accordance with 7 U.S.C. § 499h(e), but opposed the imposition of a civil penalty in the instant proceeding because a 45-day suspension of Respondent's license is appropriate, and Complainant had reason to believe that Respondent's financial condition was insecure and the imposition of any civil penalty would threaten Respondent's payment of its current produce obligations. On April 22, 1996, Respondent filed Respondent's Reply Regarding Further Briefing/Argument requesting a further evidentiary hearing either before the ALJ or the Judicial Officer regarding the sanction to be imposed should Respondent be found to have violated 7 U.S.C. § 499h(b).

On April 24, 1996, the Judicial Officer issued an Order to Show Cause denying Respondent's April 1, 1996, motion for oral argument and Respondent's April 22, 1996, motion for a further evidentiary hearing, and requiring Respondent and Complainant to show cause why a sanction which gives Respondent an option of a suspension of its PACA license or the payment of a civil penalty should not be considered. *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 640 (1996) (Order to Show Cause).

Complainant filed Complainant's Response to Order to Show Cause on May 2, 1996, opposing the imposition of a civil penalty based upon Complainant's belief that the only appropriate sanction in this case is a 45-day suspension of Respondent's PACA license, and Complainant's reason to believe that Respondent's financial condition is very insecure and that imposition of any civil penalty would threaten Respondent's payment of its current produce obligations. On May 7, 1996, Respondent filed Respondent's Reply to Show Cause Order, opposing the imposition of any sanction, but stating that, if any sanction is imposed, it should be a civil monetary penalty.

On May 16, 1996, the Judicial Officer issued a Decision and Order and Remand Order which adopted the ALJ's Initial Decision and Order as the final Decision and Order, except that the case was remanded for consideration of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license; and if a civil

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not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

penalty is appropriate, what amount should be assessed. *In re Ruma Fruit and Produce Co.*, 55 Agric. Dec. 642 (1996). The Decision and Order and Remand Order filed May 16, 1996, describes the limited purpose of the remand, as follows:

> I find that the record in this case is not sufficient to determine whether the assessment of a civil penalty in lieu of the 45-day suspension of Respondent's license would be appropriate, and, if assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed.
>
> Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, before a civil penalty may be assessed, due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. I find that the record is sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that it is not sufficient with respect to the size of Respondent's business and the number of Respondent's employees.
>
> Therefore, this case is remanded to the ALJ for the limited purpose of determining the appropriateness of the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and, if the ALJ finds that assessment of a civil penalty is appropriate, the amount of the civil penalty to be assessed. The ALJ shall take evidence regarding the size of Respondent's business, the number of Respondent's employees, the sanction recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA, and any other evidence the ALJ believes necessary to assist her determination regarding the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license, and issue an Order in accordance with her findings.

In re Ruma Fruit and Produce Co., supra, 55 Agric. Dec. at 672-73.

On July 25, 1996, the ALJ presided over a remand hearing concerning the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., represented Respondent.

The ALJ filed an Initial Decision and Order Pursuant to Remand on November 19, 1996, in which the ALJ ordered, as follows:

Order

A civil penalty of $12,400.00 is assessed against Respondent Ruma Fruit and Produce Co., Inc. and shall be payable within thirty-five (35) days after this Decision has been served upon Respondent unless a monthly payment plan is agreed upon with Complainant. Otherwise a forty-five day suspension is imposed.

Initial Decision and Order Pursuant to Remand at 9.

On December 23, 1996, Respondent appealed the Initial Decision and Order Pursuant to Remand to the Judicial Officer, requested oral argument before the Judicial Officer, and filed a Request for Mediation. On January 16, 1997, Complainant filed Complainant's Response to Respondent's Appeal Petition Regarding Hearing on Remand, and on January 17, 1997, the case was referred to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit, (7 C.F.R. § 1.145(d)), is refused. Oral argument would appear to serve no useful purpose because the issues concerning assessment of a civil penalty have been fully addressed in the remand hearing, in thorough briefs filed by the parties, and in the Initial Decision and Order Pursuant to Remand.

Based upon a careful consideration of the record, the Initial Decision and Order Pursuant to Remand is adopted as the final Decision and Order on Remand. Changes in the ALJ's Initial Decision and Order Pursuant to Remand are shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the conclusions of the ALJ.

ALJ'S INITIAL DECISION PURSUANT TO REMAND (AS MODIFIED)

On May 16, 1996, the Judicial Officer filed a Decision and Order and Remand Order wherein the Judicial Officer remanded the case to the ALJ to consider whether the imposition of a civil penalty in lieu of a 45-day suspension of Respondent's [PACA] license is appropriate, and if a civil penalty is appropriate, the amount of the civil penalty to be assessed.

Until [November 15, 1995,] the available sanctions, in a case of this nature, were limited to publication of the facts and circumstances of the violation, suspension of an offender's [PACA] license or revocation of [an offender's PACA license]. (7 U.S.C. § 499h(a)).

On November 15, 1995, the PACA was amended to add a new subsection (e) to 7 U.S.C. § 499h, as follows:

(e) Alternative Civil Penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment the Secretary may now assess civil penalties in lieu of suspending or revoking a license. . . . The Initial Decision [and Order filed August 3, 1995, imposed] a 45-day suspension [of Respondent's PACA license].

. . . .

. . . [T]he amendment to the PACA was approved after Respondent's violation of 7 U.S.C. § 499h(b) had been established and after the ALJ had issued the Initial Decision and Order. However, both Complainant and Respondent agreed that the Judicial Officer has authority . . . to impose a civil penalty [against Respondent in this proceeding]. Complainant was cognizant of the Secretary's greater flexibility in imposing sanctions while the case was on appeal to the Judicial Officer. However, Complainant opposed the imposition of a civil penalty in the instant case on the grounds that a 45-day suspension of Respondent's license was appropriate as a result of Respondent's willful violation of section 8(b) of the PACA and because the Complainant had reason to believe that Respondent's financial condition was very insecure and that the imposition of any civil penalty would threaten Respondent's payment of its current produce obligations.

. . . .

On May 21, 1996, a prehearing conference call ensued at which time it was agreed that the [remand] hearing would be held on July 25, 1996, at the Department of Agriculture, Washington, D.C. . . . At the [remand] hearing, the

parties presented the testimony of two witnesses and documentary evidence was admitted with respect to the issues which were the subject of the Remand Order.

At the commencement of the [remand] hearing, Complainant changed from its previous position and [stated] that it then believed that a civil penalty was appropriate. (Tr. 19). Complainant [stated] that it has "no reason to believe at this point that respondent is failing to make full payment promptly, that any penalty would take away from the produce industry." (Tr. 107.)

. . . Complainant's witness, Jane E. Servais, Head of the Trade Practice Section, PACA Branch, . . . [testified] that Complainant had changed its position regarding whether a civil penalty should be issued in this case in lieu of the 45-day license suspension ordered by [the ALJ] and affirmed by the Judicial Officer. [(Tr. 23-25.)] Ms. Servais testified as an administrative official with responsibility for achieving the congressional purpose of the PACA with regard to a civil penalty. (Tr. 22). She testified that, based on the financial data provided by Respondent, Complainant had concluded that, while Respondent's financial circumstances remained precarious, Respondent was a financially viable company. (Tr. 23-25.) Therefore, Complainant concluded that an appropriate civil penalty could be issued in this case. Complainant now recommends a civil penalty of $12,400. This [civil penalty] is much less than the maximum possible civil penalty for Respondent's violation, as authorized by section 8(e) of the PACA, of $210,000, or $2,000 per day for the 105 days during which Respondent was found to have unlawfully employed a person under employment restriction in violation of the PACA.

Complainant's witness at the July 25, 1996, hearing, Ms. Servais, initially testified that Complainant's civil penalty recommendation was $15,400. (Tr. 22.) However, after reviewing new evidence provided to Complainant the day of the hearing, Ms. Servais testified that Complainant had reduced its recommended civil penalty to $12,400. (Tr. 101.) Ms. Servais further testified that, after considering the factors set forth in section 8(e) of the PACA, (7 U.S.C. § 499h(e)), and reviewing Respondent's financial records, including the most recent information provided by Respondent the same day as the hearing, Complainant would recommend a civil penalty, in lieu of a 45-day license suspension, in the amount of $12,400. (Tr. 30-37, 100-01.) In arriving at this determination, Ms. Servais considered Respondent's business to be small to medium small and that Respondent employed from six full-time employees and two part-time employees to 15 employees. (Tr. 37[-39, 52-]53, . . . [105-06]).

Respondent protested that a $12,400 penalty was too much and urged that a $5,000 civil penalty be considered adequate. [(Tr. 77-78, 123-24.)]

. . . .

Section 8(e) of the PACA, (7 U.S.C. § 499h(e)), provides that, [in assessing the amount of] a civil penalty . . ., due consideration must be given to the size of Respondent's business, the number of Respondent's employees, and the seriousness, nature, and amount of the violation. The Judicial Officer found that the record was sufficient with respect to the seriousness, nature, and amount of Respondent's violation, but that the record was not sufficient with respect to the size of Respondent's business and the number of Respondent's employees. The Judicial Officer directed that the ALJ should take evidence regarding these factors, as well as the sanction recommendations of at least one administrative official charged with the responsibility for achieving the congressional purpose of the PACA and any other evidence that the ALJ believed necessary to assist in the determination of whether or not the assessment of a civil penalty in lieu of a 45-day suspension of Respondent's license would be appropriate, and, if so, the amount of the civil penalty to be assessed. [*In re Ruma Fruit and Produce Co., supra*, 55 Agric. Dec. at 672-73.]

Complainant's evidence indicates that it duly considered the factors set forth in section 8(e) of the PACA.

The testimony and evidence at the hearing, as well as Complainant's brief, indicates the methodology and means whereby the requested sanction of $12,400 was arrived at, premised upon the most current financial data which was made available the day of the hearing. (Tr. 101.)

Mr. James Ruma testified as to the current financial status of Respondent. He indicated that a penalty in excess of $5,000 would take money away from creditors and would preclude timely payment of [Respondent's] current accounts. Other than his testimony, there is no persuasive evidence, even in the financial statements adduced by Respondent, to sustain this contention of Respondent and such assertion is not regarded as credible. The PACA requires that only responsible persons be associated with the industry and it is incumbent upon Respondent to act as such and to be in compliance with the PACA at all times. . . .

At the present time, the record as a whole justifies the imposition of a $12,400 civil penalty [as an alternative to] a 45-day suspension.

Premised upon the record herein, the following findings of fact are made.

Findings of Fact

1. Respondent's business may be described as "very small," (Tr. 56), "small" to "medium small," (Tr. 38, 59; CX 2).
2. The number of employees currently employed by Respondent is six full-

time employees and two part-time employees, (Tr. 67), which includes Mr. Ruma and members of his family. At one time Respondent employed 15 persons. In computing the amount of the civil penalty, the difference between 6 and 15 employees is immaterial.

3. Ms. Jane Servais, Head of the Trade Practice Section, Fruit and Vegetable Division, Agricultural Marketing Service, testified that the imposition of a civil penalty would achieve the purposes of the PACA and recommended a civil penalty of $12,400, arrived at by a methodology, computation, and formula which she described.

Conclusions

Taking into consideration the record herein and the testimony and documentary evidence adduced at the remand hearing, . . . a civil penalty should be imposed as an alternative to the 45-day suspension already issued. The recommendation of the agency officials charged with administering the PACA is adopted herein.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues on appeal.

First, Respondent contends that the amount of any civil penalty assessed should be based upon the net profit Respondent would lose if Respondent's PACA license were suspended for 45 days, Respondent's ability to pay the civil penalty, and Respondent's ability to continue to conduct business. (Respondent's Appeal Petition at 1-4.)

I disagree with Respondent. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)), does not require the Secretary to consider the net profit Respondent would lose if Respondent's PACA license were suspended, Respondent's ability to pay the civil penalty, or Respondent's ability to continue to conduct business, when determining the amount of the civil penalty, as Respondent asserts.

Respondent bases its contention, that Respondent's ability to pay the civil penalty and ability to continue to conduct business must by taken into account, on legislative history applicable to the Perishable Agricultural Commodities Act Amendments of 1995 and on statements made during a hearing on the PACA held on March 16, 1995, by the Subcommittee on Risk Management and Specialty Crops of the Committee on Agriculture, House of Representatives, as follows:

> The second problem with this formula is that it fails to implement

the intent of Congress and the administration regarding the assessment of fines because it has no relationship to whether Ruma can actually pay such a fine.

As explained in the Judicial Officer's remand order at pages 38 through 40, the administration made it clear during the hearings on Section 11 of the Perishable Agricultural Commodities Act amendments of 1995 (PACAA-1995), that the authority to a[ss]ess civil penalties was for the purpose of allowing a business to continue, rather than putting it out of business through a suspension. In the remand order, the Judicial Officer quoted each of the relevant passages from the legislative history, which included the House Report and the testimony of the administrator of the Agricultural Marketing Service. Each of those excerpts indicate that the purpose of the monetary penalty is to avoid forcing the violator out of business. It was not intended by Congress or the administration to assess a fine that a business cannot pay because such a fine results in the termination of the business. Yet, the agency official at the [remand] hearing said that the issue of whether a violator could afford to pay a fine amount was not a consideration in recommending the fine amount, and that the fine was supposed to be equivalent to a 45 day suspension (Tr. 119 - 120, 124 - 127). This methodology for assessing a fine has no basis in the statute or in reality. There must be some consideration given to whether a company can pay the amount of the fine that is assessed. Otherwise, the fine is nothing more than a disguised suspension which forces a business termination.

Respondent's Appeal Petition at 3.

I disagree with Respondent's analysis. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is

to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

> A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Neither House of Representatives Report No. 207, 104th Cong., 1st Sess. (1995), *supra*, p. 14, nor Mr. Hatamiya's statements, which are part of the record of the March 16, 1995, hearing, *supra*, pp. 14-15, indicate that the amount of a civil penalty assessed under 7 U.S.C § 499h(e) must be related to a violator's net profit, a violator's ability to pay the civil penalty, or a violator's ability to stay in business.

House of Representatives Report No. 207, 104th Cong., 1st Sess. (1995), specifically states that the factors that the Secretary must consider when determining the amount of a civil penalty to be assessed under 7 U.S.C. § 499h(e) are "the business size, number of employees, [and the] seriousness, nature and amount of the violation." The House Report does not indicate, as Respondent asserts, that the Secretary must, or even should, consider a violator's ability to pay a civil penalty, ability to stay in business after the assessment of a civil penalty, or the net profit a violator would lose if the violator's PACA license were suspended or revoked.

Mr. Hatamiya's statements, which are part of the record of the March 16,

1995, hearing on PACA, merely reflect the fact that, prior to the enactment of the Perishable Agricultural Commodities Act Amendments of 1995, the only sanctions that could have been imposed against a PACA licensee found to have violated section 8(b) of the PACA were license revocation or license suspension; *viz.*, sanctions that would of necessity result in the inability of the PACA licensee to continue in business. The assessment of a civil penalty against a PACA licensee for a violation of section 8(b) of the PACA does not guarantee that a PACA licensee will be able to stay in business after being assessed a civil penalty, but, unlike license revocation or license suspension, the assessment of a civil penalty does not guarantee that the PACA licensee will be forced out of business.

Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995, (7 U.S.C. § 499h(e)), which authorizes the Secretary to assess a civil penalty in cases of this nature, requires the Secretary to give due consideration to three factors when determining the amount of a civil penalty. These factors are: (1) the size of the business; (2) the number of employees; and (3) the seriousness, nature, and amount of the violation. The record establishes that agency officials charged with the responsibility for achieving the congressional purpose of the PACA considered each of these factors and based their recommendation that Respondent be assessed a civil penalty of $12,400 for its violation of section 8(b) of the PACA, (7 U.S.C. § 499h(b)), on these factors.

Ms. Jane E. Servais, the agency official charged with responsibility for achieving the congressional purpose of the PACA who testified at the remand hearing, stated that she found Respondent to be a small to medium small business and that Respondent employed from six full-time employees and two part-time employees to 15 employees. (Tr. 37-39, 52-53, 105-06.) The seriousness, nature, and amount of Respondent's violation of section 8(b) of the PACA are reflected by the 45-day suspension of Respondent's PACA license that I imposed in *In re Ruma Fruit and Produce Co., supra.* I find that Complainant's calculation of and use of Respondent's average daily gross profit to arrive at the approximate amount Respondent would lose if its PACA license were suspended for 45 days, as described in the record, (Tr. 30-37), is reasonable and that this amount reflects the seriousness, nature, and amount of Respondent's violation.

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory

statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Initial Decision and Order Pursuant to Remand reveals that the ALJ gave appropriate weight to the recommendation of the administrative official charged with the responsibility for achieving the congressional purpose of the PACA and considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by 7 U.S.C. § 499h(e), when she assessed Respondent a civil penalty of $12,400.

Second, Respondent contends that:

> The ALJ seemed to recognize that there might be a problem with the payment of the $12,400.00 in a lump sum because she left open the possibility of an agreement for a monthly payment plan with the agency's consent. However, the agency refuses to consent to any payment plan.*
>
> ---
>
> *Filed herewith is a Request for Mediation which respondent suggests may be an appropriate method of attempting to resolve this matter.

Respondent's Appeal Petition at 4.

Further, Respondent filed a request for mediation, which states that:

> Respondent requests that the case be referred to the Alternative Dispute Resolution unit in the Department to attempt to reach a resolution of the matter through mediation.

Request for Mediation filed December 23, 1996.

While the Department does have a Dispute Resolution Specialist designated pursuant to the Administrative Dispute Resolution Act, as amended, (5 U.S.C. §§ 571-584), the Department does not have an "Alternative Dispute Resolution unit." The ALJ's Initial Decision and Order Pursuant to Remand assessing a $12,400 civil penalty against Respondent as an alternative to a 45-day suspension of Respondent's PACA license was served on Complainant on November 20, 1996, and served on Respondent on November 21, 1996. Complainant and Respondent have had ample time to agree upon a payment plan. Further, based on Respondent's Appeal Petition in which Respondent asserts that "the agency refuses

to consent to any payment plan," it appears that Respondent and Complainant have discussed a payment plan and that Complainant has rejected a payment plan as a basis for settlement of this proceeding. Moreover, nothing in this Decision and Order precludes Respondent and Complainant from engaging in dispute resolution and filing a joint motion to modify the Order issued in this Decision and Order.[3] Therefore, Respondent's request that I order the parties to mediate an agreement to a payment plan is denied.

For the foregoing reasons and the reasons in *In re Ruma Fruit and Produce Co., supra*, the following Order should be issued.

Order

Respondent is assessed a civil penalty of $12,400 which shall be paid by a certified check or money order made payable to the Treasurer of the United States, and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095-South Building, 1400 Independence Avenue, SW., Washington, DC 20250, within 60 days after the date of service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-94-565. In the event that the PACA Branch does not receive a certified check or money order in accordance with this order, a 45-day suspension of Respondent's PACA license shall take effect beginning 61 days after the date of service of this Order on Respondent.

In re: RUMA FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-94-0565.
Stay Order filed May 6, 1997.

Andrew Y. Stanton, for Complainant.
Stephen P. McCarron, Washington, D.C., for Respondent.
Order issued by William G. Jenson, Judicial Officer.

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[3] *In re Jacobson Produce, Inc.*, 55 Agric. Dec. 709 (1996) (the Judicial Officer modified an order issued April 22, 1994, in accordance with a Joint Motion to Modify Order filed by the parties on April 12, 1996); *In re Leonard McDaniel*, 46 Agric. Dec. 125 (1987) (on February 25, 1987, the Judicial Officer modified an order issued December 8, 1986, in accordance with the agreement of the parties).

On February 6, 1997, I issued a Decision and Order on Remand in which I assessed Ruma Fruit and Produce Co., Inc. (hereinafter Respondent), a civil penalty of $12,400 to be paid within 60 days after the date of service of the Decision and Order on Remand on Respondent. The Decision and Order on Remand further provides that in the event that the PACA Branch does not receive a certified check or money order for the assessed civil penalty in accordance with the Order in the Decision and Order on Remand, a 45-day suspension of Respondent's license issued under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA), shall take effect beginning 61 days after the date of service of the Order on Respondent. *In re Ruma Fruit and Produce Co.*, 56 Agric. Dec. ___ slip op. at 19-20 (Feb. 6, 1997). On April 21, 1997, Respondent filed a Petition for Review of the Decision and Order on Remand with the United States Court of Appeals for the District of Columbia Circuit and a Request for Stay of the Judicial Officer's Decision and Order on Remand with the Judicial Officer.

On May 5, 1997, Complainant filed Complainant's Response to Request for Stay stating that "Complainant has no objection to the issuance of an order staying this proceeding until resolution of the matter on appeal, with the understanding that the civil penalty has not been paid and that no part of the 45 day license suspension has been served." On May 5, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Request for Stay.

Respondent's Request for Stay is granted.

The Order issued in this proceeding on February 6, 1997, which would have required Respondent to pay a civil penalty of $12,400 or incur a 45-day suspension of Respondent's PACA license, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Decision and Order filed March 21, 1997.

License revocation — Willful, flagrant, and repeated violations — Failure to make full payment promptly — Collateral effects of revocation — Roll over debt.

The Judicial Officer affirmed Judge Bernstein's (ALJ) Decision and Order revoking Respondent Kanowitz's license because Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA

(7 U.S.C. § 499b(4)) by failing to make prompt payment for produce. Complainant proved Respondent's violations of the PACA and past-due debt by a preponderance of the evidence. Respondents may not convert a "no pay" case into a "slow pay" case by paying all outstanding debts alleged in the Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Partial payment of outstanding debt does not satisfy full payment requirement, even if creditor agrees to discharge debt. Only 100% compliance at time of hearing triggers lowered sanction. Evidence of Respondent's outstanding debts is routinely admitted at time of failure-to-pay-promptly hearing to determine current compliance; but sanction is for the violations alleged in the Complaint and not for the roll over debt. Paying creditors named in the Complaint, while not paying other creditors within statutory requirements, is called "robbing Peter to pay Paul," and does not support a lowered sanction. PACA has no requirement that there be uniform sanctions among violators. ALJ's revocation sanction based upon this record was not arbitrary and capricious (5 U.S.C. § 706(A)(2)). The sanction policy set forth in *In re S.S. Linn County, Inc.*, does not change the policy set forth in *In re The Caito Produce Co.* Excuses for failure to pay and collateral effects of revocation are not relevant circumstances under the Department's sanction policy for sanctions imposed for flagrant or repeated failures to make full payment promptly under the PACA.

Jane McCavitt, for Complainant.
Sherylee F. Bauer, New York, NY, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice), by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of $206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq. of New York, New York, represented Respondent. The ALJ issued a bench decision on May 27, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's PACA license (Tr. 208). On May 29, 1996, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).

[1]On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, the case was referred to the Judicial Officer for decision.

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

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

PERTINENT STATUTORY PROVISION AND REGULATION

Section 2(4) of the PACA provides:

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in

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

interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

7 U.S.C. § 499b(4).

Section 8(a) of the PACA provides:

§ 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).

Section 46.2(aa)(5), (11) of the Regulations 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.

7 C.F.R. § 46.2(aa)(5), (11) (1993).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Findings of Fact

1. Respondent, Kanowitz Fruit and Produce Co., Inc., is a corporation organized and existing under the laws of the State of New York. Its business mailing address is [redacted] New York [redacted]

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License Number [redacted] was issued to Respondent on September 8, 197[5]. This license has been renewed annually. . . .

3. Before 1993, Respondent was in good financial condition and appeared to have paid its creditors on a timely basis. . . .

4. In 1993, Respondent discovered that employees had stolen inventory from Respondent. The amount stolen has been estimated by Respondent as being between $300,000 and $400,000. The police were notified, but informed Respondent that there was insufficient evidence to enable them to prosecute the alleged perpetrators.

5. During the period... March 1993 [through] December 1993, Respondent failed to make full payment promptly to 18 sellers [of] the agreed purchase prices of 62 lots of perishable agricultural commodities, in the total amount of $206,850.69, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Payments for these transactions were [made] from 2 weeks to 117 weeks late[, and not all sellers received the full amount originally owed to them.]

6. In an effort to correct its financial problems, Respondent undertook a number of steps. It borrowed approximately $50,000 from its bookkeeper and office manager, Frances Falcone; it sold a warehouse; it sold one of three units in the Brooklyn Terminal Market; it opened its business 7 days a week; and . . . Mr. Steven Kanowitz, [Respondent's president], obtained a small business loan using his home and a life insurance policy as collateral. Mr. Steven Kanowitz has made a bona fide commitment to turning the business around.

7. Nevertheless, during January 1996, [a United States Department of Agriculture (hereinafter USDA)] investigator visited Respondent's business establishment and inspected Respondent's books and records, and this investigation revealed that during the period . . . January 1994 through January 1996, Respondent failed to make full payment promptly to 30 sellers [of] the agreed purchase prices of 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. . . . [Respondents made payments for these transactions as of the time of the hearing. However, one produce seller, Finest Fruits, Inc., received less than full payment].

8. During the period April 15 through 19, 1996, [USDA's] investigator again visited Respondent's place of business and again inspected Respondent's books and records. This compliance review revealed that during the period . . . February 1996 [through] April 1996, Respondent failed to make full payment promptly to sellers [of] the agreed purchase prices of 100 lots of perishable agricultural commodities in the total amount of $277,437.87, which Respondent had purchased, received, and accepted in interstate [or] foreign commerce. Respondent has paid a large amount of this debt, but nevertheless, approximately $125,000 of this debt still remains unpaid.

9. Respondent has frequently issued checks to its sellers in interstate commerce which have been returned by its bank because Respondent had insufficient funds on deposit to cover these checks. Respondent's office manager, Ms. Falcone, estimated that these insufficient fund[s] checks averaged about six to seven each month.

10. In addition to the sums still owed [for produce purchased in interstate or

foreign commerce], . . . which are in the amount . . . of [approximately] $125,000, Respondent also owes money to sellers in intrastate commerce and to the Internal Revenue Service.

11. With respect to all amounts alleged to have been unpaid to sellers in interstate [or foreign] commerce in the Complaint and Amended Complaint, . . . Respondent failed to make [full] payment promptly as that term is defined in section 46.2(aa) of the Regulations [(7 C.F.R. § 46.2(aa) (1993))].

12. There were no written agreements by Respondent with any of the sellers [identified in the Complaint and the Amended Complaint] to provide for different terms of payment in accordance with the requirement in section 46.2(aa)(11) of the Regulations [(7 C.F.R. § 46.2(aa)(11) (1993))]. In fact, Respondent has never entered into any such agreement to extend payment terms.

Conclusion of Law

In failing to make [full] payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted [in interstate or foreign commerce during the period March] 1993 [through] April 1996, Respondent has committed willful, flagrant, and repeated violations of section 2[(4)] of the PACA (7 U.S.C. § 499b[(4)]).

Discussion

This is a disciplinary proceeding pursuant to section 8 of the PACA (7 U.S.C. § 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. 2163 (1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. [1] (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856[, 857-58] (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584[, 587] (6th Cir. 1971). Enforcement is effectuated through a system of licensing with penalties for violation. H.R. Rep. No. 1041, 71st Cong., 2d Sess. [3] (1930). *See also* [*George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988[, 990] (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, *inter alia*, for any commission merchant, dealer, or broker to fail to make full payment

promptly of its obligations with regard to transactions involving perishable agricultural commodities made in interstate [or foreign] commerce. Full payment promptly is defined by the Department in 7 C.F.R. § 46.2(aa)(5) [(1993)] as requiring payment of the agreed purchase prices for produce within 10 days after the day on which produce is accepted.

Complainant alleges that Respondent violated the PACA and the Regulations by failing to make full and prompt payment of the agreed purchase prices with respect to the transactions alleged in the Amended Complaint.

Respondent denie[s] violating the PACA. The $206,850.69 indebtedness of Respondent, which [is] the subject of [paragraph III of the Amended] Complaint, was finally paid . . . by November 20, 1995[, but not all sellers received the full amount originally owed to them]. Payments were made from 2 weeks to 117 weeks late.

[T]he $195,495.10 indebtedness of Respondent, which is the subject of [paragraph IV] of the Amended Complaint, was finally paid by May 7, 1996[, except that one produce seller received less than the original amount owed]. However, Respondent currently has outstanding and past-due indebtedness of approximately $125,000 for perishable agricultural commodities that it purchased in interstate [or foreign] commerce.

Respondent's failure to make timely payment, as alleged in the Complaint and Amended Complaint, violates the prohibitions of section 2 of the PACA (7 U.S.C. § 499b). *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd [per curiam]*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

Moreover, Respondent's failure to pay promptly . . . and in full for a total of 170 transactions occurring over a period of 34 months and totalling over $400,000 constitutes repeated and flagrant violations of section 2 of the PACA. . . . The 170 violations are repeated because repeated means more than one and 170 [violations are] certainly more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. . . .[2]

[[2]*See Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *United Fruit & Vegetable Co. v. Director of the Fruit and Vegetable Div.*, 668 F.2d 983 (8th Cir.) (holding 127 violations involving over $750,000 over 11 months constitute repeated and flagrant violations of the PACA), *cert. denied*, 456 U.S. 1007 (1982); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972) (finding 26 violations involving $19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and

Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards [statutory requirements]. *Cox v. United States Dep't of Agric.*, [925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991)]; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *In re Henry S. Shatkin*, 34 Agric. Dec. 296[, 297-98] (1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-69 [(1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974)].

Respondent knew, or should have know[n], that it could not have made prompt payments for the large amount of perishable [agricultural commodities] it ordered, yet Respondent continued to make purchases. Respondent was aware of the [PACA's] requirement[s], yet continued to buy knowing that each purchase would result in another violation.

Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not, pay suppliers. It deliberately shifted the risk of nonpayment to its suppliers. The suppliers were required to involuntarily, in some cases unknowingly, extend credit to Respondent.

Thus, in this case in which two [USDA] compliance investigations indicated that Respondent had incurred additional "roll over" debt in order to meet its obligations on the transactions that were the subject of the original [Complaint] and of the Amended Complaint, . . . Respondent has intentionally violated the [PACA] and operated in careless disregard of the payment requirements of the PACA, and Respondent's violations were therefore willful. *In re Atlantic Produce Co., supra*, 35 Agric. Dec. [at 1641-42]; . . . *In re Hogan Distributing, Inc.*, 55 Agric. Dec. [622, 628-30 (1996)].

The appropriate sanction for Respondent's violations is revocation of Respondent's PACA license. Even though Respondent has attempted to correct its financial problems, these problems have continued since 1993. As indicated, a large brunt of Respondent's problems has been passed on to its [produce] suppliers. This [practice of shifting risk of nonpayment to produce suppliers] is exactly the type of practice that the [PACA] is designed to prevent and correct.

Where a Respondent is not in compliance at the time of a hearing, the appropriate sanction is revocation of Respondent's [PACA] license. [In re The Caito Produce Co., 48 Agric. Dec. 602, 633-36 (1989);] *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118[, 149-50] (1984). . . .

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involved more than $250,000), *cert. denied*, 389 U.S. 835 (1967).]

In this case, Respondent failed to make full payment promptly for [170] lots of perishable agricultural commodities over a period of many years for a total of approximately $400,000. Furthermore, since the filing of the Amended Complaint, Respondent has incurred new indebtedness and currently owes approximately $125,000 on the new debt.

Where a respondent is not currently in compliance, but has in fact "rolled over" its debts, revocation is the appropriate sanction. *In re S W F Produce, Co.*, 54 Agric. Dec. [693, 700] (1995); *In re The Caito Produce Co.*, [*supra*], 48 Agric. Dec. [at 633]; *In re Gilardi Truck & Transp., Inc., supra*, 43 Agric. Dec. at 149-50.

The Judicial Officer has recently stated that there is no basis for considering facts in mitigation of the sanction where a respondent has failed to pay for produce. *See In re Atlantic Produce Co.*, 54 Agric. Dec. [701, 712-15[3] (1995)].

Taking all these factors into consideration, the sanction sought by Complainant, which is revocation of Respondent's [PACA] license, [is appropriate]. *In re J.H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705 (1978); *In re George Steinberg & Son, Inc., supra.*

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.[4] The burden of proof does not, however, require Complainant to disprove each of Respondent's assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the

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[3]See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

[4]*NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976), *cert. denied sub nom. Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

Administrative Procedure Act is the preponderance of the evidence standard,[5] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.[6] Complainant has proved it case by much more than a preponderance of the evidence, which is all that is required.

I completely agree with the ALJ's Initial Decision and Order, except to the extent that the ALJ apparently agrees with Respondent that Respondent has made full payment of the amounts alleged to be due in the Complaint and the Amended Complaint, prior to the commencement of the May 7, 1996, hearing.

To the contrary, Respondent attached documents to its Answer which establish that Respondent settled with produce sellers for less than the total amounts due. For example, Respondent paid $5,849.75 to Godwin Produce Co. to settle a debt of $16,173.10; $35,648.05 to Michael Santelli & Sons, Inc., to discharge and extinguish a debt of $50,514.45; and $3,655 to Southern Produce Distributors, Inc., on a debt of $6,676. Further, my examination of Respondent's payments to the produce sellers identified in paragraph IV of the Amended Complaint reveals that all were eventually paid in full, except for Finest Fruits, Inc., Transaction No. 74, which produce seller apparently received $2,451 on a debt of $3,284 (Amended Complaint ¶ IV; RX 39; Tr. 147-48). Nevertheless,

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[5] *Herman & MacLean v. Huddleston,* 459 U.S. 375, 387-92 (1983); *Steadman v. SEC,* 450 U.S. 91, at 92-104 (1981).

[6] *In re Havana Potatoes of New York Corp.,* 56 Agric. Dec. ___, slip op. at 6 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.,* 55 Agric. Dec. ___, slip op. at 20 n.2 (Nov. 15, 1996); *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1269 (1995), *aff'd,* 104 F.3d 139 (8th Cir. 1997); *In re John J. Conforti,* 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part,* 74 F.3d 838 (8th Cir. 1996), *cert. denied,* 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.,* 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn,* No. 94–4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.,* 53 Agric. Dec. 761, 792 (1994), *appeal dismissed,* No. 94–70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.,* 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.,* 51 Agric. Dec. 747, 757 (1992), *aff'd,* 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.,* 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam,* 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied,* 506 U.S. 826 (1992); *In re Sid Goodman & Co.,* 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam,* 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied,* 503 U.S. 970 (1992); *In re Valencia Trading Co.,* 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed,* No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Brothers Produce Co.,* 47 Agric. Dec. 1462, 1468 (1988), *aff'd,* 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.,* 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.,* 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam,* 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Respondent argues that such "full payment" entitles Respondent to a "slow pay" rather than a "no pay" sanction; to wit, a suspension of Respondent's PACA license in lieu of a revocation. However, the law and the Department's policy are clear that partial payments do not equal "full payment" in accordance with the PACA and do not negate a violation of the PACA.[7]

The record establishes that, at the start of the hearing, Respondent had not paid all its produce sellers in full; that the policy of converting "no pay" into "slow pay," therefore, is not available to Respondent on this record; and that revocation of Respondent's PACA license is appropriate under the circumstances in this case.

Respondent raises five issues in Respondent's Appeal Petition (hereinafter RAP). First, Respondent argues that the ALJ erred by allowing introduction at the hearing of evidence of Respondent's outstanding indebtedness. Respondent asserts that it is denied due process when such "new claims" are the basis for the ALJ's

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[7] *In re The Caito Produce Co., supra*, 48 Agric. Dec. at 625-28 (where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the PACA); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989) (Respondent contends that it no longer owes any money to the 22 produce sellers who agreed to take 60 cents on the dollar as a result of Respondent's bankruptcy; it has been repeatedly held that when a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 (1985) (although there may have been an occasional dispute as to the quality of produce, so that acceptance of partial payment in full satisfaction would be regarded as an accord and satisfaction, constituting full payment, there is no evidence in that respect with respect to most of the produce sellers; where a seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute full payment and does not negate a violation of the PACA), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685 (1980) (even where a produce seller agrees to accept partial payment of the purchase price in full satisfaction of a debt, e.g., because of the debtor's bankruptcy, that does not constitute "full payment" and does not negate a violation of the PACA), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414 (1980) (Respondent has failed to make full payments of the agreed purchase prices for produce it accepted and received; the debts were fully discharged under subsequent agreements between Respondent and the produce sellers providing for partial payments; it has been held that although acceptance of a partial payment of the purchase price by a seller under such an agreement fully satisfies and extinguishes the debt, it does not constitute full payment under the PACA); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1633 (a plan of arrangement under which creditors accept less than "full payment" in full satisfaction of their claims does not negate a violation of the PACA); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884 (1975) (even though 35 of 49 produce sellers listed in the Complaint voluntarily released their claims in consideration of a settlement agreement of 30 cents on the dollar, such voluntary agreement does not constitute full payment promptly under the payment provision of the PACA); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975) (although partial payment may fully satisfy and extinguish the debt, it is, nonetheless, partial payment; partial payment is not full payment under the PACA).

draconian sanction of revocation; and that the ALJ should have required Complainant to amend the Complaint, thereby giving Respondent the required procedural due process.

This argument is rejected, because the ALJ properly allowed and considered outstanding indebtedness. A respondent demanding that Complainant amend the Complaint before being allowed to show a respondent's current indebtedness at the hearing is a routine occurrence in these types of cases. On the surface, the argument seems logical, but it misses the whole point of the prompt payment provisions, which call for payment, not promises. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment provisions of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk. In a recent case, an ALJ took the position advanced in this proceeding by Respondent, and the Judicial Officer took the opportunity to set forth the Department's policy on this issue:

> The ALJ's views set forth above are based on a failure to apply the Department's policy stated, *inter alia*, in *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989). In *Caito*, it is explained that a revocation order is warranted where a Respondent fails to pay promptly, over an extended period of time, for produce transactions involving a substantial amount of money. It is further explained, however, that if the Respondent demonstrates by the time of the hearing, or if no hearing is held, by the time Respondent files its Answer, (i) that it has made full payment of the transactions alleged in the Complaint, and (ii) such payment was not made by "robbing Peter to pay Paul," the sanction will be mitigated. *Caito* further states that, not only must Respondent be in present compliance with the payment provisions at the time of the hearing, or at the time the Answer is filed if there is no hearing, but, also, Respondent cannot even have agreements with creditors for payment to be made beyond 30 days. Finally, *Caito* makes it clear that if Complainant demonstrates that Respondent is merely "rolling over" its debt, by "robbing Peter to pay Paul," the sanction to be issued is for the violations alleged in the Complaint--not for the more current transactions in which Complainant shows that Respondent is merely "rolling over" its debt. Since the sanction is being imposed only for the transactions alleged in the Complaint, there is no need for Complainant to amend the Complaint in order to refute Respondent's allegation that the sanction for

> the Complaint-transactions should be mitigated because of later compliance.

In re S W F Produce Co., *supra*, 54 Agric. Dec. at 700.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately $125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194). If the produce sellers listed in CX 24A, who did not get paid in full, are designated "Peter," and the produce sellers who got paid are designated "Paul," then the conclusion is ineluctable that Respondent "robbed Peter to pay Paul."

In order to avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent paid some produce sellers, but not others.

Second, Respondent contends that the debt owing at the time of the hearing is "new claims" and not "roll over debt." I find that the outstanding indebtedness at the time of the hearing, whether it is called "new claims" or "roll over debt," means that Respondent is not in 100% compliance with the payment provisions of the PACA at the time of the hearing, and license revocation, rather than license suspension, is the appropriate sanction. Thus, the ALJ did not err in finding the outstanding indebtedness at the time of the hearing to be "roll over debt."

Respondent argues that an infusion of "new capital" from a company retrenchment, an unsecured $50,000 loan, a secured small business loan, a factoring agreement, and a sale of assets means that produce sellers were paid with, I infer, money that would not normally have been available to pay produce sellers. Therefore, unlike Respondents in *Caito*, *Gilardi*, and *S W F*, Respondent urges that it did not "rob Peter to pay Paul." This argument is rejected, and I find Respondent did "rob Peter to pay Paul." It is not relevant where the money to pay the produce sellers originates. The only relevant factor is whether Respondent paid produce sellers in full by the date of the hearing. As it is, Respondent lacked the resources, from wherever derived, to pay all Respondent's produce sellers in full, which is the only relevant issue.

I agree with Complainant's description of the nature of Respondent's continuing roll over debt, as follows:

> Respondent's debt was not paid at the time of the hearing. The debt from the complaint and the amended complaint, which was incurred during the period March 1993 through January 1996, had been, at least

> in part, rolled over and continued from February 1996 until April 1996. Therefore, Kanowitz has had continuous rollover debt from the time listed in the original complaint, March 1993, until May 7, 1996, the date of the hearing. The Administrative Law Judge found that this continuous indebtedness constitutes rollover of the debt alleged in the complaint and the amended complaint. Therefore, there is a continuous failure to pay.

Complainant's Response to Respondent's Appeal at 9.

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, but Respondent continued to operate. By continuing to operate without sufficient capitalization, Respondent deliberately shifted the risk of nonpayment to its produce suppliers, which is a willful violation of 7 U.S.C. § 499b(4).[8]

Third, Respondent, relying on *In re Atlantic Produce Co.*, 54 Agric. Dec. 701 (1995), contends that while mitigation may not be considered for determination of willfulness or flagrancy, the ALJ may consider mitigating circumstances when considering the sanction to be imposed (RAP at 8). Respondent's argument is completely without merit. *Atlantic Produce* makes clear that mitigating circumstances are not to be considered, either in determining willfulness or in determining sanctions, if Respondent has failed to pay promptly for produce, as follows:

> Although *Caito* mentions briefly the Department's severe sanction policy, which has not been followed since *S.S. Farms Linn County*, *supra*, the overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, *excuses why payment was not made in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money, usually over an extended period of time.* That doctrine is not altered by the new sanction policy set forth in

[8] *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___, slip op. at 21-22 (Jan. 23, 1997); *In re Hogan Distributing, Inc., supra*, 55 Agric. Dec. at 630-31; *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 622; *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1641.

S.S. Farms Linn County.[9]

In re Atlantic Produce Co., *supra*, 54 Agric. Dec. at 715 (emphasis added).

Fourth, Respondent argues that Complainant's recommendation of, and the ALJ's imposition of, the sanction of revocation, are arbitrary and capricious.

Respondent's underlying argument is that Complainant has arbitrarily and capriciously recommended revocation for Respondent, when there are many other PACA licensees who are not in compliance, and who are not receiving like sanctions. Respondent argues that Complainant's revocation sanction "bears no relationship to the purposes of the PACA (i.e., to ensure prompt payment of perishable vendors and reasonable regulation of dealers who attempt to comply with the Act)." (RAP at 10.)

This argument is rejected. The PACA has no requirement that there be uniformity in sanctions among violators. Moreover, Respondent gives no authority for the proposition that the revocation sanction herein is contrary to the purposes of the PACA.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (hereinafter Packers and Stockyards Act), it is explained that uniformity is not required:

> Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . ., because there is no "uniformity" in the sanction with other cases, which impose less severe sanctions, and thus the primary purpose--deterrence for respondents and others similarly situated--is not achieved. Respondents are incorrect.
>
> There is no requirement that there be uniform sanctions in like cases.

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990).

Almost the exact situation raised by Respondent in the proceeding, *sub judice*,

[9] The underlined portion of the quotation from *Atlantic Produce* was inadvertently omitted from Agriculture Decisions. See *Erratum*, inside front cover of Part Three (PACA), 55 Agric. Dec. January-June (1996).

was addressed in another decision under the Packers and Stockyards Act which specifically stated that Complainant is free to recommend and the ALJ is free to fashion the remedial sanction:

> The cases cited by respondent for a reduction in the suspension period are not persuasive. Even if the facts were exactly the same, there is no requirement that there be uniform sanctions in like cases. The P&S [Packers and Stockyards Administration] and the ALJ are free to recommend and to fashion, respectively, the remedial sanction to fit the situation at hand, because "uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others." (Citation omitted.)

In re Floyd Stanley White, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).[10]

Respondent also contends that the ALJ does not have sufficient record evidence of Respondent's wrongdoing to support revocation.

The ALJ's choice of revocation as the sanction can be found arbitrary and capricious, if the ALJ exhibited no rational basis for the treatment of the evidence, if the ALJ failed to consider the relevant factors, or if the ALJ demonstrated clear errors of judgment. The standard of review relevant to this inquiry is set forth in *Lansing Dairy* as follows:

> The "narrow" scope of review under the arbitrary and capricious standard . . . (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:
>
> > Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)

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[10] *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric., supra*, 925 F.2d at 1107; *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. CFTC*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978 (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec ___, slip op. at 112 (Jan. 13, 1997).

> (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

In re Lansing Dairy, Inc., 50 Agric. Dec. 1453, 1505-06 (1991), *rev'd sub nom. Farmers Union Milk Marketing Cooperative*, Nos. 1:89–CV–281, 5:91–CV–104, 1992 WL 71372 (W.D. Mich. Mar. 30, 1992), *reprinted in* 51 Agric. Dec. 24, 37 (1992), *rev'd*, 39 F.3d 1339 (6th Cir. 1994), *cert. denied*, 116 S.Ct. 50 (1995).

As discussed, *supra*, I have determined that the ALJ properly evaluated the evidence in a rational manner, made no clear errors in judgment, and considered all relevant factors. Respondent's argument that the ALJ's revocation sanction was arbitrary and capricious is rejected.

Fifth, Respondent contends that the sanction imposed on Respondent is unduly harsh, in light of mitigating circumstances and the fact that the USDA supported recent Congressional enactment of civil penalties in lieu of revocation or suspension. I disagree.

This case is governed by the sanction policy adopted by the Secretary in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36–3), which in pertinent part, provides:

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

However, the sanction policy in *In re S.S. Farms Linn County, Inc.*, *supra*, does not alter the doctrine in *In re The Caito Produce Co.*, *supra.*[11] The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the congressional purpose that only financially responsible persons should be engaged in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) over a period from March 1993 to January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices of 170 lots of perishable agricultural commodities in the total amount of $402,345.79. Moreover, Respondent had approximately $125,000 in outstanding indebtedness at the time of the May 7, 1996, hearing. Respondent's excuse for its failure to pay (embezzlement by two of Respondent's employees) is not sufficient to prevent the revocation of its license for violations of the PACA. Further, this sanction is in accord with the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA.

Mr. Bruce W. Summers, Senior Marketing Specialist, Trade Practices Section of the PACA Branch, a Division of the Agricultural Marketing Service, testified as to the appropriateness of the sanction as follows:

BY MS. McCAVITT:

Q. Mr. Summers, do you represent Complainant at this proceeding?

[BY MR. SUMMERS:]

A. Yes, I do.

Q. And, are you familiar with the type of violations alleged in the complaint and the amended complaint?

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[11] *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 49 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 26 (Sept. 12, 1996); *In re Hogan Distributing, Inc., supra*, 55 Agric. Dec. at 633; *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1442-43 (1995); *In re Midland Banana & Tomato Co., supra*, 54 Agric. Dec. at 1329.

A. Yes, I am.

Q. Are you aware of whether Complainant has a recommendation it wishes to make to the Administrative Law Judge on the sanction he would issue if he finds that the Respondent violated the Act as alleged in the complaint and the amended complaint?

A. Yes.

Q. Would you tell Judge Bernstein what that recommendation is?

A. The Complainant would recommend that the Administrative Law Judge revoke the license of Kanowitz Fruit and Produce as a result of its violations of Section 2[(4)] of the PACA.

Q. And, can you tell Judge Bernstein what factors were considered by Complainant in making the recommendation?

A. Yes, there are several factors that we considered in making this recommendation. The numbers of violations, I believe that the documentation that has been introduced through Mr. Neilson as a result of his investigations shows that the Respondent has committed violations in well over 150 transactions, violations involving failure to make full payments promptly.

In addition, I believe the documentation shows that these transactions involved dollar amounts which you've seen $300,000. We also considered as a aggravating factor, the number of non-sufficient fund[s] checks which have been issued by the Respondent which we believe have a very disruptive [e]ffect to the trade in trying to conduct their business.

Furthermore, a factor we considered is that they, as of yesterday at 5:00 when Mr. Neilson quit his phone calls, still had not brought their payment practices into compliance. At that time, I believe Mr. Neilson's phone calls showed that the firm still had past due and unpaid transactions exceeding $50,000.

Finally, I would consider the serious effect that these types of violations, violations involving failure to make full payment properly on the produce industry.

Q. Why is the industry unique that this could be a serious offense?

A. Well, the produce industry is unique because of the produce itself. It's highly perishable, it has to move great distances in a short period of time before it starts to decay. If you wait too long, you can't sell it at all, so just by the very nature, that makes the industry unique.

Because of this characteristic, produce transactions occur generally over the phone between people which may or may not have ever met each other, produce is expensive, so the transactions involve very high dollar amounts and the -- in order to accomplish these transactions there had to be a great deal of trust between parties to ship this produce over great distance to people that you have never met; buyers trusting their shippers to ship the quality and quantity they need to meet their customers demands; conversely, suppliers are trusting that the receivers will accept it and pay for it in accordance with the contract terms that were discussed at the time of the negotiations.

So, this all works to make the produce industry unique. We believe it's the Secretary of Agriculture's role in this industry to insure that there's a level playing field for all members of the industry to conduct business on and we believe this is done through enforcement -- even-handed enforcement of the Perishable [Agricultural] Commodities Act.

Q. If Judge Bernstein takes the recommendation that you've suggested, do you think there would be any other [e]ffect on the industry?

A. Well, certainly if a revocation is issued by the Administrative Law Judge, the obvious [e]ffect is it puts Kanowitz Fruit and Produce Corporation out of the industry by revocation of their license, they'd no longer be legally allowed to operate, so that's one obvious [e]ffect of the revocation so there's a deterrent here, obviously to that corporation, but also there's a deterrent, we believe -- a message of

> deterren[ce] in a sense to the produce industry as a whole that the Secretary of Agriculture considers these types of violations to be very serious and that they'll be prosecuted wherever and whenever they occur.

Tr. 100-03.

Respondent argues that USDA's support of the recent civil penalties legislation (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995))), means that revocation in this case is inappropriate. I disagree. While USDA did support amendments to the PACA which allow the imposition of civil penalties, it did not support the elimination of the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

> (e) **Alternative Civil Penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

> *Section 11—Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or

revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing

penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

> A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of $402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. This admittedly harsh sanction is designed not only to deter purchasers of perishable agricultural commodities from failing to make full

payment promptly, but also is necessary to fulfill the congressional intent that only financially responsible persons should be engaged in the perishable agricultural commodities industry.[12] Allowing Respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension, when Respondent had failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect produce sellers and would not serve as a sufficient deterrent to others.

Finally, Respondent argues that his 25 employees will suffer harm from any sanction other than a civil penalty. However, "this Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). Collateral effects of a Respondent's PACA license revocation are relevant neither to a determination whether Respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.[13]

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[12]*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin, supra*, 443 F.2d at 588-89; *Zwick v. Freeman, supra*, 373 F.2d at 117; *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 50-51 (Nov. 15, 1996); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 16-17 (Sept. 12, 1996); *In re Boss Fruit & Vegetable, Inc., supra*, 53 Agric. Dec. at 785; *In re Full Sail Produce, Inc., supra*, 52 Agric. Dec. at 621; *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co., supra*, 41 Agric. Dec. at 2425; *In re Finer Foods Sales Co., supra*, 41 Agric. Dec. at 1168; *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re Connecticut Celery Co., supra*, 40 Agric. Dec. at 1133; *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

[13]*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___, slip op. at 60-61 (Nov. 15, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 28-30 (Sept. 12, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co., supra*, 55 Agric. Dec. at 639 (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed willful, flagrant, and

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

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent.

In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Order Denying Petition for Reconsideration filed June 5, 1997.

License revocation — Civil penalties — Willful, flagrant, and repeated violations — Failure to make full payment promptly — Collateral effects of revocation — Roll-over debt — Slow-pay — No-pay — Uniformity of sanction — Sanction evidence.

The Judicial Officer denied Respondent's Petition to Reconsider. Respondent may not convert a "no-pay" case into a "slow-pay" case by paying all outstanding debts alleged in the Complaint and Amended Complaint, if Respondent is not in full compliance with the PACA payment provisions at the time of the hearing. Evidence of the "commercial reasonableness" of agreements between Respondent and its produce creditors, Respondent's financing arrangements, and the payment practices of persons in the perishable

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repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co., supra*, 44 Agric. Dec. at 1249 (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co., supra*, 35 Agric. Dec. at 1644 (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co., supra*, 34 Agric. Dec. at 1887 (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

agricultural industry are not relevant to the existence of Respondent's roll-over debt. Respondent's good faith efforts to pay produce creditors and the collateral effects of license revocation are relevant neither to a determination whether Respondent violated the PACA nor to the sanction to be imposed for flagrantly or repeatedly violating the payment provisions of the PACA. The PACA has no requirement that there be uniform sanctions among violators. Sanction witness testimony is permitted. License revocation is an appropriate sanction under the circumstances. One of the purposes of revocation is to deter others in the perishable agricultural commodities industry from violating the PACA.

Jane McCavitt, for Complainant.
Sherylee F. Bauer, New York, NY, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) (hereinafter Regulations); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) (hereinafter Rules of Practice) by filing a Complaint on November 8, 1994.

On March 1, 1996, Complainant filed an Amended Complaint which alleges that, during the period March 1993 through December 1993, Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 18 sellers of the agreed purchase prices for 62 lots of perishable agricultural commodities in the total amount of $206,850.69, which Respondent purchased, received, and accepted in interstate or foreign commerce and that, during the period January 1994 through January 1996, Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 30 sellers of the agreed purchase prices for 108 lots of perishable agricultural commodities in the total amount of $195,495.10, which Respondent purchased, received, and accepted in interstate or foreign commerce (Amended Complaint ¶¶ III, IV). Respondent filed an Answer on December 19, 1994, and an Amended Answer on April 1, 1996, in which Respondent denied violating the PACA.

Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing on May 7, 1996, in New York, New York. Jane McCavitt, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. Sherylee F. Bauer, Esq., of New York, New York, represented Respondent. The ALJ issued a bench decision on May 7, 1996, in which he concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. 201) and revoked Respondent's

PACA license (Tr. 208). On May 29, 1996, in accordance with 7 C.F.R. § 1.142(c)(2), the ALJ filed a written copy of the decision announced orally from the bench, which the ALJ excerpted from the transcript, corrected for spelling, punctuation, and transcription errors (hereinafter Initial Decision and Order).

On June 24, 1996, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's (hereinafter USDA) adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On July 17, 1996, Complainant responded to Respondent's appeal, and on July 18, 1996, the case was referred to the Judicial Officer for decision.

On March 21, 1997, I issued a Decision and Order in which I found that Respondent had failed to make full payment promptly to 48 sellers of the agreed purchase prices, totalling $402,345.79, for 170 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce during the period March 1993 through January 1996. I concluded that such failures to pay constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Kanowitz Fruit and Produce, Co., Inc.*, 56 Agric. Dec. ___, slip op. at 30 (Mar. 21, 1997). Based on this conclusion, I revoked Respondent's PACA license. *In re Kanowitz Fruit and Produce, Co., Inc., supra*, slip op. at 33.

On May 7, 1997, Respondent filed a Petition for Reconsideration and Oral Argument (hereinafter Petition for Reconsideration), and on May 28, 1997, Complainant filed Complainant's Objection to Respondent's Petition for Reconsideration. On May 29, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondent raises seven issues in its Petition for Reconsideration and requests the opportunity for oral argument. Respondent's request for oral argument is denied because the issues are not complex and are controlled by established precedents, and thus, oral argument would appear to serve no useful purpose.

First, Respondent asserts that all produce sellers that were listed in the Complaint and the Amended Complaint were paid at the time of the hearing. Respondent contends that, under these circumstances, "'slow pay' is the appropriate standard" (Petition for Reconsideration at 2).

Even if I were to find that Respondent had paid all the transactions alleged in

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

the Complaint and the Amended Complaint by the time of the hearing, that finding would not cause me to treat this case as a "slow-pay" rather than a "no-pay" case. The long-standing USDA policy has been that a case will be treated as a "slow-pay case" warranting license suspension, rather than a "no-pay" case warranting license revocation, only if the respondent has paid the amounts alleged to be due in a complaint by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), the respondent is in compliance with the payment provisions of the PACA and the Regulations by the opening of the hearing (or if no hearing is to be held, by the time the answer is due), and the respondent has no agreement with produce creditors for payment to be made beyond 30 days after the day on which the produce is accepted.[2]

Thus, even if Respondent paid all of the amounts alleged to be due in the Complaint and the Amended Complaint by the date of the May 7, 1996, hearing, that payment alone would not convert this case from a "no-pay" to a "slow-pay" case because the record clearly establishes that Respondent had not paid all of its produce sellers at the time of the hearing. When a respondent is in a failure-to-pay-promptly disciplinary hearing, the respondent must be in 100% compliance with the payment provisions of the PACA to escape license revocation. Allowing a respondent who has not paid all produce sellers in full by the time of the hearing to remain licensed would put produce sellers at financial risk.

At the hearing, Respondent's bookkeeper, Frances Falcone, testified that Respondent had outstanding current indebtedness of approximately $125,000 (Tr. 160-61). This amount (within a few hundred dollars) is corroborated by the balances in the "Summary table of unpaid transactions" (CX 24A at 6; Tr. 194).

In order to convert this case from a "no-pay" to a "slow-pay" case and avoid revocation of its PACA license, Respondent would have to have paid every produce seller in full by the time of the hearing. There is no escaping the fact that Respondent paid some produce sellers, but not others.

Second, Respondent contends that its arrangements for financing, the reasonableness of the terms of its agreements with its produce creditors, and the payment practices of most persons in the perishable agricultural commodities industry are relevant to the existence of Respondent's roll-over debt, as follows:

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[2]See, e.g., *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1268-72 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693, 700 (1995); *In re Lloyd Myers, Co.*, 51 Agric. Dec. 747, 763-65 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The Caito Produce, Co.*, 48 Agric. Dec. 602, 634 (1989); *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486, 505-506 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988).

> Rollover debt was determined at the last moment by applying statutory prompt payment terms to [Respondent's] payables without regard to its actual, commercially reasonable, terms or the financing, actually arranged, to pay all suppliers without "borrowing from Peter to pay Paul." Two of the best known credit services for the industry are the Blue Book and the Red Book. A review of the ratings of the companies listed illustrate that most of the industry is NOT in compliance with prompt pay. (Transcript pp. 183 and 184). Therefore, the department did not present evidence that [Respondent] slowed its payments to these later suppliers in order to pay the suppliers covered by the initial and amended complaints.
>
> Furthermore, [Respondent] had obtained an SBA commitment (see Exhibit "D") for a loan sufficient to pay all suppliers in full prior to the hearing. The loan was proceeding normally to a closing when [Respondent] was required by warranty provision to disclose this proceeding by the Department. The loan contained sufficient working capital to pay a reasonable fine, something the bank's counsel was prepared to entertain if this proceeding could be settled. By refusing to make a reasonable settlement of this matter after having been informed of the SBA commitment, the department caused the SBA to withdraw its commitment in the face of a threat by the Department to close down [Respondent]. (see Exhibit "E").
>
> It is therefore, solely because of the Department's action that there was any unpaid suppliers at the time of the hearing. The Department should not be permitted just prior to the hearing to cite for the first time commercially reasonable debt to suppliers (upon information and belief, none of whom complained to the Department about non-payment) when the Department obstructed the payment of these suppliers.

Petition for Reconsideration at 2-3.

I disagree with Respondent's contention that Respondent's financing, the payment practices of persons in the perishable agricultural commodities industry, and the "commercial reasonableness" of the terms of Respondent's agreements to pay produce creditors are relevant to the issue of Respondent's roll-over debt. The only issues relevant to the existence of roll-over debt are whether Respondent paid

some or all of the amounts alleged to be due in the Complaint and the Amended Complaint by the beginning of the May 7, 1996, hearing, whether Respondent was in compliance with the payment provisions of the PACA and the Regulations by the beginning of the May 7, 1996, hearing, and whether any written agreement between Respondent and any of its produce creditors, executed in accordance with 7 C.F.R. § 46.2(aa)(11), provided that Respondent could pay for produce more than 30 days after the produce was accepted. *In re S W F Produce Co., supra*, 54 Agric. Dec. at 700; *In re The Caito Produce, Co., supra*, 48 Agric. Dec. at 634; *In re Carpenito Bros., Inc., supra*, 46 Agric. Dec. at 505-506.

Section 46.2(aa)(5), (11) of the Regulations provides:

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

Respondent's alleged arrangements for financing, which would enable Respondent to pay produce creditors, is not payment in accordance with the PACA and is therefore not relevant to the issue of the existence of Respondent's roll-over debt. "Commercially reasonable" terms for the payment of produce creditors are not relevant to the existence of roll-over debt. Respondent has not proven or even alleged that, at the time of the hearing, these "commercially reasonable" agreements were reduced to a writing in accordance with 7 C.F.R. § 46.2(aa)(11) and provided that Respondent was to pay produce creditors within 30 days after the produce was accepted.

Moreover, the payment practices of others in the perishable agricultural commodities industry has no relevance to whether Respondent in this proceeding had roll-over debt at the time of the May 7, 1996, hearing.

Third, Respondent contends that several relevant factors, which were not considered, should have been considered in connection with the sanction to be imposed against Respondent (Petition for Reconsideration at 4).

Respondent contends that one factor that must be considered when imposing a sanction is whether Respondent's conduct threatens to undermine the PACA's purpose of licensing responsible persons, as follows:

> The United States Department of Agriculture's (hereinafter "Department") stated policy is to only license responsible companies. What is more responsible than a company which lost $400,000 to an embezzlement paying all its suppliers rather than walking away or declaring bankruptcy? It sold one of its units, it accepted a loan from an employee (without any date on which it has to be repaid), it gave up its warehouse, and it stayed open seven days a week. Its principal was willing to use his home and life insurance policies, as well as [Respondent's] units in the Brooklyn Terminal Market as collateral to obtain an SBA loan sufficient to pay all suppliers in full plus a fine to the Department. It was the Department that frustrated this loan by refusing to settle on a fine and threatening revocation, thereby making any loan impossible. [Respondent], a previously reputable licensee, suffered a loss through circumstances totally beyond its control and worked and struggled to ensure that everyone was paid in full and as quickly as possible. It is exactly this type of company that the Department should endeavor to preserve.

Petition for Reconsideration at 4-5.

The record establishes that Mr. Steven Kanowitz undertook a number of steps to correct Respondent's financial problems and demonstrated a *bona fide* commitment to turning the business around. *In re Kanowitz Fruit and Produce, Co., Inc., supra*, slip op. at 6. However, despite Respondent's commendable efforts to pay produce suppliers, the record establishes that Respondent failed to make full payment promptly of the agreed purchase prices for many lots of perishable agricultural commodities that it purchased, received, and accepted in interstate or foreign commerce and that such failures constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires payment--not good intentions to pay produce sellers or commendable efforts to pay produce sellers. The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing. This policy is designed not only to deter purchasers of perishable agricultural commodities from failing to make full payment promptly, but also to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.[3] Respondent's failure to pay establishes that Respondent is not financially responsible.

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[3]*Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d. Cir. 1967), *cert. denied*, 389 U.S. 835 (1967); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1274 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 785 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 621 (1993); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1440 (1992); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 741-42 (1982); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977). *See also Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (the PACA is a remedial statute designed to ensure that commerce in perishable agricultural commodities is conducted in an atmosphere of financial responsibility).

In light of the record in this proceeding, which establishes Respondent's efforts to pay produce creditors and indicates that Respondent's inability to pay produce creditors began when some of Respondent's employees embezzled inventory valued between $300,000 and $400,000 from Respondent, it should be emphasized that the revocation order in this proceeding is not being issued for any punitive reasons. Respondent has done nothing worthy of punishment. Respondent has committed no action even remotely resembling a crime. The offenses here were *mala prohibita*, not *mala in se*. There is nothing inherently evil in being unable to pay one's creditors promptly. But, there is no place in the highly-regulated perishable agricultural commodities industry for a firm that paid produce sellers from 2 weeks to 117 weeks late in violation of the PACA.

Further, Respondent asserts that the cause of Respondent's violation (embezzlement) and the effect of the revocation of Respondent's PACA license on Respondent's business, Respondent's employees, the families of Respondent's employees, and the neighborhood in which Respondent's business is located should have been considered when determining the sanction to be imposed (Petition for Reconsideration at 5-6).

I disagree with Respondent. "[T]his Department routinely denies requests for a lenient sanction based on the interests of [a] respondent's customers, community or employees." *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987). Collateral effects of a respondent's PACA license revocation are relevant neither to a determination whether a respondent made full payment promptly as required, nor to the sanction to be imposed for flagrantly or repeatedly failing to make full payment promptly.[4]

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[4]*In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1282-83 (1996), *appeal docketed*, No. 97-4053 (2d Cir. Apr. 2, 1997) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996) (collateral effects of a Respondent's license revocation are not relevant to the sanction to be imposed for flagrantly or repeatedly failing to make full payment); *In re Hogan Distributing Co.*, 55 Agric. Dec. 622, 639 (1996) (the adverse impact on sellers of perishable agricultural commodities of a publication of the fact that Respondent has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b is not relevant); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993) (adverse impact of revocation of Respondent's PACA license on Respondent's creditors is not relevant); *In re James D. Milligan & Co.*, 49 Agric. Dec. 573, 576 (1990) (a PACA license is revoked in failure to pay cases even though particular creditors involved would recover larger sums if Respondent were permitted to remain in business); *In re John A. Pirrello Co.*, 48 Agric. Dec. 565, 571 (1989) (collateral effects on creditors of PACA license revocation are not relevant); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (detriment to creditors if Respondent's PACA license is revoked is not relevant); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 177 (1987) (the fact that Respondent's

Fourth, Respondent contends that sanctions imposed against those who violate the PACA are not uniform and thus arbitrary and capricious (Petition for Reconsideration at 7-9).

I disagree with Respondent. The imposition of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir. 1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 18-20 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Volpe Vito, Inc.*, 56 Agric. Dec ___, slip op. at 112 (Jan. 13, 1997). Moreover, the PACA has no requirement that there be uniformity in sanctions among violators.

The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the statutes entrusted to the Secretary for enforcement, and there is no requirement for uniformity. In a failure-to-pay-promptly case instituted under a statute similar to the PACA, the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229), it is explained that uniformity is not required:

> Respondents argue that the suspension imposed by the ALJ is excessive and unwarranted . . ., because there is no "uniformity" in the

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creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 732 (1986) (the fact that Respondent's creditors will suffer if Respondent's PACA license is revoked is irrelevant); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2019 (1985) (collateral effects of an order on persons responsibly connected with a corporation are not relevant considerations in a PACA disciplinary proceeding against the corporation); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1249 n.8 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (the effect of revocation of a PACA license on those responsibly connected with Respondent corporation should not be considered); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978) (collateral effects on responsibly connected persons of an order revoking Respondent corporation's PACA license are not relevant); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1644 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978) (the adverse impact on a responsibly connected person of a finding that Respondent repeatedly and flagrantly violated 7 U.S.C. § 499b is not relevant); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1887 (1975) (collateral effects on owners and officers of Respondent corporation found to have violated 7 U.S.C. § 499b are irrelevant).

sanction with other cases, which impose less severe sanctions, and thus the primary purpose--deterrence for respondents and others similarly situated--is not achieved. Respondents are incorrect.

> There is no requirement that there be uniform sanctions in like cases.

In re Ozark County Cattle Co. (Decision and Order as to National Order Buying Company and Thomas D. Runyan), 49 Agric. Dec. 336, 371 (1990). *See also In re Floyd Stanley White*, 47 Agric. Dec. 229, 309 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).

Fifth, Respondent contends that it is improper for Complainant to have a "sanction witness" testify because the testimony is self-serving, taints the impartiality of the proceedings, is highly prejudicial, and tests the impartiality of the ALJ (Petition for Reconsideration at 9).

This case is governed by the sanction policy adopted by the Secretary of Agriculture in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36–3), which provides:

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

In light of this sanction policy, the recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Moreover, since 1971, the Department has followed the policy of permitting, and in most types of cases encouraging, the complainant and the respondent to introduce evidence at administrative disciplinary proceedings to aid the administrative law judge and the judicial officer in determining what sanction to

impose in the event that it is found that a violation occurred.[5]

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less than that recommended by administrative officials.[6] Witnesses for parties in these proceedings frequently testify regarding the appropriate sanction to be imposed. I am not aware of any proceeding, including the instant proceeding, in which sanction testimony from witnesses called by either party affected the impartiality of an administrative law judge or the judicial officer or in any way prejudiced an administrative law judge or the judicial officer.

Sixth, Respondent contends that revocation of Respondent's PACA license would not deter other PACA licensees from violating the PACA.

The Department's policy is to revoke the PACA license of a respondent that has not made full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce and fails to make such payments by the time of the hearing.[7] This sanction policy is harsh, but has consistently been upheld by the

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[5]*In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 527-29 (1984); *In re Larry W. Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985); *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. 1930, 1944 (1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Samuel Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1096 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re J.A. Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Professional Commodity Serv.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re George Rex Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 505 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

[6]*In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

[7]*See, e.g., In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 788 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1623 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 116 S.Ct. 474 (1995); *In re Roxy Produce Wholesalers, Inc.*, 51 Agric. Dec. 1435, 1441 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 765 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989); *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1467 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Carpenito Bros. Inc.*, 46 Agric. Dec. 486, 506 (1987), *aff'd*, 851 F.2d 1500,

courts.[8] There are many steps that can be taken to minimize the likelihood of payment violations, and therefore, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry.

Seventh, Respondent contends that the imposition of a civil penalty, rather than revocation of Respondent's PACA license, would be in accord with Congressional intent, would deter violations of the PACA, and would serve as an example "of to what extent a 'responsible' company should go to to ensure that their vendors are paid promptly" (Petition for Reconsideration at 11).

I disagree with Respondent. While the PACA was amended to allow the imposition of civil penalties (section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)), the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides, as follows:

> **(e) Alternative Civil Penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and

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1988 WL 76618 (D.C. Cir. 1988); *In re Clarence Miller Co.*, 43 Agric. Dec. 529, 532 (1984); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 123, 149-50 (1984).

[8] *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Sam Leo Catanzaro*, 35 Agric. Dec. 26 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

> amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. § 499h(e) (Supp. I 1995).

Under the provisions of this amendment, the Secretary of Agriculture may now assess civil penalties in lieu of suspending or revoking a PACA license. The legislative history of the Perishable Agricultural Commodities Act Amendments of 1995, in relevant part, states:

> *Section 11—Imposition of civil penalty in lieu of suspension or revocation*
>
> Section 11 authorizes USDA to assess civil monetary penalties not to exceed $2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity's license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 207, 104th Cong., 1st Sess. 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .
>
> In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the

violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong., 1st Sess. 12, 34 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

Mr. Hatamiya also submitted a written statement which addressed penalties under the PACA and which was made part of the record of the hearing:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on

Agriculture, 104th Cong., 1st Sess. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

These statements make clear that, although USDA supported the amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 1993 through January 1996, by failing to make full payment promptly to 48 sellers of the agreed purchase prices for 170 lots of perishable agricultural commodities in the total amount of $402,345.79.

The appropriate sanction for failure-to-pay cases, like this case, is license revocation. Allowing Respondent to pay a civil penalty and continue to purchase perishable agricultural commodities in interstate or foreign commerce or to serve a suspension, when Respondent had failed to pay promptly for large produce purchases over a long period of time, with substantial produce debt still owing, would defeat the purposes of the PACA. A civil penalty or a suspension under these circumstances would not protect produce sellers and would not serve as a sufficient deterrent to others.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 21, 1997, *In re Kanowitz Fruit and Produce, Co., Inc., supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[9] Respondent's Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on March 21, 1997. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed March 21, 1997, is reinstated, with allowance for time passed.

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[9] *In re Volpe Vito, Inc.*, 56 Agric. Dec. ___, slip op. at 10 (Apr. 16, 1997) (Order Denying Petition for Reconsideration); *In re City of Orange*, 56 Agric. Dec. ___, slip op. at 3 (Mar. 25, 1997) (Order Granting Request to Withdraw Petition for Reconsideration); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. ___, slip op. at 6 (Mar. 19, 1997) (Order Denying Petition for Reconsideration); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. ___, slip op. at 15 (Feb. 4, 1997) (Order Denying Petition for Reconsideration); *In re Saulsbury Enterprises*, 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997) (Order Denying Petition for Reconsideration); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Petition for Reconsideration).

Order

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and Respondent's PACA license is revoked, effective 30 days after service of this Order on Respondent

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In re: KANOWITZ FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-95-0504.
Stay Order filed June 25, 1997.

Jane McCavitt, for Complainant.
Sherylee F. Bauer, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 21, 1997, the Judicial Officer issued a Decision and Order holding that Kanowitz Fruit and Produce Co., Inc. (hereinafter Respondent), committed willful, flagrant, and. repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA), and revoking Respondent's PACA license. *In re Kanowitz Fruit and Produce Co., Inc.*, 56 Agric. Dec. ___, slip op. at 33 (Mar. 21, 1997). On May 7, 1997, Respondent filed a Petition for Reconsideration and Oral Argument, and on June 5, 1997, the Judicial Officer issued an Order Denying Petition for Reconsideration. *In re Kanowitz Fruit and Produce Co., Inc.*, 56 Agric. Dec. ___ (June 5, 1997) (Order Denying Petition for Reconsideration).

On June 25, 1997, Respondent filed a Motion to Stay Order pending completion of proceedings for judicial review, which Respondent intends to institute, and on June 25, 1997, the case was referred to the Judicial Officer for a ruling on Respondent's Motion to Stay Order. On June 25, 1997, Jane McCavitt, attorney for Complainant in this proceeding, informed the Office of the Judicial Officer by telephone that Complainant does not oppose Respondent's Motion to Stay Order.

Respondent's Motion to Stay Order is granted. The Order issued in this proceeding on March 21, 1997, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

MOUNTAIN RIVER PRODUCE, INC. v. POTATO SPECIALTIES, INC. and/or GEM STATE PRODUCE SUPPLY, INC.
PACA Docket No. R-95-0233.
Decision and Order filed January 23, 1997.

Agency; Principal - Undisclosed; Liability - Broker.

Where co-respondent broker, acting on behalf of shipper, failed to perform duties by failing to issue confirmation, and co-respondent receiver denied knowledge of identity of complainant shipper, broker acted as agent for undisclosed principal, and by negotiating an "accord and satisfaction" check, bound its principal, relieving the receiver of further liability. Broker held liable for invoice amount less damages from breach of contract as a result of its breach of the fiduciary responsibilities to shipper.

Patrice Harps, Presiding Officer.
Complainant, Pro se.
Lawrence H. Meuers, Naples, FL, for Respondent Potato Specialties, Inc.
Jeffrey M. Chebot, Philadelphia, PA, for Respondent Gem State Produce Supply, Inc.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely formal complaint was filed with the Department against co-respondent Potato Specialties, Inc. on August 29, 1994 and a timely formal complaint was filed against co-respondent on February 24, 1995, in which complainant seeks a reparation award against the respondents in the amount of $6,175.00 in connection with a railcar load of potatoes shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondents, which filed answers thereto, denying liability.

Since the amount claimed in the formal complaint does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Respondent Potato Specialties, Inc. filed an answering statement and a brief. Respondent Gem State Sales also filed an answering statement and a brief.

Findings of Fact

1. Complainant, Mountain River Produce, Inc., hereinafter referred to as Mountain River, is a corporation whose post office address is [redacted], [redacted] Idaho [redacted] At the time of the transaction involved herein, Mountain River was licensed under the Act.

2. Respondent Potato Specialties, Inc., hereinafter referred to as Potato Specialties, is a corporation whose post office address is [redacted] [redacted] Illinois [redacted] At the time of the transaction involved in this proceeding, Potato Specialties was licensed under the Act.

3. Respondent Gem State Produce Supply, Inc., hereinafter referred to as Gem State, is a corporation whose post office address is [redacted] Idaho [redacted] At the time of the transaction involved in this proceeding, Gem State was licensed under the Act.

4. On or about May 24, 1994, complainant arranged with co-respondent Gem State, acting as collect-and-remit broker, to ship one railcar load of potatoes to co-respondent Potato Specialties, comprised of 1,300 100-pound bags of U.S. No. 1 potatoes, FOB as to price, with grade and condition guaranteed to destination.

5. Complainant invoiced co-respondent Gem State $4.75 per bag, for an invoice total of $6,175.00. Co-respondent Gem State invoiced Potato Specialties $5.00 per bag, for an invoice total of $6,500.00.

6. The potatoes arrived at destination at Potato Specialties' place of business on June 8, 1994, and were made the subject of a federal inspection on June 10, 1994. The inspection revealed 8% internal black spot, 3% net necrosis, 5% silver scurf, 3% sunken discolored areas, and 1% soft rot, for a total of 20% defects.

7. Co-respondent Potato Specialties has paid co-respondent Gem State $1,221.20, who in turn issued a check to complainant Mountain River for $896.20. Complainant has not cashed that check.

Discussion

Complainant alleges that it shipped a railcar load of potatoes to Potato Specialties in accordance with contract terms negotiated through Gem State, who

acted as broker. Complainant further alleges that it has not received payment for the potatoes, and seeks payment of $6,175.00 from Potato Specialties. In the event that Potato Specialties is not found liable for the amount claimed, Mountain River seeks a finding that Gem State is liable for its failure to perform the duties of a broker. As the proponent of this claim, complainant has the burden of proving its allegations. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors,Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler,* 32 Agric. Dec. 702 (1973).

Since complainant's claim is made in the alternative, we must first explore the question of co-respondent Potato Sales' liability. Potato Sales makes several allegations in defense of its position. It first alleges that it contracted to purchase potatoes from Gem State rather than from Mountain River. Second, it alleges that the potatoes were purchased as U.S. No. 1 FOB, with grade guaranteed to destination. Third, it alleges that the destination inspection establishes a breach of contract from which it is entitled to recover damages. Fourth, it alleges that it made payment of the invoice received from Gem State with a check marked, "Paid In Full", which Gem State cashed, effecting an accord and satisfaction.

It is not necessary to determine whether or not the contract called for the grade to be U.S. No. 1 at destination, since the inspection made upon arrival establishes a breach of contract in either case, from which Potato Specialties would be entitled to recover damages. This leaves for consideration the defenses of (1) privity of contract between Mountain River and Potato Specialties, and (2) accord and satisfaction.

The most important matter to be decided is whether complainant has established by a preponderance of evidence that it entered into a contract with Potato Specialties. Complainant alleges that Gem State's Glenn Van Der Giessen negotiated this transaction, as a collect-and-remit broker. Although Mountain River initially claimed that Gem State acted on behalf of both parties, it is apparent that it acted solely as agent for Mountain River. This finding is supported by Gem State's answer to the formal complaint, signed by Mr. Van Der Giessen. In this document, Mr. Van Der Giessen declares that he acted as agent for Mountain River, and further admits that he did not send a copy of the confirmation of sale to Potato Specialties, and further admits a long-standing practice by which his firm failed to send copies of confirmations of sale to Potato Specialties.

Potato Specialties' Ted Katz, states in his sworn answering statement, that Gem State acted,

"as a seller or broker of potatoes to Potato Specialties. Gem State sold this load to Potato Specialties and did not issue Potato Specialties a broker's memorandum of sale indicating it acted as a broker".

In Gem State's answering statement, it again insists that Potato Specialties knew that it (Gem State) was acting as the seller's broker, alleging a course of dealings, and alleging that Potato Specialties acknowledged this course of dealing in its Answer and Counterclaim in the formal proceeding, *Winnemucca Farms, Inc. d/b/a Krakaw Produce Co. v. Potato Specialties, Inc. and Gem State Produce Supply, Inc.*, PACA Docket No. R-95-147. In fact, in paragraph 6 of that document, Potato Specialties states, "Potato Specialties provided Krakaw with a copy of the confirmation of sale which set out the specific contract terms". From this document provided by Gem State, we are led to the conclusion that Potato Specialties had received a memorandum of sale from Gem State in that instance. Rather than fortifying Gem State's position, this document actually works in favor of Potato Specialties' contention that it understood Gem State to be the seller in the present instance.

Gem State contends that in 98 out of 100 previous transactions, it had acted as a broker when dealing with Potato Specialties without, presumably, issuing memoranda of sale to that firm. We find this a most remarkable admission. However, allegations about a course of dealings must be proved by numerous instances of actual practice. *California Fruit Exchange v. Spracale Fruit Co.*, 89 F. Supp. 580 (W.D. PA. 1950); *Coast Marketing Co. v. World Wide Marketing Co., Inc.*, 30 Agric. Dec. 1742 (1971); *Michael Santelli & Sons, Inc. v. Samuel H. Rubenstein*, 21 Agric. Dec. 1053 (1962); *M.R. Davis & Bros. v. William J. Flynn*, 20 Agric. Dec. 1069 (1961). Since Gem State has provided no evidence to support its claim, we find that this argument must fail.

The file does not contain any other convincing evidence that Potato Specialties knew or had reason to believe that it was purchasing the potatoes from Mountain River, and we have rejected Gem State's claim that Potato Specialties knew that Gem State was operating as a collect-and remit broker in this transaction. We find that Potato Specialties had no reason to know that it was dealing with anyone other than Gem State, having conducted all negotiations with, and having received its only invoice from Gem State.

We find that respondent Gem State essentially acted as agent for an undisclosed principal, Mountain River, and therefore bound itself as if it were the principal. See *Ucon Produce v. Jimmy Shmon Produce Broker*, 37 Agric. Dec. 1747 (1978) where we quoted *Mawer-Gulden-Annis, Inc. v. Brazilian & Colombian Coffee Company*, 49 Ill. App. 2d 400, 199 N.E.2d 222 (1964):

> It is a settled rule in verbal contracts, if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest....And the fact that the agent is known to be a commission merchant, auctioneer, or other professional agent, makes no difference....The duty is upon the agent, who wishes to avoid liability, to disclose the name or identity of his principal clearly and in such a manner as to bring such adequately to the actual notice of the other party, and it is not sufficient that the third person has knowledge of the facts and circumstances which would, if reasonably followed by inquiry, disclose the identity of the principal.

Since respondent Gem State failed to disclose the identity of its principal, we find that it relieved Potato Specialties from liability by accepting and depositing a check from that firm offered in accord and satisfaction of the claim. When a shipper allows the broker to collect on its behalf, it invests that broker with the apparent authority to accept and process payments on its behalf. Along with this authority, the broker assumes the fiduciary responsibility to protect the shipper's interests, and the shipper is bound by its agent's actions. *Gulf-Western Food Products Company v. Prevor-Mayrsohn International, Inc.*, 34 Agric. Dec. 1911 (1975).

There remains for consideration the question of whether Gem State is liable to Mountain River, and if so, for how much. It is at this point that we will return to a discussion of Gem State's remarkable admission that it repeatedly violated the Act by failing to perform the duties of a broker.

The PACA (7 U.S.C. 499b) declares it unlawful for a broker "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such undertaking". The regulations under the Act establish the express duties of brokers in 7 C.F.R. § 46.28(a), which read, in part,

> After all parties agree on the terms and the contract is effected, the broker shall prepare in writing and deliver promptly to all parties a properly executed confirmation or memorandum of sale setting forth truly and correctly all of the essential details of the agreement . . . . The broker who does not deliver copies of these documents to all parties involved in the transaction is

> failing to perform his duties as a broker . . . . If the broker's records do not support his contentions that a binding contract was made with proper notice to the parties, the broker may be held liable for any loss or damage resulting from such negligence. . .

Respondent Gem State has readily admitted its failure to meet its responsibility to provide a copy of its confirmation to Potato Specialties, and actually relies on its repeated violations of the Act to support its contention that Potato Specialties was aware of a contract with Mountain River. At this juncture, we must decide whether Gem State's failure to perform its express duties as a broker was merely a technical violation in this instance, or whether its actions, or lack thereof, make it liable to Mountain River for damages.

The lack of a confirmation of sale issued to Potato Specialties is fatal to Mountain River's claim against that firm, since Gem State acted in its stead when it received and negotiated a check in accord and satisfaction from Potato Specialties. This is more than a technical violation, and is the proximate cause of Mountain River's inability to hold Potato Specialties liable for the value of the potatoes.

We cannot, however, find that Gem State owes the full invoice amount of $6,175.00. The inspection at destination establishes that Mountain River breached the contract, which called for the potatoes to grade U.S. No. 1 at destination.

Even though complainant requested an audit of Potato Specialties' records, there is insufficient evidence in the file for us to find that complainant authorized Potato Specialties to handle the potatoes for its account. Gem State, therefore, owes Mountain River the original invoice amount less damages resulting from the breach of contract. The usual measure of damages is set forth in UCC § 2-714(2):

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The value the goods should have had can be established by taking note of the appropriate USDA Market News Report. The quotes for 100-pound bags of U.S. No. 1 Idaho Russet potatoes on June 8, 1994, on the Chicago, Illinois market were $13.00 to $14.00, mostly $13.50 to $14.00. Accepting the average of the "mostly" quote, $13.75 per bag, as the fair market value of conforming goods yields a total

of $17,875.00 (1,300 X $13.75). An audit of Potato Specialties' records by personnel of the PACA Branch revealed that its sales records did not support the accounting it issued to Gem State on these potatoes. Absent an acceptable accounting, the value of the goods accepted may be shown by use of the percentage of defects disclosed by a prompt inspection. *South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *v. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

The inspection in this instance revealed 20 percent defects against the contract. The value of the product received is therefore calculated as $17,875.00 less 20%. This figure, $3,575.00, when subtracted from the initial value of $17,875.00, yields the value of the non-conforming goods as $14,300.00. Subtracting the value of the non-conforming goods ($14,300.00) from the value of conforming goods($17,875.00) establishes basic damages of $3,575.00, to which Potato Specialties would have been entitled, had complainant been able to prove a contract with that firm.

Respondent Potato Specialties would also have been entitled to recover the $65.40 cost of inspection as an expense incidental to the breach of contract. Complainant's invoice to Gem State is for $6,175.00. Subtracting total damages of $3,640.40, leaves a balance still due of $2,534.60. We find that respondent Gem State's failure to perform its duties as a broker caused complainant Mountain River to suffer damages in this amount.

Respondent Gem State's failure to pay complainant $2,534.60 is a violation of section 2 of the Act for which reparation should be awarded to complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Order

Within 30 days from the date of this order respondent Gem State shall pay complainant as reparation $2,534.60 with interest thereon at the rate of 10% per anum from July 1, 1994 until paid. The complaint against Potato Specialties is dismissed.

Copies of this order shall be served on the parties.

PISMO-OCEANO VEGETABLE EXCHANGE v. A & S PRODUCE, INC.
PACA Docket No. R-95-0126.
Decision and Order filed February 3, 1997.

Evidence - Proof of mailing.

Where there was no evidence tending to confirm that invoices were received, and opposing party positively swore that invoices were not received, strict proof of the mailing of the invoices was required. Such evidence would consist of a declaration by the person responsible for the mailing, that the invoices were in fact properly addressed and placed in the mail.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Baret C. Fink, Los Angeles, CA, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $6,172.80 in connection with transactions in interstate commerce involving mixed vegetables.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which failed to file a timely answer, and was held in default. Respondent then filed a timely petition to reopen the proceeding, and on December 7, 1994, respondent's petition was granted, and respondent's previously submitted proposed answer was received in evidence and served on complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7

C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Prismo-Oceano Vegetable Exchange, is a corporation whose address is [redacted] California.
2. Respondent, A & S Produce, Inc., is a corporation whose address is [redacted] California. At the time of the transactions involved herein respondent was licensed under the Act.
3. On or about the following dates complainant shipped to respondent produce as follows:

Date	Description	Quantity
June 24, 1993	Nappa	100
June 25, 1993	Nappa	80
June 26, 1993	Nappa	100
July 15, 1993	Spinach	42
July 16, 1993	Red Leaf	63
July 17, 1993	Red Leaf	42
	Spinach	42
	Nappa	160
July 19, 1993	Red Leaf	42
	Spinach	42

4. An informal complaint was filed on January 6, 1994, which was within nine months after the causes of action alleged herein accrued.

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law-104-48).

Conclusions

Complainant claims that the produce listed in finding 3 was sold to respondent on an f.o.b. basis prior to shipment. Dennis Donovan, complainant's sales manager, submitted an affidavit in which he stated that he was the person responsible for the sale of the produce on behalf of complainant, and that he was initially contacted by Casey O'Connor of California Fresh Marketing (hereafter CFM) of Arroyo Grande, California, who was seeking to purchase mixed vegetables for sale to respondent. Mr. Donovan states that he informed O'Connor that he would not let CFM take title to the produce, but would allow CFM to be broker on a sale of the produce to respondent. Donovan also alleges that the produce was subsequently sold to respondent, and that invoices were sent to respondent for each lot of produce. Complainant attached copies of invoices covering each lot to its complaint, and to other submissions herein.

Respondent denied purchasing the produce from complainant, but admitted receiving the produce. Respondent alleged that the produce was purchased from CFM, and submitted evidence that CFM had billed respondent for the produce, and had been paid for the produce. Respondent also submitted the affidavit of its president Mihee Jang stating that none of the invoices submitted by complainant were ever received by respondent.

Complainant submitted the affidavit of Donovan stating that he was personally aware of the fact that complainant had promptly invoiced respondent for each of the lots of produce. Mr. Donovan further stated that he "personally oversaw the invoices which were sent and mailed to respondent . . ." This statement falls short of a declaration by the person responsible for the mailing, that the invoices were in fact properly addressed to respondent, and placed in the mail.[2] If there were some evidence tending to confirm that the invoices were received by respondent, or if respondent had not positively sworn that the invoices were not received, we might be less stringent in our requirement of strict proof of mailing. However, in this case there is an important additional factor which leads us to question the mailing of the invoices. As respondent's counsel points out, complainant contends that respondent has not paid for any of the lots of produce. Why then would complainant continue to make shipments to respondent in July, when the original June shipments had not been paid? The original invoice, which

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[2]See *Maine Potato Growers v. Orrell Produce Company,* 14 Agric. Dec. 399 (1955); *H. W. Butler & Brother v. S. D. Monash Produce Company,* 11 Agric. Dec. 472 (1952); *John H. Postel v. Phil Peck Company, Inc.,* 10 Agric. Dec. 82 (1951); and *Goldsby-Evans Produce Company v. Ernest E. Fadler Company,* 9 Agric. Dec. 228 (1950).

complainant claims to have sent on June 28, 1993, states (as do all the other invoices) that the terms are: "CASH F.O.B. NET 10 DAYS." This invoice would have been received by respondent no later than approximately July 1, 1993, and should have been paid no later than ten days from the date of receipt of the produce. The produce would have been received no later than the day following shipment, or June 26, 1993, and payment should have been made by July 6, 1993. One week after payment was due on this transaction complainant began, and then continued, the July shipments to respondent. We conclude that complainant has failed to meet its burden of proving by a preponderance of the evidence that the produce which is the subject of the complaint was sold to respondent. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

PRIMARY EXPORT INTERNATIONAL v. BLUE ANCHOR, INC.
PACA Docket No. R-95-0037.
Decision and Order filed February 11, 1997.

Purchase After Inspection — Failure to use term in contract negotiations
Transportation — Normality
Good Delivery — Averaging lots to determine

"Purchase after inspection" is a trade term defined in the Regulations, and must be employed by the parties to be applicable. Under the UCC an actual inspection of the very goods shipped, or a sample thereof, voids implied warranties, but the suitable shipping condition warranty, made applicable by use of f.o.b. terms, is an express warranty, and inspection of the goods shipped will not void such warranty in the absence of proof that it was the intent of the parties to do so.

A foreign survey that lumped together apples from three sea-land containers was utilized to determine whether apples arrived with abnormal deterioration, even though this method of survey made it impossible to associate the apples surveyed with the transit conditions applicable to each container. This was permitted because the temperature history for the three containers was sufficiently similar, and sufficiently within normal parameters, that transit conditions could safely be said not to void the suitable shipping condition warranty as to any of the containers.

After analysis of the definition of "commercial unit" in the Regulations, and of prior cases holding that lots of similar produce on a load should be averaged to determine if the load as a whole made good delivery, it was held that there is no reasonable basis for continuing to require that a breach pertain to a load as a whole. It was stated that "[t]here is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted." The portions of a load which will be considered as subject to a finding

of a breach of contract were stated to be those which are distinguished in federal inspections.

George S. Whitten, Presiding Officer.
R. Jason Read, Newport Beach, CA, for Complainant.
Thomas R. Oliveri, Newport Beach, CA, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $56,708.09 in connection with transactions in foreign commerce involving three loads of apples.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint exceeds $15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant, Primary Export International, Inc., is a corporation whose address is California.

2. Respondent, Blue Anchor, Inc., is a corporation whose address is At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about March 1, 1994, respondent sold, on an f.o.b. basis, to complainant, and complainant sold (through CDS Distributing, Inc., of San Francisco, California, acting as broker) to EOS Trading Co., of Foster City, California, who, in turn, sold to Universal Fruit, Inc., of Taipei, Taiwan, three

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

ocean container loads of California Fuji apples as follows:

Container No. EISU 5616215:

No. Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
3	72	XFCY	$48.00	$55.95
16	80	"	39.00	45.95
4	88	"	33.00	39.95
14	100	"	26.00	32.95
16	113	"	24.00	30.95
11	125	"	23.00	29.95
8	138	"	22.00	28.95
49	150	"	20.00	26.95
18	163	"	18.00	24.95
25	72	FCY	35.00	41.95
42	80	"	33.00	39.95
42	88	"	27.00	33.95
84	100	"	23.00	29.95
42	113	"	22.00	28.95
42	125	"	22.00	28.95
46	138	"	20.00	26.95
42	150	"	18.00	24.95
42	163	"	17.00	23.95
42	80	No. 1	25.00	31.95
42	88	"	23.00	29.95
42	100	"	18.00	24.95
42	125	"	17.00	23.95
42	138	"	16.00	22.95
42	150	"	15.00	21.95
42	163	"	14.00	20.95
840				

Container No. EMCU 5103288:

No. Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
5	64	No. 1	$27.00	$33.95

36	72	"	27.00	33.95
36	80	"	25.00	31.95
126	100	"	18.00	24.95
294	113	"	17.00	23.95
126	125	"	17.00	23.95
84	138	"	16.00	22.95
84	150	"	15.00	21.95
49	163	"	14.00	20.95
840				

Container No. ELSU 5605709:

No. Ctns.	Size	Grade	F.o.b. Price to Complaint	Delivered Harbor Price to Universal
42	88	FCY	$27.00	$33.95
210	100	"	23.00	29.95
210	113	"	22.00	28.95
84	150	"	18.00	24.95
42	80	No. 1	25.00	31.95
84	88	"	23.00	29.95
168	100	"	18.00	24.95
840				

4. The three containers of apples were federally inspected at shipping point, between March 1 and 3, 1994, and found to grade as stated above. The apples were loaded on to the three containers, as stated above, on March 3, 1994, and shipped from loading point in Digiorgio, California to Universal Fruit, Inc. in Taipei, Taiwan. The containers were loaded on the vessel Ever Goods at the port of Los Angeles, California on March 4, 1994. The vessel Ever Goods arrived at port of discharge, Keelung, Taiwan, on March 27, 1994, and the containers were landed on March 28, 1994. The containers were delivered to the receiver on March 30, 1994.

5. On March 31, April 1, and 2, 1994, the apples from the three containers were subjected to a survey by Standard Marine Surveyors & Adjusters LTD. The survey covered the apples from all three containers, and grouped the apples by grade, and within grade categories by size, giving the percentage of damaged fruit for each size and grade of apples. The total sample used was stated to be 119 cartons taken at random from various locations in the refrigerated chambers in which the apples were stored. This is a more than adequate sampling. The

breakdown gave the percentage of apples "partly rottened," and the percentage having "several brown spots on the skin." The survey also stated a percentage of apples that were "yellowish," and a hardness range for each category. A summary of the percentages of rot and brown spots is given below:

U.S. No. 1:

Size	Percentage of Rot	Percentage of Brown Spots
64	10.94	48.44
72	9.72	18.06
80	8.54	14.17
88	9.09	22.16
100	8.38	24.19
113	3.13	25.55
125	3.20	9.60
138	3.14	12.68
150	5.67	8.67
163	0.	0.

For the U.S. No. 1 category the average rot was 5.57%, and the average brown spots was 17.66%.[2]

U.S. Fancy:

Size	Percentage of Rot	Percentage of Brown Spots
72	—	—
80	—	—
88	12.50	6.53
100	2.79	3.79
113	5.31	9.14
125	1.60	6.80

[2]These averages were derived by calculating the number of boxes in each size category from the percentages of rot and brown spots, and then calculating the average percentages from the relation of the total of such boxes to the total boxes in the grade category.

138	0.	6.52
150	1.22	5.44
163	0	8.28

For the U.S. Fancy category the average rot was 3.60%, and the average brown spots was 5.86%.[3]

U.S. Extra Fancy:

Size	Percentage of Rot	Percentage of Brown Spots
72	6.94	0.
80	5.00	0.
88	6.82	0.
100	8.00	0.
113	6.20	0.
125	4.00	0.
138	7.97	0.
150	4.00	—
163	3.07	—

For the U.S. Extra Fancy category the average rot was 5.02%.[4]

6. Temperature recorders were placed in each of the containers at shipping point, and were set to run for 32 days. Chart number 301414 was extracted from the instrument from container No. EISU 5616215 at destination, and showed as follows: The trace begins on the first day at approximately 38°, rises to 40° at about the eighth hour, and varies between 39° and 41° through the eighth day. From the middle of the eighth day until the middle of the fifteenth day the trace makes a gradual descent from 40° to about 34°, and remains at about 34° until the twenty-fifth day. There is a gradual rise to about 35° at the twenty-sixth day, and the tape varies between 35° and 36° for the remainder of the tape. Chart number 301413 was extracted from the instrument from container No. EISU 5103288 at destination, and showed as follows: The trace begins on the first day at

[3]See note 2. The dashes indicate that the surveyor was unable to find any size 72 and 80 apples. Nevertheless, the number of boxes of these sizes shipped were included in the averages for the U.S. Fancy category.

[4]See note 2.

approximately 39°, falls to about 37° at the eighth hour, rises to about 42° at the twelfth hour, and then falls to about 38° at about the thirtieth hour where it remains until the beginning of the third day. From the third day to the fifth day the trace varies between 37° and 40°. From the fifth day to the eleventh day the trace gradually falls from about 37° to about 34°, and remains at approximately 34° through the remainder of the tape. Chart number 301412 was extracted from the instrument from container No. EISU 5605709 at destination, and showed as follows: The trace begins at about the fourth hour on the first day at approximately 42°, rises to about 45° at about the tenth hour, falls to about 41° at the twelfth hour where it remains for the remainder of the first day. At about the beginning of the second day the trace falls to about 40° where it remains through the middle of the second day. From the middle of the second day until the beginning of the fifth day the trace varies between 39° and 41°. From the beginning of the fifth day until the beginning of the fourteenth day the trace falls gradually from 39° to 34° where it remains until the middle of the twentieth day. From the middle of the twentieth day to the beginning of the twenty-fourth day the trace rises from 34° to about 36°, and varies between 36° and 37° for the remainder of the tape.

7. The receiver in Taiwan incurred the following expenses in connection with the apples:

Import duty	$26,228.74
Labor fees (into and out of cold room)	761.88
Coldroom charge	1,142.81
Drayage	845.88
Handling charge	476.55
Customs broker charge and customs inspection charge	389.30
Terminal receiving charge	429.92
Survey charge	605.00

8. The formal complaint was filed on September 15, 1994, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant purchased the three containers of apples from respondent on an f.o.b. basis, admits acceptance at destination, and has paid respondent the full purchase price. Complainant alleges that respondent breached the contract of sale by shipping apples that were not in suitable shipping condition, and seeks to

recover the damages resulting from that breach.

The Regulations,[5] in relevant part, define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . ., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined,[6] in relevant part, as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

The suitable shipping condition provisions of the Regulations,[7] which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery,"[8] are based upon case law predating the adoption of the Regulations.[9] Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless

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[5]7 C.F.R. § 46.43(i).

[6]7 C.F.R. § 46.43(j).

[7]7 C.F.R. § 46.43(j).

[8]7 C.F.R. § 46.44.

[9]See *Williston, Sales* § 245 (rev. ed. 1948).

make good delivery.[10] This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined.[11]

Respondent alleges that the suitable shipping condition warranty is inapplicable to the shipment of apples because the apples were purchased after inspection. Respondent asserts, and submits testimony to prove, that complainant's representative inspected the very apples shipped, and complainant asserts, and submits testimony to prove, that the representative only looked at the general run of apples being shipped. Respondent cites section 46.43(ff) of the Regulations for the proposition that complainant waived all warranties as to quality and condition relative to the apples. The cited section provides:

> "Purchase after inspection" means a purchase of produce after inspection or opportunity for inspection by the buyer or his agent. Under this term the buyer has no right of rejection and waives all warranties as to quality or condition, except warranties expressly made by the seller.[12]

However, the first sentence of section 46.43 of the Regulations states:

> The following terms and definitions, when used in any contract or communication involving any transaction coming within the scope of the Act, shall be construed as follows:

It should be obvious that the intent of the Regulations is that the waiver of warranty applies when the parties actually use the trade term "purchase after

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[10]See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[11]See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

[12]7 C.F.R. § 46.43(ff).

inspection." This term was not used by the parties to the contract here.[13] Moreover, the contract documents, such as the invoices issued by respondent to complainant, not only omit all reference to the "purchase after inspection" trade term, they explicitly include the trade term "f.o.b." (which, under the Regulations, expressly entails the suitable shipping condition warranty), and refer to the apples by the U.S. grades Extra Fancy, Fancy, and No. 1.

Although the "purchase after inspection" trade term was not used, and is therefore not applicable, the Uniform Commercial Code contains a section with similar import whose applicability does not depend upon its express use as a trade term. The Uniform Commercial Code, section 2 - 316, provides as follows:

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty or merchantability or any part of it the language must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

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[13]See *Viva Tiger, Inc. v. Cornucopia Trading Co., Inc.*, 53 Agric. Dec. 817 (1994); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Jim Hronis & Sons v. Luna Co., Inc.*, 47 Agric. Dec. 1497 (1988).

(b) **when the buyer before entering the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him;** and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and in contractual modification of remedy (Sections 2-718 and 2-719).

In analyzing the applicability of the above quoted section of the UCC to the usual produce transaction it is first necessary to establish the significance of the parties' use of "f.o.b." as a trade term. In this connection it is inescapable that the use of the contract term f.o.b. entails the applicability of the warranty of suitable shipping condition.[14] Thus, what originated as an extension of the implied warranty of merchantability,[15] seems to become an express warranty by use of the term f.o.b. This regulatory definition of the term entails some interpretative difficulty when we confront the above quoted provisions of the UCC. Is the suitable shipping condition warranty to be treated as an express warranty under 2 - 316(1), or does it partake of the nature of an implied warranty, and fall under 2 - 316(2), due to its historical derivation from the warranty of merchantability?

In *L. E. Jensen & Sons, Inc. v. Huston Produce, Inc.*,[16] the parties used "f.o.b." as an express term of the contract, but also, in the same document, used exculpatory language negating implied warranties. We stated that there was no

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[14]Section 46.43(i) of the Regulations (7 C.F.R. § 46.43(i)) states:

"F.O.B." (for example, "f.o.b. Laredo, Tex.," or "f.o.b. California') means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in "suitable shipping condition (see definitions of "suitable shipping condition," paragraphs (j) and (k) of this section), and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. . . .

[15]*Lookout Mountain, et al. v. Consumer Produce Co., et al.*, 50 Agric. Dec. 960 (1991).

[16]*L. E. Jensen & Sons, Inc. v. Huston Produce, Inc.*, 51 Agric. Dec. 814 (1992).

mention in the contract of merchantability as required by 2 - 316(2), and concluded that:

> since the warranty of suitable shipping condition, made applicable by the Department's regulations in f.o.b. sales, is an extension of the warranty of merchantability, the suitable shipping condition warranty is also not excluded by the exculpatory language of the contract.

The thrust of the decision seems to be that, due to its historical derivation from the warranty of merchantability, the suitable shipping condition warranty should be taken as an implicit part of the warranty of merchantability when f.o.b. terms are used in connection with the sale of perishables. The decision might equally have been based on 2 - 316(1). The use of "f.o.b." in a produce contract can be said to *express* the suitable shipping condition warranty.[17] The negation of the warranty could not reasonably be construed as consistent with the expression of the warranty, and therefore its negation must be deemed inoperative.[18] Following this

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[17]Due to its historic connection with the warranty of merchantability we have sometimes referred to the suitable shipping condition warranty as an implied warranty. See *Rancho Dos Palmas, Inc. v. Desert Melon Distributors, Inc.*, 54 Agric. Dec. 727 (1995). Though in one sense of the word "implied," the warranty might be thought to be implied in the term f.o.b. by reason of the provision of the Regulations, this is not what is normally meant by the term "implied warranty." Because of the regulatory definition the warranty is better thought of as an express warranty whose applicability is signaled by the use of the term "f.o.b."

[18]In *Jensen* the f.o.b. terms were inserted, whereas the negation of the warranty was apparently contained in a pre-printed part of the contract. One can imagine circumstances which would require a different interpretation of what the parties meant by "f.o.b.," notwithstanding the definition in the Regulations. For instance, if the inserted terms were "f.o.b. — as is," then the most reasonable interpretation of the intent of the parties would likely be that the "f.o.b." portion of the terms was intended only as an indication of pricing, i.e., that the quoted price did not include freight. This is true because the close juxtaposition of "f.o.b." and "as is" would strongly indicate that the parties knowingly wished to give effect to both, and such an interpretation would be the most likely meaning of the parties in such an event. In all contract interpretation the intent of the parties, where it can reasonably be discerned, should be paramount, except in those rare instances where public policy is thereby contravened. That such intent controls the meaning of the trade terms defined in the Regulations, and not vice versa, cannot be doubted. See *L. T. Malone Company v. Al Kaiser & Bros.*, 19 Agric. Dec. 84 (1960), and *L. T. Malone Company v. Jebbia-Metz Co.*, 18 Agric. Dec. 1287 (1959) where we stated:

> . . . the terms "f.o.b." and "delivered," as they pertain to sales, are defined in the regulations under the act and therefore have a well-established meaning in the trade. If [a party] chooses to use the terms in a different sense from that generally understood in the trade, then the burden rests upon him to show the peculiar meaning he attached to the term in the course of [the] transaction, and further to show that the party with whom he was dealing . . . understood such usage of the term

same reasoning, the provisions of 2 - 316(3)(b) apply only to implied warranties, and not to the express warranty of suitable shipping condition, applicable in this case by reason of the use by the parties of f.o.b. terms. Of course, similar conclusions are even more clearly applicable to the definition of "purchase after inspection" given in the Regulations, for in such definition warranties expressly made by the seller are specifically excepted from the effects of the term when it is used. As emphasized earlier, the term was not used in this case. There is no occasion here for concluding that the inspection of the apples performed by complainant's agent, even if admitted to have been an inspection of the same apples shipped, had any affect on the contract between the parties.

We turn now to a consideration of whether the apples made good delivery on arrival in Taiwan. In this connection we must consider the way in which the fruit was surveyed in Taiwan. The survey was performed prior to the unloading of the containers, and was done on March 31, April 1, and April 2, following the landing of the containers on March 28, and delivery to the receivers on March 30. We find this to be prompt for an international shipment.

The containers were placed in different locations, and instead of giving the results for each container, the survey lumps together the results for all containers, but gives a breakdown as to each size grouping for each grade of apples shipped. Since grades were mixed in the containers it is not possible to allocate the results by container. Respondent objects to the survey on this basis, asserting that it is impossible to know what affect transit conditions had on the damage revealed in the survey. Respondent's objection would be well taken were it not for the fact that the temperature history for the three containers is sufficiently similar, and sufficiently within normal parameters, that transit conditions may safely be said not to void the suitable shipping condition warranty as to any of the containers.

There remains the question whether, in determining the issue of breach, we should consider each container as a whole, consider the three containers as a whole shipment, consider each grade category as a separate whole, or consider each size within each grade. If we are required to consider each container as a whole then we have insufficient data to determine whether there was a breach. There is little basis for considering the three containers as one shipment, since separate contract documents were issued as to each container. The question whether we should consider each grade, or each size within each grade, leads us into confrontation with a number of cases which have determined that loads of produce must be considered as a whole for purposes of determining whether there

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at that time.

is a breach of contract. However, an examination of the way this subject has been treated over the years discloses inconsistencies that raise the question whether we should continue to follow these precedents. The earliest case we have discovered which treated a load as a whole for purposes of determining whether there was a breach was *Idaho Fruit Sales, Inc. v. Milwaukee Produce Distributing Co., Inc.* [19] where complainant sold respondent a truckload of U.S. No. 1 cherries, with the two halves of the load having been loaded at different orchards, and where each half bore a different label which reflected the orchard of its origin. A federal inspection at destination showed that the half of the load from one orchard contained considerable damage, enough to show a breach of contract as to that half, but the other half had very little damage. The decision stated that "since this was one load of cherries," it was necessary to consider the load as a whole, and as a whole the load made good delivery. In *Sin-Son Produce Co., Inc. v. Tom Lange Company, Inc.* [20] we found that a truckload containing three sizes of tomatoes shipped under one contract was a "commercial unit," and the whole load was deemed accepted when the tomatoes were unloaded "because a receiver cannot accept a part of a truckload of perishable agricultural commodities while rejecting the rest." We found that the inspection results as to each size should be averaged together to arrive at a damage percentage for the whole load in order to determine whether the load as a whole made good delivery. [21] These decisions seem to be influenced by a consideration of the "commercial unit" definition adopted by the Regulations which states:

> "Commercial Unit" means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract. Such commercial unit must be accepted or rejected in its entirety. Acceptance of a commercial unit does not modify the parties' existing contractual rights and responsibilities.[22]

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[19]*Idaho Fruit Sales, Inc. v. Milwaukee Produce Distributing Co., Inc.*, 37 Agric. Dec. 737 (1978).

[20]*Sin-Son Produce Co., Inc. v. Tom Lange Company, Inc.*, 44 Agric. Dec. 409 (1985).

[21]See also *Jen Sales, Inc. v. S. Friedman & Sons, Inc.*, 53 Agric. Dec. 810 (1994).

[22]7 C.F.R. § 46.43(ii).

However, in the same year in which *Sin-Son* was decided another decision cast doubt on its result. In *D M B Packing Corp. v. Garden Products, Inc.*,[23] respondent had accepted a load, consisting of three sizes, of tomatoes. The extra large size tomatoes were shown by the arrival inspection to be the most severely damaged. We stated:

> This lot was of course, the smallest, amounting to only 72 cases. Considering the lot shipment as a whole, the inspection does not show that the load failed to make good delivery. However, this does not mean that we would be precluded from awarding damages relative to the extra large size tomatoes, assuming that such damages had been proven.

In addition, where a mixed load is involved, we have not followed the precedents cited earlier. Where such goods are accepted a buyer can prove a breach, and collect damages, as to less than a commercial unit. In *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*,[24] asparagus were a small part of a load of mixed produce, and we found a breach as to the asparagus and awarded damages. In *The Garin Company v. Ed Given, Inc.*[25] we awarded damages for cauliflower which did not make good delivery on arrival, and was a part of a mixed load containing other produce which did make good delivery. A breach was found as to cantaloupes that were a part of a larger mixed load of produce, and damages were awarded, in *Sharyland Corp. v. Milrose Food Brokers of NJ, Inc.*,[26] and in *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*[27] a breach was found as to cauliflower which was accepted as a part of a larger mixed load of produce, and damages were awarded. In *Everkrisp Vegetables, Inc. v. J.*

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[23]*D M B Packing Corp. v. Garden Products, Inc.*, 44 Agric. Dec. 1304 (1985).

[24]*Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991).

[25]*The Garin Company v. Ed Given, Inc.*, 44 Agric. Dec. 1359 (1985).

[26]*Sharyland Corp. v. Milrose Food Brokers of NJ, Inc.*, 50 Agric. Dec. 994 (1991).

[27]*Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1209 (1982)

Randazzo & Sons, Inc. [28] the whole load consisted of grapes, but in two varieties. Complainant sold to respondent 882 cartons of Perlett grapes, and 318 cartons of Flame grapes. An inspection on arrival showed different percentages of damage for each lot, and a breach was found, and damages awarded, for the Perlett grapes, but no breach was found for the Flame grapes. More significantly, these exceptions to the precedent requiring that we treat a load as a whole load for determining whether there is a breach, have been logically extended to allow rejection where a breach has been found as to only some of the commodities in a mixed load.[29]

If, as *Sin-Son* would seem to indicate, the "commercial unit" definition is the basis for focusing on the whole load to determine whether there is a breach of contract, it is apparent that there is no basis in the definition for treating mixed loads any different than loads containing a single commodity. The regulation speaks of "one or more perishable agricultural commodities."

In the only case found from the era long prior to the issuance of the "commercial unit" definition, we find a very different attitude toward breach when only a portion of a load was in question. There, a load containing 1,470 boxes of peaches, sold as U. S. Extra No. 1, was shipped, and the buyer accepted the load on arrival. A federal inspection indicated that only 142 boxes, consisting of the size 65s and 70s, failed to make grade. Nevertheless, a breach was found as to only the 142 boxes.[30]

When we give close consideration to the "commercial unit" regulation we find that there is no requirement that damaged portions of a load be lumped with the portions of the load that have no, or less, damage. The definition only requires acceptance or rejection of the whole shipment. There is nothing to prohibit rejection of a shipment when the breach exists only as to a portion of the load, and there is no prohibition of finding a breach and damages as to only a portion of a load when the whole load is accepted. We can find no reasonable basis for continuing to require that a breach pertain to a load as a whole, and the cases that

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[28] *Everkrisp Vegetables, Inc. v. J. Randazzo & Sons, Inc.*, 46 Agric. Dec. 1536 (1987).

[29] *Van Solkema Farms, Inc. v. Atlantic Produce*, 45 Agric. Dec. 1637 (1986).

[30] *United Packing Co. v. Connecticut Celery Co.*, 16 Agric. Dec. 810 (1957).

hold otherwise are overruled.[31]

The portions of a load which will be considered as subject to a finding of breach of contract will generally be those which are distinguished in federal inspections. The *General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors*,[32] provide, in part, that:

> [471] [w]henever there is a marked difference found in quality, condition or size and such differences can be definitely associated with different types or sizes of packages or certain markings on the packings, then the certificate and notesheet must report such differences as separate lots. The package markings which must be separated when such differences exist include brands, size, grade, variety, and Positive Lot Identification marks. The notesheet must show next to each sample the particular markings so that such differences can be recognized during the process of inspection and for appeal purposes. It is not permissible to combine readily identifiable out-of-grade or properly sized lots with identifiable out-of-grade or off-size lots in order to cause the combined lot to either fail or pass, . . ."
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> [472] "No firm rule can be established on the amount of irregularity required before such lots must be reported separately. However, when some lots would fail to grade and others would pass, even on the basis of a condition only inspection, then those lots definitely must be reported separately. . . ."

In the present case, the categories used by the survey in Taiwan are

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[31]This should not be viewed as having any affect upon the line of cases dealing with those situations where only a portion of a homogeneous load is inspected, and found to be in poor condition. Those cases are based upon the thoroughly reasonable fear that the portion not inspected may have been of better quality, and may have been selected out for that reason. If, however, the portion inspected is distinguishable as a lot from the remainder not inspected, even though the portion not inspected is assumed to have been free of significant defects, the rule enunciated today will apply, and a breach may be found as to the inspected portion. See *South Florida Growers Association, Inc. v. County Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *Salinas Lettuce farmers Cooperative v. Ag-West Growers, Inc.*, 50 Agric. Dec. 984 (1991); and *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons, Co., and C. H. Robinson*, 49 Agric. Dec. 620 (1990).

[32]*General Market Inspection Instructions for Use of Fresh Fruit and Vegetable Inspectors*, Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, paragraphs 471 and 472 (Jan., 1988, as revised May, 1992).

appropriate for us to use in making the determination as to whether a breach of contract is indicated as to each of such categories. After consideration of the terms of sale, and the expected length of the transit period, we have determined that any amount of rot or decay in excess of 5.5 percent will be considered abnormal, and any total of rot and brown spots in excess of 20 percent will be considered abnormal.[33] The application of these criteria to the survey results related in finding 5 should make clear those portions of the three containers which we deem to have arrived in breach of the warranty of suitable shipping condition. It only remains to attempt an assessment of damages as to each of those portions.

The measure of damages as to accepted goods is stated in UCC section 2-714(2) as follows:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

As the value of the apples if they had been as warranted, in the absence of market prices in Taiwan, we may use the delivered cost of the apples. The value of the apples accepted may be shown by the gross proceeds of the resale of such apples in Taiwan. In addition, under UCC section 2-714(3) ". . . any incidental and consequential damages under section 2-715 may also be recovered."

Complainant's customer in Taiwan has supplied us with a detailed record of the expenses associated with the apples. Some of these expenses should be included as components of the delivered cost of the apples. The expenses are, unfortunately, stated as totals associated with the three shipments as a whole. However, such expenses can be broken out so as to allocate them to the lots which were surveyed. The major expense is the import duty on the three containers in the amount of $26,228.74. Unfortunately complainant did not inform us whether this import duty was assessed on the basis of thc invoice cost of thc apples, or on the basis of the weight. Therefore, in order to use the duty as a part of the delivered cost as to the several lots of apples as to which we have found a breach we will have to compute the applicable amount on the basis of both weight and invoice

[33] If we had used the grade designations as the basic categories for determination of whether there was a breach, we would have concluded that there was a breach as to the U.S. No. 1 cartons considered as a whole, and that there was no breach as to any of the Extra Fancy and Fancy apples. We did not use these categories because the surveyor broke the shipments into smaller categories, and subsequent sales were based on these smaller categories.

cost, and use the lesser of the two amounts.[34] The labor fees, coldroom charge, and handling charge should not be used as a component of the delivered cost since these are expenses associated with the normal handling and distribution of the produce. Complainant also listed as an expense "tax" in the amount of $5,935.26. In the affidavit of Betty Sung, submitted as a part of complainant's statement in reply, the expenses are set forth with an explanation for each item, and documentation for each item is attached. However, the "tax" is not listed as an expense in this affidavit, and no explanation for the tax is contained in the affidavit. Nevertheless, exhibit 6, a letter from the Taiwanese buyer, which is attached as evidence for the handling fee, contains a statement as to the "tax." This statement indicates that the listed amount is an "estimated" "value added tax," and that it is computed on the "landed cost." We are unable to ascertain from the evidence submitted whether the tax has been paid, or whether the amount claimed is the correct amount. Nor is it certain that, if such information were available, the tax would be a proper expense for inclusion in complainant's damages. The "tax" is disallowed. The drayage will be allowed as a component of the delivered cost, and allocated, on the basis of weight, to the items as to which we have found a breach. The Customs charges and terminal receiving charge will also be allowed as a part of the delivered cost. Since we were not informed as to whether these were assessed on the basis of weight or invoice cost, we will add these to the import duty so as to utilize the lesser of the amounts calculated on both bases. The survey charge will be allowed in its entirety as an incidental expense attributable to the breach.

The 5 cartons of size 64 U.S. No. 1 apples were sold at a delivered to harbor price of $33.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges, allocated on the basis of the $33.95 price, amount to $13.38 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges of $.3357 per carton, to the delivered harbor price results in a per carton delivered cost of $45.0157, or a delivered cost for the 5 cartons of $225.08. Thc accounting shows

[34]By using this method of computation we do not allow complainant the full amount of the duty charge allocable to the lots as to which we have found a breach. However, complainant's failure to supply us with the necessary information to compute complainant's damages must not be allowed to harm respondent. *Cf. Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

that these apples sold for NT$ 750,[35] or US $28.3661,[36] or $141.83. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $83.25.

The 36 cartons of size 72 U.S. No. 1 apples were sold at a delivered to harbor price of $33.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $33.95 price amount to $13.38 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $45.0157, or a delivered cost for the 36 cartons of $1,620.57. The accounting shows that these apples sold for NT$ 750, or US $28.3661, or $1,021.18. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $599.39.

The 120 cartons of size 80 U.S. No. 1 apples were sold at a delivered to harbor price of $31.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $31.95 price amount to $12.59 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $43.0157, or a delivered cost for the 120 cartons of $5,161.88. The accounting shows that 119 cartons of these apples sold for an average price of NT$ 716.13, or US $27.0851, or $3,223.13.[37] Complainant's damages for this lot is the difference between this amount and the delivered cost, or $1,938.75.

The 126 cartons of size 88 U.S. No. 1 apples were sold at a delivered to harbor price of $29.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $29.95 price

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[35]An examination of the accounting shows that these 5 cartons were sold under the U.S. No. 1, size 72 category, and that the 36 cartons of U.S. No. 1, size 72 apples were sold under the U.S. No. 1, size 88 category. This is evident from the fact that reported sales for each category, exclusive of these two, balance with the amounts reported shipped, with minor exceptions attributable for the most part to the four cartons lost due to the survey.

[36]The exchange rate of 26.44 Taiwan dollars to 1 U.S. dollar was supplied by complainant. Respondent did not object to this exchange rate.

[37]The missing carton was apparently lost as a result of the survey, and therefore we have, by using the figure of 119 in computing the actual value of the apples, allowed the loss of this carton as a part of complainant's damages.

amount to $11.80 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $41.0157, or a delivered cost for the 126 cartons of $5,167.98. The accounting shows that 126 cartons of these apples sold for an average price of NT$ 686.90, or US $25.9796, or $3,273.43. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $1,894.55.

The 336 cartons of size 100 U.S. No. 1 apples were sold at a delivered to harbor price of $24.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $24.95 price amount to $9.83 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $35.1157, or a delivered cost for the 336 cartons of $11,798.88. The accounting shows that 336 cartons of these apples sold for an average price of NT$ 730.57, or US $27.6312, or $9,284.08. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $2,514.80.

The 294 cartons of size 113 U.S. No. 1 apples were sold at a delivered to harbor price of $23.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $23.95 price amount to $9.44 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $33.7257, or a delivered cost for the 294 cartons of $9,915.36. The accounting shows that 294 cartons of these apples sold for a per carton price of NT$ 650, or US $24.5840, or $7,227.70. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $2,687.66.

The 126 cartons of size 150 U.S. No. 1 apples were sold at a delivered to harbor price of $21.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $21.95 price amount to $8.65 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $30.9357, or a delivered cost for the 126 cartons of $3,897.90. The accounting shows that 126 cartons of these apples sold for a per carton price of NT$ 733.33, or US $27.74, or $3,495.24. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $402.66.

The 84 cartons of size 88 U.S. Fancy apples were sold at a delivered to harbor price of $33.95 per carton. Per carton drayage charges are $.3357. The duty,

customs, and terminal receiving charges allocated on the basis of the $33.95 price amount to $13.38 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $45.0157, or a delivered cost for the 84 cartons of $3,781.32. The accounting shows that 84 cartons of these apples sold for an average per carton price of NT$ 788.45, or US $29.8203, or $2,504.91. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $1,276.41.

The 3 cartons of size 72 U.S. Extra Fancy apples were sold at a delivered to harbor price of $55.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $55.95 price amount to $22.06 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $67.0157, or a delivered cost for the 3 cartons of $201.05. The accounting shows that 3 cartons of these apples sold for a per carton price of NT$ 800, or US $30.2572, or $90.77. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $110.28.

The 4 cartons of size 88 U.S. Extra Fancy apples were sold at a delivered to harbor price of $39.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $39.95 price amount to $15.74 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $51.0157, or a delivered cost for the 4 cartons of $204.06. The accounting shows that 4 cartons of these apples sold for a per carton price of NT$ 800, or US $30.2572, or $121.03. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $83.03.

The 14 cartons of size 100 U.S. Extra Fancy apples were sold at a delivered to harbor price of $32.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $32.95 price amount to $12.98 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $44.0157, or a delivered cost for the 14 cartons of $616.22. The accounting shows that 14 cartons of these apples sold for a per carton price of NT$ 800, or US $30.2572, or $423.60. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $192.62.

The 16 cartons of size 113 U.S. Extra Fancy apples were sold at a delivered

to harbor price of $30.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $30.95 price amount to $12.19 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $42.0157, or a delivered cost for the 16 cartons of $672.25. The accounting shows that 16 cartons of these apples sold for a per carton price of NT$ 800, or US $30.2572, or $484.12. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $188.13.

The 8 cartons of size 138 U.S. Extra Fancy apples were sold at a delivered to harbor price of $28.95 per carton. Per carton drayage charges are $.3357. The duty, customs, and terminal receiving charges allocated on the basis of the $28.95 price amount to $11.41 per carton. Allocated on a weight basis these charges are $10.73. Adding the lower of these amounts, plus the drayage charges, to the delivered harbor price results in a per carton delivered cost of $40.0157, or a delivered cost for the 8 cartons of $320.13. The accounting shows that 8 cartons of these apples sold for a per carton price of NT$ 800, or US $30.2572, or $242.06. Complainant's damages for this lot is the difference between this amount and the delivered cost, or $78.07.

The total of the damages resulting from respondent's breaches of contract is $12,049.60. In addition complainant is entitled to the $605.00 survey fee as an incidental expense resulting from the breach. The value of the four cartons of apples lost as a result of the survey should also be allowed. One of these was allowed in the computation of damages as to the U.S. No. 1, size 80 apples. Two of the cartons came from the U.S. No. 1, size 163, which had a per carton delivered value which totaled $29.5357, or $59.07 for the two containers. The remaining container came from the U.S. Fancy, size 72, which had a delivered value which totaled $53.02. Since complainant accepted the apples it became liable to respondent for their full contract price. Since such price has been paid in full, complainant is entitled to reparation for the full amount of its damages. Respondent's failure to pay complainant $12,766.69 is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[38] Since the

[38]*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[39] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $12,766.69, with interest thereon at the rate of 10% per annum from May 1, 1994, until paid.

Copies of this order shall be served upon the parties.

DeBRUYN PRODUCE CO. v. RUBEN E. LOPEZ d/b/a R L DISTRIBUTORS.
PACA Docket No. R-96-0008.
Decision and Order filed March 17, 1997.

Consignments — adequacy of accounting

Onions arrived showing breach of delivered sale contract, but were in good enough condition that they would have made good delivery if sale had been f.o.b. As a result of the breach the parties agreed to the receiver handling the onions on a consignment basis. The accounting disclosed that the onions were sorted, and then sold in one lot which contained the same number of sacks as were shipped. Gross proceeds of the resale were less than half of the current market price, but this was stated to not be sufficient cause, in and of itself, to find the accounting improper. The accounting also lumped together as one charge the cost of storage, sorting, and commission. It was stated that the sale of the onions in one lot, though not fatal to the accounting, was unusual, and was more questionable when the price appears markedly low relative to market price. The accounting was found to be improper in that it showed no wastage resulting from the sorting, and in that it failed to break out the charges for commission, sorting, and storage. The charge for storage was also stated to be improper. The shipper was awarded reasonable value based on the low price shown by market reports, less the percentage of condition defects shown by the arrival inspection.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and order issued by William G. Jenson, Judicial Officer.

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[39]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $4,587.43 in connection with a transaction in interstate commerce involving onions.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, DeBruyn Produce Co., is a corporation whose address is Michigan.
2. Respondent, Ruben E. Lopez, is an individual doing business as R L Distributors, whose address is (b) (6) At the time of the transaction involved herein respondent was licensed under the Act.
3. On or about March 10, 1995, complainant sold to respondent 870 50 lb. sacks of medium yellow onions, U. S. No. 1, for $9.00 per sack, or a total of $7,830.00, delivered to respondent at Cypress, California.
4. On March 13, 1995, at 3:20 p.m., the onions were federally inspected at shipping point in Ontario, Oregon, and graded U. S. No. 1, 2 inch minimum, with no defects noted. On the same date the onions were shipped to respondent by truck.
5. The onions arrived at respondent's place of business near Los Angeles on March 15, 1995, and were federally inspected at 9:00 a.m. of that day while still loaded on the truck. The certificate of inspection stated in relevant part as follows:

[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995.(Public Law 104-48).

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID	NUMBER OF	INSP.
A	50 to 56 °F	Northern Onions	"CITATION"	ID	yellow	870 Sacks	N

LOT	AVERAGE DEFECTS	including SER DAM	including V:. S. DAM	OFFSIZE/DEFECT	OTHER
00	% 00	%	% Quality		Gen firm & Dry
07	% 07	%	% Watery Scales (1 to 15%)		
01	% 00	%	% Sprouts		
½	% ½	%	% Decay		
08	% 07	%	% Checksum		Size: 2 1/8 to 3 1/4" DIA.
GRADE: fails to grade U.S. No. 1,2" minimum DIA only account condition.					no off size.

6. Respondent promptly rejected the onions to complainant, and complainant requested that respondent handle the onions on a consignment basis. Respondent agreed to complainant's request.

7. On March 17, 1995, respondent rendered an accounting to complainant showing that 870 sacks of medium yellow onions had been sold in one lot for $4.65 per sack, or $4,045.50. Respondent deducted $687.73 for "STORAGE SORTING & COMMISSION," $40.00 for "UNLOADING," and $75.20 for the inspection, leaving net proceeds of $3,242.57, which were remitted to complainant.

8. Market reports [2] show that fair average quality medium yellow onions in 50 lb. sacks from Idaho-Oregon were selling on the Los Angeles terminal market at the following prices, on the following dates:

March 15, 1995	$12.00 - 14.00
March 16, 1995	$11.00 - 13.00
March 17, 1995	$11.00 - 13.00

9. The formal complaint was filed on July 27, 1995, which was within nine months after the cause of action therein accrued.

Conclusions

Complainant asserts that the accounting furnished by respondent is flawed, and complains that the price reported in such accounting is too low in comparison to the prices shown by contemporary market reports. We have stated:

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[2]Published by the Market News Branch of the Fruit & Vegetable Division of the Agricultural Marketing Service of this Department.

> Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.[3]

The prices realized in this case are low relative to market price. The fact of complainant's obvious breach of the original sale contract does not alter this conclusion. As complainant points out, the federal inspection at destination shows that the onions failed to make the required grade by only 3 percentage points. Moreover, if the contract had been f.o.b. instead of delivered, the onions would have made good delivery, and there would have been no breach. It is, nevertheless, questionable whether we would find a breach by respondent of his agency duties under the consignment contract based on the price differential alone. However, in this case complainant has called into question more than the price differential between market price and the price realized by its agent. Complainant also points out that the accounting claims that the onions were sorted, but also shows that all 870 sacks were sold. Respondent's reply was to imply that the sacks in which it sold the onions contained less than 50 pounds, and to assert that this was not a violation of the false branding requirements of the Act[4] because the party to whom the onions were sold knew that the weight label was false. Respondent's idea that a verbal disclosure to a purchaser that produce weighs less than the weight stated on the label obviates the false branding requirements of the Act is patently incorrect. But more importantly for our purposes here, this assertion by respondent does not cure the flaw in the accounting. The proper sorting of produce with defects totaling 8 percent on a federal inspection will result in at least 8 percent (and likely more) wastage. An accounting that, on its face, shows no wastage, and yet claims expenses for sorting, is flawed, even if the consignee attempts to explain away the apparent discrepancy by admitting to illegal acts. The

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[3]*Lavern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc.*, 46 Agric. Dec. 1673 (1987). See also *Southampton Prod. Dist'rs v. D.C. Flores & Co.*, 19 Agric. Dec. 893 (1960); *Monarch Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956); PACA Docket 5512, 11 Agric. Dec. 388 (1952).

[4]7 U.S.C. § 499b(5).

accounting is further flawed by failing to break out the costs relating to storage[5], sorting, and commission. The sale of the onions in one lot to one customer is unusual, but not necessarily fatal. Such practice becomes more questionable when the price appears to be markedly low. We find on the basis of all the evidence of record that respondent failed to issue a proper accounting, and thus failed to perform its fiduciary duty under the consignment agreement.

Respondent is liable to complainant for the reasonable value of the onions. We will use the low price shown by the market report for March 15, or $12.00, and reduce such value by the 8 percent defects shown by the federal inspection, to arrive at a figure of $11.04 as the value of the onions. In addition respondent should be allowed a commission of 20 percent, or $2.21 per sack, and the inspection fee of $75.20. The total reasonable value of the shipment was $7,606.90. Respondent has already paid complainant $3,242.57. The total amount remaining due from respondent to complainant is $4,364.33. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. In addition, respondent is liable to complainant for the $300.00 handling fee as prescribed by section 5(a) of the Act.[6]

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[7] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[8] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $4,364.33, with interest thereon at the rate of 10% per

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[5]Storage would not be allowable as an expense in any event.

[6]7 U.S.C. § 499e(a).

[7]*L&N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L&N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[8]*See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

annum from April 1, 1995, until paid. Within 30 days from the date of this order respondent shall pay to complainant the additional sum of $300.

Copies of this order shall be served upon the parties.

R & R PRODUCE, INC., v. FRESH UNLIMITED, INC., d/b/a FRESHWAY FOODS.
PACA Docket No. R-95-0212.
Decision and Order filed April 30, 1997.

Contracts — Impossibility Of Performance
Contracts — Right To Adequate Assuarance Of Performance
Cover — May Be Accomplished By Contract To Purchase In Future
Cover — Right To Cover Does Not Survive Justified Demand For Assurance

Where complainant was obligated under a requirements contract to ship 5 loads of bin lettuce per week to respondent for the period of one year, a claim that no supplies were available was insufficient to furnish an excuse not to ship under UCC section 2-615. Respondent's late payments also did not furnish an excuse not to ship under the contract, but were grounds for insecurity and a demand for assurance of respondent's ability to perform under the contract. Furthermore, under UCC section 2-609(3), complainant's right to demand assurance was not prejudiced by its delay in making the demand, and complainant was justified in withholding performance under the supply contract while it awaited a response to its demand for assurance, and following respondent's failure to respond to its demand.

Respondent was found to be entitled to make purchases to cover complainant's failure to ship under the contract for the period prior to the demand for assurance, and was also entitled to credit for cover as to purchases made under a substitute supply contract insofar as that contract was concluded prior to the demand for assurance, but not as to purchases made under a modification of that contract made after the demand for assurance.

George S. Whitten, Presiding Officer.
Andrew M. Lauderdale, Watsonville, CA, for Complainant.
Joseph P. McCafferty, Cleveland, OH, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of $66,432.20 in connection with sixteen transactions in interstate commerce involving mixed perishable produce, principally bin lettuce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent

which filed an answer thereto denying liability to complainant. Complainant then filed an amended complaint in which it added one shipment of bin lettuce bringing the total amount of reparation sought to $70,318.70. Respondent filed an answer to the amended complaint denying any liability thereunder. Respondent's amended answer included a counterclaim and set-off in the amount of $368.789.82 arising out of the parties' contract for the supply of bin lettuce.

The amounts claimed in both the formal complaint and counterclaim exceed $15,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed a brief.

Findings of Fact

1. Complainant, R & R Produce, Inc., is a corporation whose address is California. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Fresh Unlimited, Inc., is a corporation doing business as Freshway Foods, whose address is Ohio. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about May 6, 1994, complaint and respondent entered into a contract calling for complainant to supply respondent with bin lettuce. The contract was written under complainant's letterhead, and stated as follows:

ATTENTION: FRANK GILARDI
FRESHWAY FOODS

R&R PRODUCE, INC. HAS SECURED FIVE LOADS OF BIN LETTUCE WEEKLY, STARTING JUNE 1st, 1994 THRU MAY 31st, 1995.

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

FRESHWAY AGREES TO PAY 10¢ PER POUND FOR FOUR LOADS WEEKLY AND .095¢ PER POUND FOR ONE LOAD WEEKLY. (EACH LOAD CONSISTING OF APPROXIMATELY 41,000 LBS. NET.

/s/	/s/
FRANK GILARDI President 5/6/94	ROBERT ROSSI
FRESHWAY FOODS	R&R PRODUCE, INC.

4. Complainant began shipping lettuce to respondent on June 1, 1994. Complainant shipped 24 loads of lettuce in June, 22 loads in July, 22 loads in August, 20 loads in September, 17 loads in October, 15 loads in November, and 6 loads in December, or a total of 126 loads. Prior to the filing of the informal complaint respondent had paid for 110 of the loads. Respondent's payment times were as follows:

For the 24 June loads between 41 and 49 days, or an average of 45.25 days.
For the 22 July loads between 43 and 54 days, or an average of 48.73 days.
For the 22 Aug. loads between 44 and 57 days, or an average of 50.50 days.
For the 20 Sept. loads between 45 and 65 days, or an average of 57.20 days.
For the 17 Oct. loads between 51 and 59 days, or an average of 54.58 days.
For the 4 paid Nov. loads between 38 and 56 days, or an average of 48 days.
For the 1 paid Dec. load 34 days.

The average payment time for all loads that were paid was approximately 51 days. At the time the informal complaint was written on January 6, 1995, there were 16 loads that remained unpaid. These 16 loads had been unpaid on Jan. 6, for from 8 to 58 days, or an average of 42 days.

5. Bin lettuce supplies became scarce during November, 1994, to January, 1995, and market prices rose precipitously. When respondent fell behind in its supply of bin lettuce in November, Frank Gilardi informed Robert Rossi that the supply of only 2 to 3 loads per week would not be viewed as a breach of the requirements contract as long as such amount was maintained.

6. On December 21, 1994, respondent wrote to complainant stating that for the past several weeks respondent had not been getting all of the loads required under the contract. At the time of writing complainant had shipped 3 loads during the week that was comprised of the last part of November and first part of December, and only 1 load during each of the remaining three weeks of December.

Respondent gave complainant "until midnight Friday, December 23, 1994, to confirm shipment and dispatch of at least two full loads (41,000 plus pounds) of bin lettuce to our facility." Respondent stated that if this was not done respondent would buy against the contract. On or about December 23, 1994, Gilardi and Rossi talked by phone, and Rossi stated that complainant did not have any supply of bin lettuce to ship, but requested time to find a supply. Gilardi stated that respondent would not buy against the contract if complainant could confirm by December 27, 1994, that a load was on its way to respondent. No such confirmation was given.

7. On January 5, 1994, respondent sent (stated to have been sent via UPS next day air and faxed for receipt January 6, 1995) complainant a letter setting forth purchases against the contract, and attached a "DEBIT MEMO" which respondent said was being applied as a credit to their accounts payable. The debit memo stated in part as follows:

> Because of your failure to supply our company with bulk bin lettuce as stated in our contract we were forced to purchase substitute goods in order to fulfill contracts with our customers. This debit memo represents the amount of product purchased against your contract.
>
> A summary of the dates, quantities, and dollar amounts purchased follows:

DATE	QTY	AMOUNT ACTUALLY PAID	AMOUNT CONTRACT PRICE	AMOUNT PAID OVER CONTRACT
12-26-94	40,660#	$16,670.60	$4,066.00	$12,604.60
12-28-94	10,100#	6,060.00	1,010.00	5,050.00
12-28-94	14,900#	7,599.00	1,490.00	6,109.00
12-29-94	7,500#	3,060.00	750.00	2,310.00
12-29-94	10,000#	5,800.00	1,000.00	4,800.00
12-29-94	12,000#	6,480.00	1,200.00	5,280.00
12-29-94	13,750#	7,012.50	1,375.00	5,637.50
12-31-94	30,991#	6,198.20	3,099.10	3,099.10
TOTAL	139,901#			$44,890.20

8. On January 6, 1995, complainant wrote the informal complaint letter. This letter was received by the Department on January 10, 1995. A copy was sent by

complainant to respondent. This letter, like the formal complaint filed later, listed 16 loads as unpaid. Invoices were attached which showed, in part, as follows:

DATE	INV. NO	QUANT.	DESCRIPTION	UNIT PRICE	AMOUNT
11-8-94	G-2096	96	BROCCOLI BITS	$12.30	$1,180.80
		40	LETTUCE BINS 37,180#	.10	3,718.00
			RECORDER #701534		23.50
					$4,922.30
11-8-94	G-2112	42	LETTUCE BINS 34,460#	.10	$3,446.00
			RECORDER #162136		23.50
					$3,469.50
11-9-94	G-2137	42	LETTUCE BINS 34,460#	.10	$3,446.00
			RECORDER #622724		23.50
					$3,469.50
11-14-94	G-2161	46	LETTUCE BINS 36,700#	.10	$3,670.00
			RECORDER #162123		23.50
					$3,693.50
11-14-94	G-2172	48	CAULIFLOWER 9	11.75	$ 564.00
		32	CELERY 30	10.25	328.00
		32	LETTUCE BINS 27,300#	.10	2,730.00
			RECORDER #223227		23.50
					$3,645.50
11-15-94	G-2165	900	LETTUCE 24 "EARLY MONTEREY"	4.35	$3,915.00
					23.50
					$3,938.50
11-17-94	G-2185	40	LETTUCE BINS 40,520#	.10	$4,052.00
			RECORDER #207322		23.50
					$4,075.50
11-17-94	G-2186	64	CELERY 30	9.75	$ 624.00
		24	LETTUCE BINS 24,080#	.10	2,408.00
		16	LETTUCE BINS 13,220#	.10	1,322.00
			RECORDER #223227		23.50
					$4,377.50
11-19-94	G-2194	48	LETTUCE BINS 42,220#	.10	$4,222.00
			RECORDER #391247		23.50
					$4,245.50
11-21-94	G-2200	64	CELERY 30	9.75	$ 624.00
		42	LETTUCE BINS 36,920#	.10	3,692.00
			RECORDER #216241		23.50
					$4,339.50
11-22-94	G-2204	46	LETTUCE BINS 39,040#	.10	$3,904.00
			RECORDER #216257		23.50
					$3,927.50
12-02-94	G-2260	46	LETTUCE BINS 40,050#	.10	$4,005.00
			RECORDER #2007736		23.50
					$4,028.50
12-05-94	G-2269	46	LETTUCE BINS 41,080#	.10	$4,108.00
			RECORDER #2007228		23.50
					$4,131.50
12-08-94	G-2295	43	LETTUCE BINS 41,350#	.14	$5,789.00
			RECORDER #581829		23.50

					$5,812.50
12-16-94	**G-2317**	**38**	**LETTUCE BINS 34,160#**	**.14**	**$4,782.40**
			RECORDER #2012557		**23.50**
					$4,805.90
12-29-94	**G-2375**	**44**	**LETTUCE BINS 35,260#**	**.10**	**$3,526.00**
			RECORDER #2004793		**23.50**
					$3,549.50

Complainant later amended its complaint to include an additional load shipped January 4, 1995, with a total cost of $3,886.50, but disclosed no particulars as to such load. Respondent, however, admitted receipt of the load, and that the total claimed for the load was correct.

9. When complainant sent a copy of the informal complaint letter to respondent on January 6, 1995, it included a letter to respondent which was not made a part of the record. On January 13, 1995, respondent sent a letter to complainant in which it responded to allegations made in cómplainant's January 6, letter. On January 23, 1995, respondent again wrote to complainant giving notice that three additional purchases had been made against the contract. These purchases were set forth as follows:

DATE	QTY	AMOUNT ACTUALLY PAID	AMOUNT CONTRACT PRICE	AMOUNT PAID OVER CONTRACT
1-10-95	41,574#	$7,899.06	$4,157.40	$3,741.66
1-12-95	39,852#	4,383.72	3,985.20	398.52
1-12-95	42,312#	5,289.00	4,231.20	1,057.80

10. On February 3, 1995, Robert Rossi of complainant wrote the following letter to Frank Gilardi of respondent:

> For reasons beyond the control of R&R PRODUCE, INC. we have been unable to supply FRESHWAY with five deliveries of lettuce per week. I explained these reasons to you in some detail in my letter of January 6, 1995.
>
> R&R PRODUCE is ready and willing to perform under our May 6, 1994 contract to the maximum extent possible. We are ready to begin doing so as soon as we receive some reasonable assurance from you that R&R PRODUCE will be paid for any product delivered.
>
> We deny that R&R is responsible for any of FRESHWAY's costs for open purchases but R&R will certainly not be responsible for FRESHWAY's

refusal to accept and pay for the lettuce we can deliver.

Please advise.

11. On February 9, 1995, complainant faxed a proposed modification of the May 6, 1994, contract to respondent. This proposed modification recited the dispute that had arisen over the May 6, 1994, contract, provided that rights and claims which arose prior to the modification would not be waived or released, called for the shipment of 1 load of bin lettuce per week until May 31, 1995, and a 30 day payment period, and included a force majeure clause. Respondent did not sign the proposed modification.

12. On January 18, 1995, respondent entered into a "Bin Lettuce Agreement" with Diamond Produce, of Salinas, California whereby that firm was required to supply respondent with 1 load of bin lettuce per week ("40 bins per load") through December 31, 1995, at $0.105 per pound. The contract included a force majeure clause that provided as follows:

> 2. Shipper shall supply Buyer with:
>
> a. A steady supply of lettuce as specified in Section 1 above regardless of the lettuce market. It is the responsibility of shipper to fulfill its obligations under Section 1 of this Agreement, with the exception of an industry-wide crop shortage due to acts of God (i.e. hurricane, tornado, or an industry-wide shortage of the lettuce crop due to adverse weather), labor strikes or other unforeseen events beyond the reasonable control of the shipper.
>
> b. The exception described in the previous paragraph applies only if the entire producc industry within Shipper's District is affected. This exception does not allow for grower errors in estimating acreage for fulfilling commitment, poor growing practices or any conditions subject to or under human control.

On February 15, 1995, respondent and Diamond Produce entered into a second "Bin Lettuce Agreement" for the supply of bin lettuce with essentially the same provisions as the January 18, 1995, contract, except that 2 loads per week of bin lettuce were required to be shipped. This was interpreted by the parties as adding one load to the January 18, 1995, contract, so that Diamond Produce's total

obligation was to ship only 2 loads per week.

13. Under the above contracts Diamond Produce made the following lettuce shipments:

DATE	QTY	AMOUNT ACTUALLY PAID	AMOUNT CONTRACT PRICE	AMOUNT PAID OVER CONTRACT
1-26-95	41,378#	$4,344.69	$4,157.40	$206.89
2-02-95	41,884#	4,397.82	4,188.40	209.42
2-10-95	36,016#	3,781.68	3,601.60	180.08
2-16-95	36,284#	3,809.82	3,628.40	181.42
2-22-95	41,640#	4,372.20	4,164.00	208.20
2-23-95	34,508#	3,623.34	3,450.80	172.54
2-27-95	41,484#	4,355.82	4,148.40	207.42
3-03-95	36,038#	3,783.99	3,603.80	180.19
3-06-95	40,324#	4,234.02	4,032.40	201.62
3-09-95	32,500#	3,412.50	3,250.00	162.50
3-14-95	40,616#	4,264.68	4,061.60	203.08
3-16-95	31,212#	3,277.26	3,121.20	156.06
3-20-95	40,172#	4,218.06	4,017.20	200.86

14. Respondent relieved Diamond Produce of its obligation under the "Bin Lettuce Agreement" "[d]ue to market shortages in late March 1995 . . . ." From March 23, 1995, through May 23, 1995, Diamond Produce supplied respondent with 28 loads of bin lettuce. The difference between the price of such lettuce under the $.10 per pound price of the original May 6, 1994, contract between complainant and respondent, and the market prices paid by respondent to Diamond Produce totaled $312,931.36.

15. An informal complaint was filed on January 10, 1995, which was within nine months after the causes of action alleged therein accrued. The counterclaim was filed on July 12, 1995, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 16 loads of mixed perishable produce, the largest portion of which was bin lettuce sold to respondent under the contract set forth in finding of fact 3. Respondent admits the purchase, shipment, and acceptance of the produce, but claims that it was justified in setting off against the admitted purchase price of the 16 loads, the cost of cover purchases made against the contract as a consequence of complainant's failure to

ship the number of loads required by the contract. In addition respondent has counterclaimed for a substantial excess of the cost of cover above the purchase price of the 16 loads.

Since respondent's basic liability for the 16 loads is not in dispute, the focus of our inquiry is upon respondent's alleged right to cover, and the extent of that right. Complainant disputes respondent's alleged right to cover on several grounds.

First, complainant asserts supplies of bin lettuce became scarce in November, 1994, to January, 1995, and that supplies became non-existent. On this basis complainant claims that it was excused from shipping the required number of loads under the contract on the ground of impossibility. The Uniform Commercial Code, section 2-615, provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

However, complainant's reliance on this provision of the UCC is misplaced. The Official Comments state in part:

> Increased cost alone does not excuse performance unless the rise in

> cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.[2]

The comment goes on to say that a "local crop failure" will provide the type excuse contemplated by the section. Official Comment 9 describes what is meant by a local crop failure:

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he may be excused, where there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

In dealing with this section of the UCC we have often affirmed the requirement that a specific acreage be referenced in the contract as the source for produce in order for the section to have effect.[3] Moreover, complainant has not shown that there was no supply to be had of bin lettuce at any price. Respondent managed to purchase bin lettuce.[4] Carton lettuce could have been striped from the cartons and used to supply the bin lettuce commitment.[5] As respondent does not tire of

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[2]UCC § 2-615, Official Comment 4.

[3]See *G. & H. Sales Corp. v. C. J. Vitner Co., Inc.*, 50 Agric. Dec. 1892 (1991); *Al Campisano Fruit Co., Inc. v. Richard C. Shelton*, 50 Agric. Dec. 1875 (1991); *Bliss Produce Co. v. A. E. Albert & Sons*, 35 Agric. Dec. 742, 20 UCC Reporting Service 917 (1976); *Harrell v. Olin Price*, 31 A.D. 331 (1972), and *Holt v. Shipley*, 25 A.D. 436 (1966).

[4]Complainant asserts that because respondent's cover purchases on December 28, and 29, 1994, were of carton lettuce, the impossibility of purchasing bin lettuce is demonstrated. However, respondent explains that the cover purchases were delayed at complainant's request following complainant's undertaking to confirm a shipment of bin lettuce by December 27, 1994, and that when no such confirmation was received it was necessary to have lettuce immediately, and not wait for an f.o.b. shipment from the growing areas in the West.

[5]The availability of carton lettuce throughout the period of the contract shows that there was no general failure of the lettuce crop throughout all possible supply regions such as could be argued to have caused the agreed performance to have been made impracticable by the occurrence of a contingency the nonoccurrence

pointing out, the basic purpose of the contract, was to insure a supply of bin lettuce regardless of variation in market price. Respondent points to the fact that at the time it entered into the contract, agreeing to pay $.10 per pound, the market price for bin lettuce was $.08 per pound. Neither party knew what the price range of bin lettuce would be during the coming contract year. If the price fell far below production costs complainant was nevertheless assured of a good price for its lettuce, and if the price soared respondent was assured of lettuce at a reasonable cost. This is the nature of the type contract into which the parties entered, and it is far to late in the game for complainant to have second thoughts about the cost of meeting its obligations under the contract.

Complainant's second excuse for failure to ship the required lettuce centers on respondent's late payment for the lettuce that was shipped. That payment was late, and grossly so, is beyond dispute. Where the parties fail to provide any other payment period, the Regulations provide for payment to be accomplished within 10 days after the day on which produce is accepted.[6] Moreover the Regulations also provide that:

> Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly", *Provided,* That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.[7]

There was no such written provision here, and therefore the 10 day payment period applies, even though complainant admits that it encouraged respondent, when the contract was entered, to keep within a 30 to 35 day payment schedule.

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of which was a basic assumption on which the contract was made. The rationale of the requirement that the contract call for the crop to be grown on designated land in order for the impossibility excuse to be applicable, is that the absence of such a provision leaves the whole of the remaining world (excepting only reasonable transportation strictures) as a possible source of supply, and, that absent such a clause in the contract, it must be concluded that there were no contemplated restrictions on the seller accessing these other sources of supply.

[6]See 7 C.F.R. § 46.2(aa)(5).

[7]7 C.F.R. § 46.2(aa)(11).

But we must ask what relevance this has for the issues between the parties here. Clearly respondent violated the Act by not paying within 10 days. Clearly complainant could have at any time insisted on payment within 10 days. Clearly a disciplinary action could be brought on the basis of the late payments. But for complainant to suspend its performance under the contract on the basis of the late payments two contingencies must have occurred. First, complainant must have taken the late payments as grounds for insecurity, and second, a demand in writing must have been made by complainant for adequate assurance of due performance (payment) on the part of respondent. UCC section 2-609 provides:

> (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
>
> (2) Between merchants the reasonableness of ground for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
>
> (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
>
> (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

Complainant claims that the late payments did constitute grounds for insecurity. We note, however, that although complainant claims to have made verbal protests throughout the period in question concerning the lateness of the payments, it nevertheless continued to go along with the late payments for quite some time. Respondent asserts that the slowing of shipments coincided with the substantial rise in the market price for bin lettuce. It seems apparent that although 10 day payment was the *due* performance required by the contract, complainant entered the contract without any expectation of such due performance. But, under paragraph (3) of section 2-609, complainant's acceptance of respondent's improper payments did not prejudice complainant's right to demand adequate assurance of performance at a later time. Furthermore, Robert Rossi alleged, and the point was

not disputed by respondent, that in late November or early December of 1994, Rossi was informed by respondent's trucker, CTI, that respondent was in debt to CTI for over $200,000.00.[8] While complainant claims this, along with the late payments, as justification for its failure to ship the required number of loads beginning in November, complainant delayed in demanding assurance in writing of due performance. Complainant's demand for such assurance was not made until the February 3, 1995, letter from Robert Rossi to Frank Gilardi quoted in finding of fact 10. Consequently, qualifying cover purchases made before the February 3, 1995, demand for assurance should be allowed.

On January 18, 1995, respondent entered into the supply contract with Diamond Produce calling for the supply of one load of bin lettuce per week at $0.105 per pound. This was a valid cover contract because at the time it was entered complainant was in breach of the May 6, 1994, supply contract with respondent, and had made no demand for the adequate assurance of respondent's performance to which it was entitled. Moreover, the right to claim cover under this contract continued until the termination of the contract, or the expiration of the May 6, 1994, contract on May 31, 1995, whichever occurred first.[9] However, when the January 18, 1995, contract was amended on February 15, 1995, to call for an additional load per week, respondent was in receipt of an offer by complainant to ship under the May 6, 1994, contract if respondent furnished some reasonable assurance of payment. Respondent did not respond to that letter by offering such assurance, and consequently its cover purchases under the February 15, 1995, expansion of the January 18, 1995, contract should not be allowed.

Respondent released Diamond Produce from its obligation to supply lettuce under the January 18, 1995, contract following the March 20, 1995, shipment by Diamond recited in finding of fact 13. The release was stated by respondent to have been "[d]ue to market shortages in late March 1995 . . . ." This is not an adequate reason for the release of Diamond Produce from the contract, either

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[8]Such "rumors" have been held to be adequate justification for a demand for assurance. See Official Comments 3 and 4 to UCC § 2-609.

[9]UCC § 2-712 provides, in part, that:

> (1) After a breach within section 2-711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (underlining supplied)

Certainly, considering the period of inflated prices which had been recently experienced in the bin lettuce market, the January 18, 1995, contract to purchase lettuce for $.105 per pound was reasonable.

under the force majeure clause of that contract, or under the Uniform Commercial Code.

Complainant was justified in withholding performance while it awaited a response to its February 3, 1995, demand for assurance, and following respondent's failure to provide that assurance within a reasonable time. However, the cover loads at the rate of one per week, under the contract (concluded prior to the February 3, 1995, demand) with Diamond Produce, should be allowed. Thus, for the period prior to excusing Diamond from the contract, nine loads can be used as valid cover purchases. We will use those loads that were closest to the required contract volume of approximately 41,000 pounds. The total cost of cover for these loads was $1,799.10.

In addition to the cover loads purchased under contract from Diamond Produce, respondent purchased eleven other loads as set forth in findings of fact 7 and 9. Complainant asserts that many of these loads should not be allowed because the lettuce purchased was carton lettuce. However, these purchases appear to have all been on December 28, and 29, 1994, following the delay in making cover purchases requested by complainant, and respondent states that they were necessary in order to meet immediate needs for lettuce caused by that delay.[10] Respondent explains that the purchase of head lettuce from nearby suppliers bypassed the delay that would have resulted if orders for bin lettuce were made from California. An examination of the invoices shows that the lettuce came from Ohio, Indiana, Kentucky, and Michigan. Considering all the circumstances we consider these cover purchases to have been commercially reasonable. The total cost of cover for purchases made prior to the February 3, 1995, demand for

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[10]Respondent seeks cover for one load purchased on December 26, 1994, a day before the December 27, 1994, extension which respondent granted complainant to resume shipment. Respondent's explanation follows:

> Because of the ongoing deficiencies of R & R Produce in meeting its obligation to Freshway, we were forced, in order to meet the demand of our customers, to purchase a load of lettuce on Monday, December 26, 1994. Pursuant to my word, this load would not have been credited against R & R's contractual agreement had R & R been able to confirm by Tuesday, December 27, 1994, that a truckload of lettuce was on its way to Freshway.

We do not view the application of this load to cover as inconsistent with respondent's undertaking to delay making cover purchases. Nor should the purchase of this load on December 26, 1994, be thought (on the basis of hindsight) to be inconsistent with respondent's need to purchase carton lettuce because of the delay incurred by waiting for complainant to ship by the 27th. Respondent purchased one load outside the contract at inflated prices on the 26th knowing that complainant might resume shipments under the contract. It was not necessary that it purchase several (thus precluding the necessity of later carton lettuce purchases) when there was the possibility that complainant would resume shipments under the contract.

assurance, and not purchased under the January 18, 1995, contract with Diamond Produce, was $50,088.18. The cost of all respondent's allowable cover purchases was $51,887.28. This amount should be set off against the $70,318.70 owing from respondent to complainant. The net amount owing from respondent to complainant is $18,431.42. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act. The counterclaim should be dismissed.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[11] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[12] We have determined that a reasonable rate is 10 percent per annum.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $18,431.42, with interest thereon at the rate of 10% per annum from December 1, 1994, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

SHARYLAND LP d/b/a PLANTATION PRODUCE v. CARIBE FOOD CORP.
PACA Docket No. R-95-0090.
Decision and Order filed May 5, 1997.

Breach of Contract - No-Grade Delivered Sale.

Shipper and buyer contracted for the delivery of onions on a no-grade delivered basis. Timely inspection upon arrival revealed condition defects in excess of those allowed under the U.S. Grade Standards for onions. Held that condition defects on a no-grade delivered sale may not exceed the tolerances established

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[11] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[12] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

under the U.S. Grade standards.

Patrice Harps, Presiding Officer.
Complainant, Pro se.
John D. Kallen, N. Miami Beach, FL, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely informal complaint was filed with the Department on July 18, 1994, and a formal complaint was filed on the same date, in which complainant seeks a reparation award against the respondent in the amount of $4,824.00 in connection with a trucklot of onions shipped in the course of interstate commerce.

A copy of the formal complaint was served upon the respondent, which filed an answer thereto, denying liability and alleging a set-off. Complainant replied to the set-off, denying liability.

Since the amount claimed in the formal complaint does not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and briefs. Complainant filed an opening statement and a brief. Respondent filed an answering statement.

Findings of Fact

1. Complainant, Sharyland LP d/b/a Plantation Produce, hereinafter referred to as Plantation, is a limited partnership whose post office address is [redacted] Texas [redacted] At the time of the transaction involved herein, Plantation was licensed under the Act.

2. Respondent, Caribe Produce Corp., hereinafter referred to as Caribe, is a corporation whose post office address is [redacted] Florida [redacted] At the time of the transactions involved in this proceeding, Caribe was licensed under the Act.

3. On or about May 21, 1994, complainant sold and shipped to respondent

[1]Effective November 15, 1995, the threshold for oral hearings was raised to $30,000 by Public Law 104-48.

640 50-pound sacks of Large/Medium yellow onions at $5.60 Delivered, 150 50-pound sacks of jumbo yellow onions at $5.60 Delivered, and 96 25-pound sacks of jumbo red onions at $7.05 Delivered.

4. Upon arrival at respondent's place of business in Miami, Florida, the onions were federally inspected on May 25, 1994, with the following results;

Yellow Jumbo - 4% Decay

Red Jumbo - 18% Decay

Yellow Large/Medium - 1% Black Mold, 4% Decay

5. Respondent has paid $3,080.00 against this shipment.

Discussion

Complainant Plantation sold to respondent Caribe a trucklot of onions at delivered prices. In its formal complaint, complainant alleges that the red onions were sold "open", and its invoice shows the same terms. Respondent, however, correctly points out that complainant's invoice was not issued until the product arrived on May 25, 1994. In addition, the broker's confirmation of sale issued by CDC Sales (Department's Report of Investigation (ROI) Exhibit 4A), issued May 21, 1994, shows the red onions sold for $7.05 delivered, and we so find.

Upon arrival at destination, the onions were federally inspected, with the results reported in Finding of Fact 4. It was apparently at this time that the parties entered into discussions concerning the disposition of the onions. They agree that some sort of alteration in the contract was discussed regarding the red onions, but differ on the nature of that alteration.

Respondent alleges that the terms of sale were changed through the broker to allow it to handle all the onions with "full protection" for the shipper's account. Complainant denies that the terms were changed with regard to the yellow onions, since they arrived within what it characterizes as "good delivery standards". Complainant's claim is supported by the sworn affidavit of its John R. Bearden, the salesman in this transaction (Complainant's Reply to Set-Off, Exhibit 10), and by a statement from the broker, Dean Bearden of CDC Sales dated August 4, 1994 (ROI Exhibit 5).

In his statement, Mr. Dean Bearden states,

> I contacted John Bearden at Plantation on the same day (May 25, 1994), he said that he would not give them a open ticket but he would help when it was time to settle on 640 large mediums, 150 jbo yellow onions and full protection on the 100 1/2 sxs. jbo red onions. On June 27, 1994, John at Plantation offered Caribe $1.00 $1.00 per sx. on the L/Ms and Jbo

yellow onions and his settlement on the Jbo red onions, which was declined by Caribe.

This letter was accompanied by a copy of a "Trouble Report" issued by CDC on June 28, 1994 (ROI, Exhibit 5A), which refers to this load, and states, under "Disposition", "Shipper has offered a $1.00 adjustment, which was declined by receiver, on the L/M yellow onions and the Jbo onions and the reds would be settled according to his accounting". Hand-written notations by Plantation's John Bearden state, "CDC Att. Dean/ Our offer was on the LM as Caribe did not need any help on the Jbo. If they do not accept this offer we withdraw and expect full payment - PPC/John".

For there to be a novation of a contract, it must be clear that it is the intent of both parties to substitute a new agreement for the old one. *Eastern Potato Dealers of Maine, Inc. v. Commodity Marketing Co.*, 36 Agric. Dec. 2017 (1977); *Morris Bros. Fruit Co. v. Elmer Stutzman, et al.*, 1 Agric. Dec. 98 (1942). Based on the preponderance of evidence, we find that the parties did not agree to amend the contract with regard to the yellow onions, and will base our decision on whether complainant breached the contract terms. Mr. John Bearden, in his sworn affidavit, admits that the red onions were to be handled for the account of Plantation.

Respondent claims that the contract called for U.S. #1 onions, an assertion which complainant stoutly denies. The evidence in the file supports complainant's position. Neither the invoice nor the broker's confirmation shows that Plantation agreed to ship U.S. #1 onions, nor is there any evidence that respondent objected to either of these documents. The confirmation is not the contract between the parties but merely evidence of the contract. *L. S. Taube & Co. v. Palmer*, 38 Agric. Dec. 731 (1979). It is true, however, that confirmations of sale and invoices are considered as evidencing the understanding between the parties when no prompt objection is made to their contents. *J. R. Simplot Co. v. Red L. Foods Corp.*, 17 Agric. Dec. 384, at 389 (1958).

We find, then, that the yellow onions were sold Delivered with no specified grade. "Good Delivery Standards" do not apply, as mistakenly asserted by complainant. This term applies to Iceberg lettuce only, and then under FOB terms. Under Delivered terms, when no grade is specified, the shipper's responsibility is still to deliver product with condition defects within the tolerances established in the U.S. Grade Standards. Where those standards provide destination tolerances for specific commodities, those tolerances apply. In this instance, the tolerances for decay in all grades is 2%, and there are no destination tolerances. We find that the yellow onions, which contained 4% decay, failed to meet this standard, and

that complainant breached the contract. We should note here that had the shipment been made under FOB terms, we would have held that the 4% decay would not have represented abnormal deterioration and would have held that the onions had been shipped in suitable shipping condition.[2]

Complainant has agreed that respondent's settlement on the red onions is acceptable, and we find respondent liable for the amount of $576.00 for these 96 packages. With regard to the yellow onions, we will calculate the damages which Caribe may recover due to complainant's breach of contract. The basic measure of damages is set forth in UCC § 2-714(2):

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average prices shown by Market News Service Reports, or other industry market reports for the destination market on the first day on which resales could have been made following arrival.

The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale. *R. F. Taplett Fruit & Cold Storage Co. v. Chinook Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980). Such results are evidenced by the submission into evidence of a proper accounting.

A proper accounting should show a breakdown of sales of individual lots of produce with the number of containers sold at each price and the date on which sales of each lot took place. An accounting that shows a breakdown of sales by individual lots, but that does not show the dates of the resale of each lot, may be utilized if there is no objection from the opposing party. The determinative factor is whether from all the evidence it is concluded that the resales were made promptly.

Complainant has objected to the returns realized by respondent through its resale of the onions. We find that although respondent's accounting does not show the dates of sale of each sale, the accountings for the onions were generated on June 7, 1994, less than two weeks after arrival, and are considered timely.

The U.S. Market News for Miami, Florida on May 26, 1994 shows medium

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[2]7 C.F.R. § 46.43 (i).

yellow onions selling for $6.00 - $7.00. Utilizing the average of $6.50, we find that the 640 sacks had a market value of $4,160.00. Subtracting from this amount the respondent's gross proceeds of $2,409.20, yields its damages of $1,750.80.

The U.S. Market News on the same date shows jumbo yellow onions selling for $6.50 - $7.50. Utilizing the average of $7.00, we find that the 150 sacks had a market value of $1,050.00. Respondent realized gross proceeds of $1,160.75, and therefore suffered no damages on these onions, and owes the original invoice price for them.

Respondent is also allowed to recover expenses incidental to the breach. Prorating the inspection fee of $108.00 to cover the yellow onions, yields an additional amount of $94.80.

To summarize, we have found that respondent owes complainant the agreed amount of $576.00 for the red onions. It also owes complainant the full original invoice amount of $840.00 for the jumbo yellow onions. For the Large/Medium onions, respondent is liable for the original invoice amount of $3,584.00 less its damages of $1,750.80, or $1,833.20. The grand total due is, then $3,249.20, from which we deduct the inspection fee of $98.40, for a net due of $3,150.80. Since respondent has already paid $3,080.00, the amount for which it is liable to complainant is $70.80.

Respondent's failure to pay complainant $70.80 is a violation of section 2 of the Act for which reparation should be awarded to complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Order

Within 30 days from the date of this order respondent shall pay complainant as reparation $70.80 with interest thereon at the rate of 10% per annum from August 1, 1994 until paid.

Copies of this order shall be served on the parties.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: HAVANA POTATOES OF NEW YORK CORP., and HAVPO, INC.
PACA Docket No. D-94-0560.
Order Denying Petition for Reconsideration filed February 4, 1997.

Burden of proof — Standard of proof — Preponderance of the evidence — Substantial evidence — Consideration of the whole record — Hearsay documents prepared in anticipation of litigation.

The Judicial Officer denied Respondents' Petition to Reconsider. Complainant, as proponent of an order, bears the burden of proof. Complainant not only met its burden of proof, but also met the burden of persuasion by a preponderance of the evidence. Complainant introduced substantial evidence of Respondents' willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)). Hearsay documents prepared in anticipation of litigation are admissible, and under the circumstances, have probative value. Testimony regarding admissions of Respondents' president is entitled to considerable weight. The whole record was considered prior to the issuance of the Decision and Order and imposition of the sanctions.

Andrew Y. Stanton, for Complainant.
Tab K. Rosenfeld, New York, NY, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture (hereinafter Complainant), instituted this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (hereinafter PACA), (7 U.S.C. §§ 499a-499s); the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice), (7 C.F.R. § 1.130-.151), by filing a Complaint on August 1, 1994.

The Complaint alleges that, during the period February 1993 through January 1994, Respondent Havana Potatoes of New York Corp. (hereinafter Havana) violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to 66 sellers of the agreed purchase prices for 345 lots of perishable agricultural commodities in the total amount of $1,960,958.74, which Havana purchased, received, and accepted in interstate and foreign commerce and that, during the period August 1993 through December 1993, Respondent Havpo, Inc. (hereinafter Havpo), violated section 2(4) of the PACA, (7 U.S.C. § 499b(4)), by failing to make full payment promptly to six sellers of the agreed purchase prices for 23 lots of perishable agricultural commodities in the total amount of

$101,577.50, which Havpo purchased, received, and accepted in interstate commerce. Respondents filed Answers on August 17, 1994, in which they denied violating the PACA.

On May 2, 1995, and May 3, 1995, Administrative Law Judge Edwin S. Bernstein (hereinafter ALJ) presided over a hearing. Julie Cook, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant, and Tab K. Rosenfeld, Esq., of New York, New York, represented Respondents. The ALJ issued an Initial Decision and Order on October 19, 1995, in which he found that Respondents committed willful, flagrant, and repeated violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and revoked Respondent Havana's PACA license and Respondent Havpo's PACA license. (Initial Decision and Order at 5, 17.)

On February 20, 1996, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated final administrative authority to decide the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557. (7 C.F.R. § 2.35.) On March 18, 1996, Complainant responded to Respondents' appeal, and on March 19, 1996, the case was referred to the Judicial Officer for decision.

On November 15, 1996, I issued a Decision and Order adopting the ALJ's Initial Decision and Order. On January 2, 1997, Respondents filed a Petition to Reconsider Decision of the Judicial Officer (hereinafter Respondents' Petition for Reconsideration), and on January 16, 1997, Complainant filed Complainant's Response to Respondents' Petition to Reconsider Decision of the Judicial Officer (hereinafter Complainant's Response). On January 17, 1997, the case was referred to the Judicial Officer for reconsideration.

Respondents raise six issues in Respondents' Petition for Reconsideration. I do not find that Respondents have raised any issue in Respondents' Petition for Reconsideration that warrants my granting Respondents' Petition for Reconsideration or in any way modifying the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. ___ (Nov. 15, 1996).

First, Respondents contend that:

> 2. . . . [C]omplainant failed to satisfy its burden of proving the elements of the alleged violations by substantial evidence.

Respondents' Petition for Reconsideration at 1-2.

I disagree with Respondents.

The Administrative Procedure Act provides, with respect to substantial

evidence, that:

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

5 U.S.C. § 556(d). (Emphasis added.)

"Substantial evidence" denotes quantity,[1] and it is generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] Complainant introduced a large number of sellers' invoices obtained from Respondents' accounts payable files and summaries of amounts unpaid and past-due and called three witnesses who gave extensive testimony regarding their review of Respondents' business records, discussions with Respondents' president and Respondent Havana's controllers regarding the Respondents' failures to pay produce sellers in accordance with the PACA, and conclusions drawn from the review of Respondents' business records and discussions with Respondents' president and Respondent Havana's controllers. As fully discussed in the Decision and Order filed November 15, 1996, I find the evidence introduced by Complainant substantial evidence of Respondents' violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), and Respondents have not raised any issue in Respondents' Petition for Reconsideration that would cause me to reconsider my finding that Complainant introduced substantial evidence of Respondents' violations of the PACA.

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[1] *Steadman v. SEC*, 450 U.S. 91, 98 (1981); *Wall Street West, Inc. v. SEC*, 718 F.2d 973, 974 (10th Cir. 1983); *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130, 134 n.8 (9th Cir. 1974).

[2] *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Diaz v. Shalala*, 59 F.3d 307, 314 (2d Cir. 1995); *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (per curiam); *Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994).

Second, Respondents contend that:

> 15. The JO further erred when he impermissibly shifted the burden of proof to Havana and Havpo, even though complainant utterly failed to prove its case. It was complainant's burden to prove the elements of the alleged violations; i.e., inter alia, agreed upon price, delivery to and acceptance by Havana, including date of acceptance, etc. Notwithstanding that the burden falls on complainant, the JO, nevertheless, asserted that "while it is possible that any given produce supplier invoice may be inaccurate, **respondents** have not introduced any evidence to show that any of respondents' produce supplier invoices in question are inaccurate." Decision at 32.

Respondents' Petition for Reconsideration at 10.

I agree with Respondents that Complainant has the burden of proof in this proceeding. However, I disagree with Respondents' contention that the sentence from *In re Havana Potatoes Corp. of New York, supra*, slip op. at 32, quoted in Respondents' Petition for Reconsideration at 10, "shifted the burden of proof to Havana and Havpo."

The Administrative Procedure Act provides, with respect to burden of proof, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof*. . . .

5 U.S.C. § 556(d). (Emphasis added.)

Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case.[3] The burden of proof does not, however,

[3] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989), *cert. denied sub nom. American Petroleum Institute v. EPA*, 498 U.S. 849 (1990); *Bosma v. United States Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976),

require Complainant to disprove each of Respondents' assertions or theories of the case.

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[4] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.[5]

As fully explained in the Decision and Order filed November 15, 1996, Complainant not only met its burden of proof by coming forward with a prima facie case, but also met the burden of persuasion, with respect to all allegations in the Complaint, by proving each allegation by a preponderance of the evidence.

The Decision and Order filed November 15, 1996, contains a discussion of Respondents' theory of the case and Respondents' failure to introduce evidence to support that theory, as follows:

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cert. denied sub nom. Velsicol Chemical Corp. v. EPA, 431 U.S. 925 (1977); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). *See also Attorney General's Manual on the Administrative Procedure Act* 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward'"); *3 Kenneth C. Davis, Administrative Law Treatise* § 16.9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward, not the ultimate burden of persuasion).

[4] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC, supra*, 450 U.S. at 92-104.

[5] *In re Havana Potatoes of New York Corp., supra*, slip op. at 20 n.2; *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, No. 95-3552 (8th Cir. Jan. 7, 1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Brothers Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Respondents contend that it is possible that the produce supplier invoices may not mean what they appear to mean, or may have no meaning at all. (Respondents' Appeal to the Judicial Officer at 5-12, 28-30.) Specifically, Respondents contend that produce supplier invoices kept by purchasers of perishable agricultural commodities can contain inaccuracies, can contain iterations and stamps whose meaning is not fathomable to any given reviewer, can be generated by persons other than those whose names appear on the invoices as produce suppliers, and can even refer to produce that has never been received. However, I find nothing in the record to indicate that the produce supplier invoices, which were located in Respondents' files, described by Respondents' president and Respondent Havana's controllers as the accounts payable files, are anything other than they appear to be; *viz.*, itemized statements of perishable agricultural commodities sold to Respondents by those identified on the invoices.

Not only is there no evidence that any of Respondents' litany of possibilities apply to Respondents' produce supplier invoices, but Respondents' own actions belie their contention that their produce supplier invoices are inaccurate or meaningless. Respondents' president confirmed to both Mr. Dutton and Mr. Koller that the produce supplier invoices represent amounts owed suppliers of perishable agricultural commodities, and that, generally, the amounts found by Mr. Dutton and Mr. Koller to be past-due are correct. (Tr. 46, 106-07.) Further, Mr.Perez discussed with Mr.Dutton the "steps that he[, Mr.Perez,] could take ... to resolve these problems he was having" and the steps he had taken to "return his business to a status of being able to pay on a timely basis." (Tr. 46-47.) Further still, Respondents stipulated that, by the time of the hearing, they had paid all of the amounts alleged in paragraph III of the Complaint to be past-due and identified in produce supplier invoices obtained from Respondents' files by Mr. Dutton, (Tr. 27; Respondents' Proposed Findings of Fact and Conclusions of Law ¶ 5). I find it improbable that Respondent Havana would have paid $1,960,958.74 and Respondent Havpo would have paid $101,577.50 based on what Respondents contend are inaccurate, unintelligible produce supplier invoices, which invoices could have been sent to Respondents by persons that are not identified on the invoices, for perishable agricultural commodities that had never been delivered to Respondents. Moreover, Respondents' president, in response to Mr.

> Dutton's findings, "agreed . . . that the total dollar amounts . . . seemed reasonable in terms of what the company's debt was," and, in response to Mr. Koller's finding new past-due debt, "acknowledged that the transactions were past-due and unpaid" and that none of the transactions were in dispute. (Tr. 46, 106-07.)
>
> While it is possible that any given produce supplier invoice may be inaccurate, Respondents have not introduced any evidence to show that any of Respondents' produce supplier invoices in question are inaccurate. I find nothing in the record to indicate that the produce supplier invoices are anything other than they appear to be--reliable, probative, and substantial evidence of past-due debts for perishable agricultural commodities Respondents purchased, received, and accepted in interstate and foreign commerce.

In re Havana Potatoes of New York Corp., supra, slip op. at 31-32. This discussion of Respondents' theory of the case and Respondents' failure to introduce evidence to support that theory does not, as Respondents assert, shift the burden of proof to Respondents. Instead, it is a finding that Respondents failed to introduce reliable, probative, and substantial evidence to prove their theory of the case and thereby rebut Complainant's evidence.

Third, Respondents contend that:

> 3. . . . [T]he testimony of complainant's witnesses utterly failed to make out the elements of the charged PACA violations. The extent to which such testimony was thoroughly impeached, and the sheer unsubstantiated nature of this testimony, is set forth at length in pages 3 - 12 of Respondents' Appeal[.] . . . It is crucial to note, however, that complainant's witnesses largely based their testimony on hearsay documents created in anticipation of litigation; to wit, tables of past due amounts compiled by the witnesses themselves.

Respondents' Petition for Reconsideration at 2.

I disagree with Respondents' contention that Complainant's witnesses were impeached. I find nothing on this record which indicates that Complainant's witnesses are not credible.

Further, while some of Complainant's witnesses' testimony is based on hearsay documents prepared in anticipation of litigation, most of Complainant's witnesses' testimony is based on their review of Respondents' business records and

interviews, which two of Complainant's witnesses had with Respondents' president and Respondent Havana's controllers. Moreover, the hearsay documents prepared in anticipation of litigation, (CX 4, 5, 6, 7), are merely summaries of information obtained from Respondents' records. Copies of Respondents' records upon which these summaries are based were introduced into evidence, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and a comparison of the summaries to Respondents' records on which the summaries are based reveals that the summaries are accurate.

Fourth, Respondents contend that:

> 5. . . . [T]he Administrative Procedure Act requires . . . proof to amount to "substantial evidence". In this regard, it is settled that all factors in the record must be weighed and considered, including factors detracting from complainant's case. . . .
>
> 6. . . . [T]he JO failed to consider the plethora of evidence on the record seriously detracting from complainant's case.

Respondents' Petition for Reconsideration at 3-4.

The Administrative Procedure Act provides:

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

5 U.S.C. § 556(d).

I agree with Respondents that a sanction or order may not be issued unless the whole record or those parts of the record cited by a party and supported by and in accordance with reliable, probative, and substantial evidence, is first considered. Further, I find that Respondents clearly cited those parts of the record that Respondents believe detract from Complainant's case. However, I disagree with Respondents' assertion that I failed to consider the evidence that detracts from Complainants' case and I disagree with Respondents' description of the quantity of the evidence detracting from Complainant's case as a "plethora" of evidence.

The Decision and Order filed November 15, 1996, describes Respondents' evidence, as follows:

> In the face of [Complainant's] evidence, Respondents have chosen to present no contradictory evidence. They have merely adopted an obstructionist stance, trying to pick holes in the evidence which Complainant obtained from Respondents' own files. If this evidence were not correct, Respondents could have introduced evidence to contradict it. Respondents' failure to contradict this evidence leads me to conclude that the evidence is sufficient to prove Complainant's allegations of sales, deliveries, and failure to pay in a timely fashion. I find that Complainant has met its burden of proof. The documentary evidence presented at the hearing was obtained directly from the books of Respondents. Respondents have failed to rebut this evidence. Therefore, I find the evidence proves the allegations in the Complaint.
>
> Although Complainant submitted voluminous exhibits, Respondents submitted no exhibits. The only evidence presented at the hearing by Respondents was testimony of [Mr.] Hector Paredes, a controller of Havana Potatoes, and [Mr.] Robert Reich, an employee of one of Havana's [produce] suppliers.
>
> Respondents' attorney argues . . . that Mr. Koller's testimony is devoid of credibility and no probative weight should be given to this testimony because "Complainant can not dispute Mr. Paredes' testimony that he does not speak English." [(Respondents' Reply Memorandum at 7.)] However, [the ALJ] found Mr. Koller to be a very credible witness, something [the ALJ did not find] with respect to Mr. Paredes. [(Initial Decision and Order at 10.)]
>
> Mr. Paredes testified through an English-Spanish interpreter. He first stated that he does not speak English but knows words that he needs such as "accounts payable" and "accounts receivable." He has a degree in public accounting and a degree in business administration from Venezuelan universities. (Tr. 285, 287.) [Mr. Paredes] testified that, when Mr. Koller visited Respondents' office in April 1995, at Mr. Perez' request, Mr. Paredes directed Mr. Koller to Respondents' financial files, including [their] accounts payable records. (Tr. 290, 294.) When [the ALJ] questioned Mr. Paredes, he stated that he had been living in the

> United States for 3 years and 2 months, (Tr. 296), and that he studied English for 3 years in secondary school, (Tr. 297-98). As a result of Mr. Paredes' study of English for 3 years in Venezuela, his residence in the U.S. for over 3 years, and his dealing on a daily basis with records that were in English, [the ALJ found] that [Mr. Paredes] understood more than enough English to direct Mr. Koller to the appropriate financial records. [(Initial Decision and Order at 11.)]
>
> Respondents' only other witness was Robert Reich, sales manager for Red Hawk Farms, one of Havana's [produce suppliers]. Mr. Reich testified regarding his belief as to what payment practices in the produce industry as a whole are. (Tr. 442[-43.]) Mr. Reich also testified regarding ratings of produce firms in a private publication known as "The Blue Book." (Tr. 444-51.) This testimony is not relevant because the law regarding payment for perishable agricultural commodities is set out in the PACA and the regulations promulgated pursuant to the PACA. This matter is not bound by "The Blue Book," but by the law itself. The regulations promulgated pursuant to the PACA define prompt payment. *See* 7 C.F.R. § 46.2(aa). Under the [PACA] and regulations, payment for produce must be made within 10 days after the day on which the produce is accepted, unless there are written payment terms, entered into prior to the transaction, extending the time for payment.
>
> Mr. Reich also testified that Havana had extended payment terms with his firm and that he was sure that Havana had paid Red Hawk Farms in a timely manner. However, Mr. Reich could not identify what the specific payment terms were or when his company was paid. (Tr. 463, 465-67.) Respondents have not submitted any written credit agreements with Red Hawk into evidence. Additionally, Mr. Reich was unable to explain why, if his firm was satisfied with Havana's payment practices, it had filed reparation complaints against Havana and notified USDA of the insufficient funds checks that it had received from Havana in purported payment for produce purchases. (Tr. 464.)

In re Havana Potatoes of New York Corp., supra, slip op. at 12-14.

Fifth, Respondents contend that the summaries of Respondents records prepared by two of Complainant's witnesses, Mr. Dutton and Ms. Jervis, (CX 4, 5, 6, 7), have almost no probative value, as follows:

> 7. . . . . - - - documents specifically prepared in anticipation of litigation - - - are, as a matter of law, the type of hearsay which is entitled to almost no probative value.

Respondents' Petition for Reconsideration at 4.

The hearsay documents prepared by Mr. Dutton and Ms. Jervis in anticipation of litigation, (CX 4, 5, 6, 7), are merely summaries of information obtained from Respondents' records. Copies of Respondents' records upon which these summaries are based were introduced into evidence, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), and a comparison of the summaries to Respondents' records on which the summaries are based reveals that the summaries are accurate. My views as to the admissibility of these summaries and the weight to be given these summaries are fully explained in the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp., supra*, slip op. at 33-40, and Respondents have not raised any issue in Respondents' Petition for Reconsideration that would cause me to change my view either as to the admissibility of the summaries or the weight to be given these summaries.

Even if I agreed with Respondents (which I do not), and found that the summaries are "entitled to almost no probative value," that finding would not constitute a basis for granting Respondents' Petition for Reconsideration or modifying the Decision and Order filed November 15, 1996, in light of the evidence of Respondents' violations of section 2(4) of the PACA, (7 U.S.C. § 499b(4)), contained in the sellers' invoices, (CX 4a-4ppp, 5a-5f, 6a-6z, 7a), which were obtained from Respondents' files and Mr. Dutton's and Mr. Koller's testimony regarding their conversations with Respondents' president and Respondent Havana's controllers.

Sixth, Respondents contend that the ALJ and the Judicial Officer give too much weight to statements made by Respondents' president to Mr. Dutton and Mr. Koller, as follows:

> 14. In addition, it is quite telling that, although both the ALJ and the JO make much of an exit interview between U.S.D.A. marketing specialist Donald Dutton ("Dutton") and Havana's president Pedro Perez ("Perez"), in which Perez allegedly agreed with Dutton's statement regarding the latter's findings in terms of total dollar amount past due (Tr. 46), the Decision completely ignores the evidence indicating the lack of significance of such "admission". Specifically, the JO ignored the clear fact, emphasized in Respondents' Appeal, that Dutton himself admitted never reviewing a single invoice with Perez, or even identifying

> for Perez the invoices Dutton believed were unpaid. (Tr. 73, 85, 410, 414). Similarly, the Decision erroneously points to the testimony of John Koller, Assistant Regional Director for the Northeast Region ("Koller"), as proof that Perez acknowledged to Koller unpaid past due transactions. Here too, however, Koller failed to indicate what specific transactions, if any, he discussed with Perez, and made no attempt to recall the actual words used in their alleged conversation.

Respondents' Petition for Reconsideration at 9-10.

I disagree with Respondents' contention that the ALJ and the Judicial Officer give too much weight to testimony by Messrs. Dutton and Koller concerning their discussions with Respondents' president, Mr. Perez.

The record does not reveal that either Mr. Dutton or Mr. Koller reviewed with Mr. Perez each of Respondents' transactions which were unpaid and past-due. Nonetheless, the record establishes that, after their respective audits of Respondents' past-due accounts, Mr. Dutton and Mr. Koller each discussed, with Mr. Perez, their findings of Respondents' failures to pay produce sellers in accordance with the PACA. The record further reveals that Mr. Perez agreed with Mr. Dutton's and Mr. Koller's findings.

Mr. Dutton's and Mr. Koller's testimony regarding Mr. Perez's admissions is uncontroverted and I gave Mr. Dutton's and Mr. Koller's testimony regarding Mr. Perez's admissions considerable weight, *In re Havana Potatoes of New York, Corp., supra*, slip op. at 9-12, 22-31. I do not find Mr. Dutton's or Mr. Koller's failure to review each unpaid and past-due seller's invoice with Mr. Perez a basis for giving Mr. Dutton's or Mr. Koller's testimony regarding their conversations with Mr. Perez less weight than I gave to their testimony in the Decision and Order filed November 15, 1996.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 15, 1996, *In re Havana Potatoes of New York Corp., supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice, (7 C.F.R. § 1.146(b)), provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[6] Respondents' Petition for Reconsideration was timely filed and automatically stayed the Decision and Order filed on November 15, 1996. Therefore, since

[6] *In re Saulsbury Enterprises* (Order Denying Petition for Reconsideration), 56 Agric. Dec. ___, slip op. at 28 (Jan. 29, 1997); *In re Andershock Fruitland, Inc.* (Order Denying Petition for Reconsideration), 55 Agric. Dec. ___, slip op. at 1 (Oct. 29, 1996).

Respondents' Petition for Reconsideration is herein denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 15, 1996, is reinstated, with allowance for time passed, as follows:

Order

1. Respondent Havana Potatoes of New York Corp.'s PACA license is revoked, effective 11 days after service of this Order on Respondent Havana Potatoes of New York Corp.
2. Respondent Havpo, Inc.'s, PACA license is revoked, effective 11 days after service of this Order on Respondent Havpo, Inc.
3. The facts and circumstances set forth in this decision shall be published.

In re: HAVANA POTATOES OF NEW YORK CORP., AND HAVPO, INC.
PACA Docket No. D-94-0560.
Stay Order filed February 20, 1997.

Andrew Y. Stanton, for Complainant.
Tab K. Rosenfeld, New York, NY, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

The Order previously issued in this case, which would have revoked Respondent Havana Potatoes of New York Corp.'s PACA license and Respondent Havpo, Inc.'s PACA license, is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Stay Order filed March 4, 1997.

Timothy A. Morris, for Complainant.
Mark A. Amendola, Cleveland, OH, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On September 12, 1996, I issued a Decision and Order revoking Respondent Andershock Fruitland, Inc.'s license issued under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA); denying Respondent AAA Recovery's application for a PACA license; and ordering the publication of the facts and circumstances of the decision. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___, slip op. at 38 (Sept. 12, 1996). On September 26, 1996, Respondents filed a Petition for Reconsideration, and on October 29, 1996, I issued an Order Denying Petition for Reconsideration. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. ___ (Oct. 29, 1996). On December 30, 1996, Respondents filed a Petition for Review of the Order Denying Petition for Reconsideration with the United States Court of Appeals for the Seventh Circuit. On January 22, 1997, Respondents filed a Motion for Stay of the Judicial Officer's Order Denying Petition for Reconsideration, pending the disposition of Respondents' Petition for Review with the United States Court of Appeals for the Seventh Circuit.

Complainant did not respond to Respondents' Motion for Stay, and on March 4, 1997, the case was referred to the Judicial Officer for a ruling on Respondents' Motion for Stay.

Respondents' Motion for Stay is granted.

This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: THE PRODUCE PLACE.
PACA Docket No. D-93-0550.
Order Lifting Stay filed March 28, 1997.

Andrew Y. Stanton, for Complainant.
Stephen P. McCarron, Washington, DC, for Respondent.
William G. Jenson, Judicial Officer.

On December 14, 1994, the Judicial Officer issued a Decision and Order which suspends The Produce Place's (hereinafter Respondent) license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499A-499s) (hereinafter PACA), for 90 days. *In re The Produce Place*, 53 Agric. Dec. 1715 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert denied*, 117 S.Ct. 959 (1997). Respondent filed a Request for Stay pending the outcome of proceedings for judicial review which the Judicial Officer granted on March 29, 1995. *In re The Produce Place*, 54 Agric. Dec. 738 (1995). On March 11, 1997, Complainant

filed a Motion to Lift Stay Order. On March 27, 1997, Respondent and Complainant filed a Joint Motion to Lift Stay Order in which Complainant and Respondent request that Respondent's 90-day license suspension take effect commencing April 1, 1997.

Complainant's Motion to Lift Stay Order filed March 11, 1997, is denied. Complainant's and Respondent's Joint Motion to Lift Stay Order filed March 27, 1997, is granted. The Stay Order issued March 29, 1995, *In re The Produce Place,* 54 Agric. Dec. 738 (1995), is lifted, and the Order issued in *In re The Produce Place,* 53 Agric. Dec. 1715 (1994), *aff'd,* 91 F.3d 173 (D.C. Cir. 1996), *cert. denied,* 117 S.Ct. 959 (1997) suspending Respondent's PACA license for 90 days is effective beginning April 1, 1997.

In re: COUNTY PRODUCE, INC.
PACA Docket No. D-94-548.
Order Lifting Stay filed May 16, 1997.

Andre Allen Vitale, for Complainant.
Harold James Pickerstein, Fairfield, Connecticut, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On January 22, 1996, the Acting Judicial Officer filed a Decision and Order which revokes County Produce, Inc.'s (hereinafter Respondent), license under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) (hereinafter PACA). *In re County Produce, Inc.*, 55 Agric. Dec. 596 (1996), *aff'd*, 103 F.3d 263 (2d Cir. 1997). Respondent filed a Motion for Stay Pending Appellate Review which the Judicial Officer granted on March 5, 1996. *In re County Produce, Inc.*, 55 Agric. Dec. 617 (1996) (Stay Order). On April 29, 1997, Complainant filed a Motion to Lift Stay Order. On May 13, 1997, Respondent filed a Response to Motion to Lift Stay Order stating that Respondent has no objection to Complainant's Motion to Lift Stay Order.

Complainant's Motion to Lift Stay Order filed April 29, 1997, is granted. The Stay Order issued March 5, 1996, *In re County Produce, Inc.*, 55 Agric. Dec. 617 (1996), is lifted. The Order issued in *In re County Produce, Inc.*, 55 Agric. Dec. 596 (1996), *aff'd*, 103 F.3d 263 (2d Cir. 1997), revoking Respondent's PACA license and requiring the publication of the facts and circumstances set forth in the Decision and Order filed in this proceeding on January 22, 1996, is effective on the 30th day after service on Respondent of this Order Lifting Stay.

In re: PATRICIA LARSON.
PACA Docket No. APP 96-0005
Dismissal and Order Canceling Hearing filed March 10, 1997.

Jane McCavitt, for Complainant.
Stephen Thomas, Peoria, IL, for Respondent.
Dismissal issued by Edwin S. Bernstein, Administrative Law Judge.

In a Motion filed March 7, 1997, by Attorney for Complainant, the P.A.C.A. Branch Chief's responsibly connected determination against Patricia Larson, which is the subject matter of this appeal, has been deemed moot. As a result, the parties hereby request that the above-captioned matter be dismissed. Upon good cause shown, Complainant's motion to dismiss is granted and the hearing scheduled to commerce on March 12, 1997, in Peoria, Illinois, is hereby canceled.

In re: STELLA AMERIAN and JOHN JANIGAN.
PACA Docket No. APP-96-0008.
Dismissal filed May 5, 1997.

Jane McCavitt, for Complainant.
Duane M. Geck and Gregory C. Nuti, San Francisco, CA, for Respondents.
Order issued by Victor W. Palmer Chief Administrative Law Judge.

On the basis of the Withdrawal of Petition, the petition is hereby dismissed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: TOM'S QUALITY PRODUCE, INC.
PACA Docket No. D-96-0527.
Decision and Order filed December 11, 1996.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant and repeated violations - Settlement payments irrelevent to issue of whether there have been violations of section 2(4) of the PACA - Publication.

Andrew Stanton, for Complainant.
Justin Johl, Overland Park, KS, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "PACA", instituted by a complaint filed on April 24, 1996, by the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the complaint that respondent had committed wilful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to 21 sellers for purchases of 448 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $880,654.06 during the period April 1995 through July 1995. Complainant requested that a finding be made that respondent had committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that respondent's license be revoked. Respondent's license has since terminated.

Respondent filed an answer, denying that it committed any of the violations alleged in the complaint and stating "that it has, since July 1995, ceased doing business altogether." Respondent also asserted all of the sellers referenced in the complaint had been paid, voluntarily settled all of their claims, waived their rights to pursue any further claims, or failed to file the required PACA trust notices in a timely manner and, as a result, are not entitled to protection under the PACA.

Respondent's affirmative defense is based on a March 29, 1996, settlement order in an action before the United States District Court for the Western District of Missouri, Case No. 95-0607-CV-W-3, brought pursuant to the trust provisions of the PACA (7 U.S.C. § 499e(c)) against respondent by numerous produce creditors, including many of the produce sellers set forth in paragraph III of the

complaint. The settlement order provides for payment of $831,484.25 to 18 produce creditors.

However, settlement payments pursuant to the PACA trust provisions are irrelevant to the issue of whether there have been violations of section 2(4) of the PACA. Further, examination of the payments noted in the March 29, 1996, settlement order reveals that respondent paid $708,745.59 to 16 of the 21 sellers set forth in paragraph III of the complaint, although such payment was made after it was due. A total of $171,908.47 remains unpaid to 20 of the 21 sellers named in the complaint. As respondent admits in its answer that it is not currently engaged in business, it is highly unlikely that any of the $171,908.47 will be paid by the date of the hearing.

Respondent's failure to make full payment promptly constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA. *Caito Produce Co.*, 48 Agric. Dec. 602 (1989). When a respondent is found to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly, and fails to make such payments by the time of the hearing, the appropriate sanction is a license revocation or a finding of the commission of wilful, flagrant and repeated violations if the license has terminated. *Andershock Fruitland, Inc. and James A. Andershock d/b/a AAA Recovery*, 55 Agric. Dec. ___ (1996).

The granting of a Motion for Decision Without Hearing by Reason of Admissions should be granted prior to the hearing when respondent has admittedly made partial payment after such payment was due, and it is apparent that full payment will not be made by the date of the hearing. *Moreno Bros.*, 54 Agric. Dec. 1425, 1443 (1995); *Potato Sales Co., Inc.*, 54 Agric. Dec. 1409, 1424 (1995), appeal voluntarily dismissed, No. 95-70906 (9th Cir. 1996).

In its brief and "stipulation of facts" (containing twelve numbered paragraphs), respondent contends that because of mitigating circumstances -- its past history of compliance with the PACA and its effort, and that of its president, Thomas Sherrer, to voluntarily take prompt steps when it found itself unable to pay for all its produce purchases to lessen the loss to its creditors --it should not be further sanctioned and its president, Thomas Sherrer, should not be barred from employment in the produce industry.

Complainant, agreeing with the "stipulation of facts," except for paragraphs 9 and 11, contends that, under the Department's longstanding policy, mitigating circumstances are considered "excuses" which are never accepted in non-payment PACA cases for purposes of reducing a sanction, citing *Havana Potatoes, et al.*, 55 Agric. Dec. __ (Nov. 15, 1996).

As complainant argues, *Havana Potatoes* provides that even "good excuses" for non-payment "are never regarded as sufficiently mitigating to prevent a

respondent's failure to pay from being considered flagrant and wilful." Accordingly, I find that the circumstances in this case do not warrant a reduction in complainant's proposed sanction. However, no decision is made as to Mr. Sherrer's employment status.

Therefore, upon the motion of the complainant for the issuance of a Decision Without Hearing by Reason of Admissions, the following decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Tom's Quality Foodservice, Inc. (hereinafter, "respondent"), is a corporation organized and existing under the laws of the State of Missouri. Its business address is , Missouri 6 -, and its mailing address is , Missouri 6 -.

2. At all times material herein, respondent was licensed under the provisions of the PACA. License number was issued to respondent on May 5, 1980. This license was renewed annually but terminated on May 5, 1996, when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, respondent, during the period April 1995 through July 1995, failed to make full payment promptly to 21 sellers for purchases of 448 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $880,654.06.

4. Respondent, on approximately March 29, 1996, paid $708,745.59 to 16 of the 21 sellers set forth in paragraph III of the complaint, although such payment was made after it was due. A total of $171,908.47 remains unpaid to 20 of the 21 sellers.

Conclusions

Respondent has failed to make full payment promptly for purchases of produce, as alleged in the complaint, and $171,908.47 remains unpaid. Respondent's failures to make payment constitute wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent, Tom's Quality Foodservice, Inc., is hereby found to have committed wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and such finding is hereby ordered published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final January 21, 1997.-Editor]

In re: LOTTO INTERNATIONAL, INC.
PACA Docket No. D-96-0519.
Decision and Order filed March 19, 1997.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant, and repeated violations - License revocation.

Kimberly Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), (the "Act") instituted by a Complaint filed on March 8, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of August 1994 through December 1994, Respondent, Lotto International, Inc., failed to make full payment promptly to six sellers of the agreed purchase prices in the total amount of $252,252.64 for 22 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

In a timely Answer filed April 30, 1996, Respondent did not deny owing the sums alleged but stated that it had reduced the total debt by $45,000. On December 18, 1996, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions. Respondent's Answer to the motion, filed January 21, 1997, reemphasized that it was attempting to repay its creditors.

In a telephone conference on January 29, 1997, Respondent stated that it still owed $100,000. and requested more time to pay these debts. I encouraged the parties to enter into constructive discussions which would encompass Respondent paying the balance of these debts in the near future.

On February 27, 1997, Complainant filed a renewed Motion for Decision Without Hearing. The renewed motion stated that Respondent's PACA license has been suspended since June 22, 1995; since then four additional reparation awards have been issued against Respondent; three of these awards remain unpaid to date; and there are no assurances that Respondent will pay its debts within a specified time period.

Respondent's Answer to the renewed motion, filed March 14, 1997, did not deny that it has failed to pay moneys owed, as alleged, but instead requested sympathy for its financial plight which it stated was due in large part to the devaluation of the Mexican peso.

That Respondent admits to being substantially indebted to the sellers named in the Complaint as alleged in the Complaint is irrefutable. Since this indebtedness is not *de minimus*, Complainant is entitled to the issuance of an Order without further proceedings. *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question).

In re Atlantic Produce Co. and Joseph Pinto, 54 Agric. Dec. 701 (March 23, 1995) sets forth the policy that, where a respondent violates section 2(4) of the PACA by failing to make full payment promptly, the appropriate sanction is a license revocation with no excuses accepted in mitigation of such sanction where the respondent owes a substantial amount of money for produce purchases in numerous transactions over an extended period of time.

The numerous violations by Respondent over a lengthy period of time constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370 (5th Cir. 1980); *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom., George Steinberg & Son, Inc. v. Butz, supra*, 491 F.2d 988 (2d Cir.); *Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118, 125-127 (1984).

Respondent's violations are willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, Inc., supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961). Respondent knew or should have known that it could not make prompt payment for the perishables it ordered, yet Respondent continued to make purchases knowing that each additional purchase would result in another violation.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)), and that its PACA license is revoked as a result of those violations.

This Order shall take effect on the eleventh day after this decision becomes final. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

[This Decision and Order became final April 30, 1997 and effective May 11, 1997.-Editor]

In re: ANTHONY R. TRUJILLO, dba WEST TEXAS PRODUCE.
PACA Docket No. D-97-0003.
Decision and Order filed April 7, 1997.

Failure to file an answer - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA) initiated by a Complaint filed on October 15, 1996, by the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that Respondent, Anthony R. Trujillo, doing business as West Texas Produce (hereinafter "Respondent"), failed to make full payment promptly to 31 sellers of the agreed purchase prices in the total amount of $446,802.48 for 166 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate and foreign commerce during the period November 1994 through August 1995. Complainant requested that a finding be made that Respondent has committed wilful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and that such

findings be ordered published.

A copy of the complaint was served on Respondent on October 25, 1996. An answer was not filed within the time prescribed by the Rules of Practice. The complainant moved for the issuance of a decision without hearing by reason default. As a result of the respondent's failure to file an answer within the time prescribed, the material facts alleged in the complaint are deemed admitted and are adopted as set forth below in the findings of fact.

This Decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Anthony R. Trujillo, is an individual doing business as West Texas Produce, with a business mailing address of [redacted] Texas [redacted]

2. Pursuant to the licensing provisions of the PACA, license number [redacted] was issued to Respondent on September 24, 1993. This license was renewed annually but terminated on September 24, 1995, 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 August 24, 1995, Respondent filed a Voluntary Petition for Bankruptcy in the U.S. Bankruptcy Court for the District of Texas pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*). The bankruptcy petition was designated case No. 95-31180 and on March 12, 1996 was converted to Chapter 7.

4. As set forth in paragraph III of the complaint, Respondent purchased, received and accepted 166 lots of perishable agricultural commodities in interstate and foreign commerce from 31 sellers from November 1994 to August 1995, and failed to make full payment promptly for the agreed purchase prices or balance thereof in the total amount of $446,802.48.

Conclusion

Respondent's failures to make full payment promptly with respect to the transactions set forth above in Finding of Fact No. 4, constitute wilful, repeated and flagrant violations of Section 2(4) of PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

These findings are ordered published.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty–five (35) days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after such service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 20, 1997.-Editor]

In re: ADAN O. TINAJERA dba INTER-DISTRIBUTORS.
PACA Docket No. D-95-0505.
Decision and Order filed November 14, 1996.

Jane McCavitt, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 15, 1994, in which it was alleged that respondent had committed wilful, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to eight sellers for purchases of 69 lots of perishable commodities in the course of interstate or foreign commerce in the amount of $173,418.30 during the period of April 1993 through September 1994. Complainant requested that a finding be made that respondent had committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that respondent's license be revoked. Respondent's license expired on October 6, 1996, and has not been renewed.

A copy of the complaint was served upon respondent and was answered on December 8, 1994. In the answer respondent admitted that it owed some sellers

for produce as alleged in the complaint, but stated that some of the sellers were paid and that it was making payments on account for other sellers. Specifically, respondent admitted that it is making payments to two sellers; is attempting to arrange monthly payments to four other sellers; and believes that two sellers have been paid. Respondent's answer thus constitutes an implicit admission that it had failed to make prompt payment to at least six sellers for some of the produce purchases alleged in the complaint. Its answer therefore constitutes an admission of material allegations of fact contained in the complaint within the meaning of Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Complainant has now moved for the issuance of a Decision Without Hearing by Reason of Admissions, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As respondent's admission that it had failed to pay at least six sellers for the purchase of produce constitutes an admission of material allegations of fact contained in the complaint, complainant's motion is granted. *Cf. Potato Sales Co., Inc.*, 54 Agric. Dec. 1409 (1995).

Findings of Fact

1. The mailing address of respondent, Adan O. Tinajera, d/b/a Inter-Distributors is (b) (6)

2. Pursuant to the licensing provisions of the Act, license number was issued to respondent on October 6, 1992. This license was renewed annually, but terminated on October 6, 1996, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee. This license was suspended on October 8, 1993, for failure to pay a reparation order pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g(d)).

3. As more fully set forth in paragraph III of the complaint, during the period April 1993 to September 1994 respondent purchased, received, and accepted in interstate and foreign commerce various lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices to at least six sellers.

Conclusion

Respondent's failure to make full payment promptly with respect to six sellers constitutes wilful, repeated, and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed wilful, flagrant, and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final June 19, 1997 and effective on June 30, 1997.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

Reddish Enterprises, Inc. PACA Docket No. D-97-0011. 1/2/97.

M. Miqueli & Co., Inc. PACA Docket No. D-97-0012. 1/14/97.

Amerian Brother, Inc. PACA Docket No. D-96-0518. 5/5/97.