AGRICULTURE DECISIONS

Volume 58

January – June 1999

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

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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.

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MIDWAY FARMS, INC., A CALIFORNIA CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 97-5460 AWI SMS.
Decided May 18, 1998.

Raisins — Handler — *In camera* inspection of documents.

The Court held that the plain language of 7 U.S.C. § 608c(15)(A) limits the statute's application to *any handler subject to an order* and rejected Plaintiff's contention that the Judicial Officer erred in dismissing with prejudice Plaintiff's 15(A) petition, based on Plaintiff's denial that it was a handler subject to the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California (Raisin Order). The Court also rejected Plaintiff's contention that the administrative law judge erred in determining that he could not conduct an *in camera* inspection of Plaintiff's documents. Moreover, the Court rejected Defendant's contention that the issue before the Court was whether Plaintiff was a handler subject to the Raisin Order and that Court lacked subject matter jurisdiction because the issue was not ripe for judicial review. The Court denied Plaintiff's motion for summary judgment, denied Defendant's motion for judgment on the pleadings, and granted Plaintiff an opportunity to submit evidence in opposition to the Court's contemplated *sua sponte* entry of summary judgment for Defendant.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is an action for declaratory relief, based on the review of an administrative proceeding. The court has jurisdiction over this matter pursuant to 7 U.S.C. § 608c(15)(B), part of the Agricultural Marketing Agreement Act. Pursuant to the request of the parties, this matter, originally calendared for April 27, 1998, was submitted on the papers.

PROCEDURAL HISTORY

Plaintiff Midway Farms, Inc. ("Midway Farms") filed a "Complaint for Review of Agency Action; Declaratory Relief," on May 5, 1997. In its complaint, Midway Farms sets forth two claims for relief. First, Midway Farms alleges that pursuant

to 7 U.S.C. § 608c(15)(A) and 5 U.S.C. §§ 702 through 706, this court has jurisdiction to order Defendant United States Department of Agriculture ("USDA") to proceed with Midway Farms' administrative petition, and to declare that a petitioner does not have to admit that it is a handler in order to bring an administrative petition when USDA claims that Midway Farms must comply with various marketing order provisions. Second, Midway alleges that this court has authority to order that an Administrative Law Judge can review its records *in camera* in an administrative proceeding to prevent the disclosure of proprietary information.

USDA filed an answer to the complaint on August 7, 1997. On November 21, 1997, Midway Farms filed a motion for summary judgment. In response, on January 9, 1998, USDA filed memorandum in support of judgment on the pleadings and in opposition to Midway Farms' motion for summary judgment, seeking dismissal for lack of subject matter jurisdiction. On February 10, 1998, Midway Farms filed an opposition to the motion for judgment on the pleadings and a reply to the opposition to its motion for summary judgment. On March 5, 1998, USDA filed a reply in support of its motion for judgment on the pleadings.

UNDISPUTED FACTS

Midway Farms has submitted the following undisputed facts in support of its motion for summary judgment. Midway Farms asserts that the initial facts are taken directly from the Joint Scheduling Report filed September 5, 1997.

1. Midway Farms filed an Administrative Petition with USDA alleging that it is not a "handler" under the Raisin Marketing Order and therefore is not subject to the reporting requirements and other obligations imposed on handlers under the Order. (JSR 2:8-10)

2. In June 1994 the Raisin Administrative Committee had informed Midway Farms that it should comply with certain reporting requirements under the Raisin Marketing Order. (JSR 2:10-12)

3. During the pendency of the administrative process, USDA subpoenaed documents from Midway Farms in order to determine whether Midway Farms was a handler under the Raisin Marketing Order. Midway Farms provided documents to USDA in redacted form in order to protect its business. USDA objected to the redactions and deemed the documents nonresponsive, and the Chief Administrative Law Judge arranged for an *in camera* inspection of Midway Farms's documents in unredacted form, to which USDA objected. (JSR 2:12-16)

4. On motion by USDA the ALJ dismissed the petition without prejudice and Midway Farms appealed to the Secretary. The Secretary's Judicial Officer

dismissed the petition with prejudice, on the grounds that Midway Farms could not litigate the interpretation of "handler" while alleging itself not to be a handler, because the Agricultural Marketing Agreement Act of 1937 only allows handlers to file a petition. (JSR 2:17-20)

5. The Judicial Officer also ruled that the ALJ erred in protection of Midway Farms's documents from disclosure to USDA, and the JO rejected the ALJ's view that the petitioner could toll any civil penalties during the pendency of its petition. (JSR 2:20-23)

Midway Farms asserts that the following are undisputed facts from Midway Farms's verified petition filed with the USDA, attached as Exhibit "1" to the complaint. Any reference to the verified petition will be noted as "VP" and then the paragraph number.

6. Midway is a corporation, incorporated in the State of California on or about April 28, 1989, with its principal place of business in Fresno. (VP ¶ C, D)

7. Midway Farms purchases from raisin packers and processors off-grade raisins, failing raisins, raisin residue matter, stems, sticks, sand and other junk that the processor or packer grades out of the raisins that the packers and processors are packing for sale into the normal stream of interstate and foreign commerce for human consumption. (VP ¶ 2)

8. The product purchased by Midway Farms is distillery material, cattle feed and concentrate material. (VP ¶ 2)

9. None of the products received by Midway from processors and packers is resold by Midway as "raisins" as that term is defined in § 989.5, § 989.9, and in conjunction with the grade and condition standards found in § 989.58 and § 989.59 (7 C.F.R.). (VP ¶ 2)

10. 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, but even if it were considered a handler pursuant to § 989.15 it has never been the first handler. (VP ¶ 3)

11. Under the Raisin Marketing Order, packers and processors must account for the disposition of off grade raisins, other failing raisins and raisin residue material. (VP ¶ 4)

12. The Raisin Administrative Committee has taken the position, as of at least June, 1994 that Midway is required to fill out and account for all of the material received from other handlers (packers and processors) and to account to the Raisin Administrative Committee for all of Midway's dispositions, including to whom Midway sells its product. (VP ¶ 4)

13. The Raisin Administrative Committee Manager has memorialized the purported requirement in a letter dated June 13, 1994 to Midway, which is attached

to the Verified Petition as Exhibit "A". (VP ¶ 4)

14. As far as Midway knows, understands and has been told, Midway is not responsible for any assessments, any reserve obligation or any other obligations under the Raisin Marketing Order. (VP ¶ 5)

15. The processor/packer/handler who acquires and receives raisins from growers or from others after reconditioning said raisins is obligated under the R.A.C. rules and regulations and under the Raisin Marketing Order to account for the acquisitions and the disposition of said raisins, and the disposition of off grade raisins, failing raisins and raisin residue material, and, upon information and belief, Midway understands that said packer/processor/handlers from whom Midway purchases said off grade, failing and residual raise material do account to the R.A.C. for the material sold to Midway. (VP ¶ 6)

16. Those persons and entities to whom and which Midway sells its distillery material, cattle feed and concentrate material are an extremely important and safeguarded trade secret of Midway. (VP ¶ 7)

17. That is, if the packers/processors/handlers knew of Midway's outlet sources for said material, said packer/processor/handlers would simply bypass Midway and sell directly to Midway's outlet sources. (VP ¶ 7)

18. Midway is extremely fearful that if Midway is required to fill out R.A.C. forms showing the quantity sold by Midway and to whom that quantity is sold, that said information would be passed back, intentionally, negligently, or perhaps even innocently to others in the industry who would then use that information to bypass Midway and put Midway out of business by dealing to Midway sources directly. (VP ¶ 7)

19. Midway further believes that the R.A.C., in retaliation for Midway's refusal to fill out the R.A.C. forms and/or filing this administrative opinion, will advise Midway's sources not to deal with Midway. (VP ¶ 7)

20. As a result of Midway Farms receiving the letter described in paragraph 13 above, Midway promptly filed an administrative petition with USDA (described above) seeking declaratory relief from the Secretary that Midway is not a handler pursuant to the AMAA and therefore cannot be subjected to the Raisin Marketing Order. (Complaint, ¶ 9)

21. During the administrative process USDA filed a motion to dismiss the petition, alleging that since Midway claims that it is not a handler it could not bring an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). (Complaint, ¶ 11)

22. USDA also sought through a subpoena a large volume of documents from Midway that USDA could, purportedly, determine whether Midway was a handler subject to the Marketing Order. (Complaint, ¶ 11)

23. Midway provided many documents to USDA showing that Midway's acquisitions of off-grade raisins from various handlers and showed disposition documents but with the name of the buyer and the price received redacted. (Complaint, ¶ 11)

24. Midway claimed to the Administrative Law Judge, and then to the Secretary's Judicial Officer, and claims today that providing USDA with unredacted sales documents, if the names of the buyers and the purchase prices were ever disclosed, it would put Midway out of business because first handlers of raisins could simply bypass Midway, go directly to Midway's buyers and sell the product directly to those buyers and thus eliminate Midway as a "middle man" altogether. (Complaint, ¶ 11)

25. Midway offered to provide all of the original documents to the ALJ *in camera* and Midway further agreed that Terry Stark, the manager of the Raisin Administrative Committee, could assist the ALJ in reviewing those documents, as Midway trusted Terry Stark, but not the USDA official that USDA said should look at the documents. (Complaint, ¶ 11)

26. The Administrative Law Judge originally agreed to this method, USDA filed another motion to dismiss, and on May 10, 1996 the Chief Administrative Law Judge issued an order dismissing that petition without prejudice because of the uniqueness of the case, but the ALJ tolled the civil penalties which might be assessed if an administrative action was filed against the Midway Farms pursuant to 7 U.S.C. § 608c(14)(B) to allow the petitioner to allege any said proceedings that it was not a handler subject to the marketing order. (Complaint, ¶ 11, Exhibit "2" to said Complaint)

27. Midway then filed an appeal to USDA's Judicial Officer (Complaint, ¶ 12), with a true and correct copy of said appeal attached to the complaint and marketed Exhibit "3".

28. On April 18, 1997, the Judicial Officer rendered a decision and order dismissing Midway's petition *with prejudice*. (Complaint, ¶ 13, Exhibit "4" to said Complaint)

29. The Judicial Officer found that since Midway alleges that it is not processor/packer/handler subject to the Raisin Marketing Order that Midway has no standing to bring an administrative petition because Midway would either have to admit that it is a handler, or produce documents showing that it is such a handler. (Complaint, ¶ 13, Exhibit "4" to said Complaint, pp. 12-14)

30. The Judicial Officer also declared that the ALJ erred in tolling civil penalties because, as the Judicial Officer held, Midway should not again be allowed to allege that it is not a handler. (Complaint, ¶ 13, pp. 14-16)

31. Midway timely filed its complaint in U.S. District Court pursuant to 7 U.S.C. § 608c(15)(B).

USDA has not reproduced the above itemized Statement of Undisputed Facts, explaining which are disputed and which are undisputed. USDA is therefore in violation of Local Rule 56-260(b). However, there does not appear to be a factual dispute in this case.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984).

> Under summary judgment practice, the moving party [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the `pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 298-89

(1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to `pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1995).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *Poller*, 368 U.S. at 468; *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1997).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for

the nonmoving party, there is no `genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

DISCUSSION

I. Midway Farms' Motion for Summary Judgment

A. First Claim for Relief

Midway Farms contends that it is entitled to summary judgment on its first claim for relief, alleging that the Judicial Officer erred in stating that Midway farms must admit that it is a handler in order to bring an administrative petition to challenge USDA's claim that it is subject to the Raisin Marketing Order.

In support of this contention, Midway Farms first correctly argues that the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601 et seq., regulates only "handlers" of the product in question. Specifically, 7 U.S.C. § 608c provides in part, "[t]he 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" Midway Farms claims, without authority, that "[t]he long established interpretation by USDA is that the AMAA only regulates the `first handier,' the one who first places the product into the stream of interstate commerce, not those who thereafter buy the product and resell it." Midway Farms's Motion for Summary Judgment, 8:10-12.

Midway Farms argues second that when, on June 13, 1994, it received a letter from the manager of the Raisin Administrative Committee advising it that pursuant to provisions of the Raisin Marketing Order it was required to fill out several forms, the Raisin Administrative Committee was claiming that Midway Farms was subject to the Raisin Marketing Order. After receiving the letter, Midway Farms filed its administrative petition with the Secretary, pursuant to 7 U.S.C. § 608c(15)(A), which provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposes 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 the regulations made by the

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

The rules of practice governing administrative petition proceedings, 7 C.F.R. § 900.50 et seq., defines the term "handler" as "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. Midway Farms claims not that it is a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable." Midway Farms contends, therefore, that it is a "handler" pursuant to the rules of practice governing administrative petition proceedings, which would allow it to seek a ruling from the USDA either that it is not a "handler," and so not subject to the Raisin Marketing Order, or, is a person "to whom a marketing order is sought to be made applicable," but to whom the Raisin Marketing Order does not apply.

In so arguing, Midway Farms ignores the plain and simple language of the statute in question, 7 U.S.C. § 608c(15)(A). The statute expressly limits its application to a specific type of handler, this is, "Any handler subject to an order." Thus, the fact that 7 C.F.R. § 900.51 provides an additional definition for "handler," is not dispositive. Midway Farms defines itself as a person, "to whom a marketing order is sought to be made applicable," which is undeniably *not* the type of handler covered under 7 U.S.C. § 608c(15)(A).

Alternatively, Midway Farms contends that if it has no standing to bring an administrative petition contesting whether the Raisin Marketing Order can be made applicable to it, it should have the absolute right to seek declaratory relief in the District Court without exhausting administrative remedies. Midway Farms argues that if it must admit not only that it is a handler but also that it is subject to the marketing order before it can file an administrative petition, it should not be forced to exhaust administrative remedies, but instead should be able to bring an action directly in district court seeking declaratory relief pursuant to 28 U.S.C. §§ 1131, and 2201 - 2202. Midway Farms provides no authority for this proposition.

Based on the above two contentions, Midway concludes that it is entitled to a ruling from this court that the Administrative Law Judge's and Judicial Officer's dismissals of Midway Farms' petition were arbitrary, capricious and not in accordance with law.

B. Second Claim for Relief

Midway Farms contends that it is entitled to summary judgment on its second

claim for relief that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of Midway Farms' documents. Midway Farms asserts that redacted versions of the documents had already been provided to the USDA, and the only information that was redacted was the buyer's name and the price for which the product was sold.

Midway Farms argues that the ALJ's decision was arbitrary, capricious and not in accordance with the law. Citing no authority, Midway Farms claims, "Proprietary information should be protected from harmful disclosure just as much as in administrative proceedings as they are protected in District Court." Midway Farms's Motion for Summary Judgment, 10:19-20. Midway Farms further claims without authority that, "Particularly in light of the fact that if Midway is not subject to the Raisin Marketing Order, USDA is not entitled to its records to be with [sic]. *Id.* at 10:21-22. In so arguing Midway Farms ignores USDA's ability to investigate to determine whether a person is subject to the Raisin Marketing Order.

C. Motion for Judgment on the Pleadings and Opposition to Motion for Summary Judgment

In its combined memorandum of points and authorities in support of motion for judgment on the pleadings and in opposition to Midway Farms' motion for summary judgment, USDA contends that this case should be dismissed for lack of subject matter jurisdiction, because it is not ripe. As USDA explains, Article III, § 2 of the Constitution limits the jurisdiction of the courts to cases or controversies, and one aspect of this requirement is ripeness. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253 (1990); *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 3332 (1985). In the present case, USDA claims that the issue to be decided is whether Midway Farms is "handler" of raisin material and therefore subject to the reporting requirement of the Raisin Marketing Order.

The United States Supreme Court has explained the ripeness doctrine as follows:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both

the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967).

In regard to the issue of fitness, the Ninth Circuit has held that "[a] claim is fit for decision if the issue raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989), *cert. den.*, 495 U.S. 904, 110 S.Ct. 1923 (1990); *see Winter v. California Medical Review*, Inc., 900 F.2d 1322, 1325 (9th Cir. 1990). Applying this standard to the present case, USDA argues that whether Midway Farms "receives or acquires" raisin material and uses it "in the production of a product other than raisins, for market or distribution" so as to fall within the definition of processor/handler under 7 C.F.R. §§ 989.13 and 989.15, is largely a question of fact. USDA argues that this question can only be resolved through further factual development, *i.e.*, through the complete examination of the documents it has subpoenaed.

In regard to the finality requirement for fitness, the court "looks to whether the agency action represents the final administrative work to insure that judicial review will not interfere with the agency's decision-making process." *State of Cal., Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987). The Ninth Circuit has further stated in regard to finality that:

> "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 245 (9th Cir. 1979). Indicia of finality include: the administrative action challenged should be a definite statement of an agency's position; the action should have a direct and immediate effect on the day-to-day business of the complaining parties; the action should have the status of law; immediate compliance with the terms should be expected; and the question should be a legal one. *FTC v. Standard Oil*, 449 U.S. 232, 239-40, 101 S.Ct 488, 493, 66 L.Ed.2d 416 (1980) (Standard Oil) (citations omitted).

Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990).

In the present case, USDA contends that none of the above criteria of finality are met. USDA argues persuasively that although Midway Farms brought this action in reaction to a letter from the Raisin Administrative Committee suggesting that it was a handler, the Raisin Administrative Committee's letter is not a definite statement of USDA's position, and the letter does not subject Midway Farms to

obligations imposed on "handlers" would affect its day-to-day business. *See Blincoe v. Federal Aviation Administration*, 37 F.3d 462, 464 (9th Cir. 1994) (letter did not constitute a definitive determination by the agency, agency's characterization of its own action is relevant in determining whether the letter is a "final" administrative resolution); *Flagship Federal Savings Bank v. Wall*, 748 F. Supp. 742, 746 (S.D. Cal. 1990) (letters did not constitute a formalized determination by an agency).

USDA summarizes its arguments regarding the lack of finality in this case as follows:

> Thus, while the Committee's conjectures prompted defendant to pursue an investigation, defendant has yet to reach a final determination on the question of plaintiff's status, and indeed, cannot do so without first examining the subpoenaed documents. No final administrative action has yet occurred, and a declaration by the Court would only interrupt the decision-making process of the agency and usurp its role prematurely. Plaintiff's claim is therefore not fit for decision by this Court.

Memorandum in Support of Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, 8:12-20.

In regard to hardship to the parties of withholding court consideration, the second aspect of consideration under *Abbott Laboratories*, the Ninth Circuit has held that a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss. *State of Cal., Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-34 (9th Cir. 1987). In the present case, USDC contends that the possibility of hardship to Midway Farms is purely speculative. USDC argues that if the administrative process is allowed to run its course, USDA may ultimately determine that Midway Farms is not a handler and therefore not subject to reporting requirements which allegedly would reveal Midway Farms' trade secrets.

With respect to Midway Farms' claim that complying with USDA's investigatory subpoena will result in publication of trade secrets, USDA asserts that its officers and employees are legally bound to hold all such information confidential or face criminal sanctions and removal from office. *See Tinoco, v. Belshe, M.D.*, 916 F. Supp. 974, 983 (N.D. Cal. 1995) (court must presume that agency will act within the law). USDA contends that Midway Farms thus has no reasonable basis for predicting financial loss and will suffer no "direct and immediate" hardship in the absence of this court's review. USDA also contends that because it has not determined that Midway Farms is a "handler," the Court

need not consider its argument that it has standing to file an administrative petition challenging USDA's alleged determination without admitting that it is a handler. Finally, USDA contends that because any harm to Midway Farms from complying with USDC's document subpoena is purely speculative, it is unnecessary for the court to consider Midway Farms' argument that it can properly submit the subpoenaed documents *in camera*.

In opposition to USDA's motion for judgment on the pleadings and in reply to the opposition to its motion for summary judgment, Midway Farms contends that USDA is mistaken in describing what issue is now before the court. Specifically, Midway Farms contends that contrary to USDA's claim, the issue before the court is not whether it is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Rather, the issue before the court is the whether USDA can dismiss Midway Farms' administrative petition because it does not admit that it is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Midway argues at length that this issue is ripe for decision and that USDA's motion for judgment on the pleadings should therefore be denied. Echoing USDA's analysis of ripeness, Midway Farms contends that the issue before the court is fit for decision because it is primarily legal, does not require further factual development, and the challenged action is final. *See Schaible*, 874 F.2d at 627.

In regard to the hardship to the parties of withholding court consideration, *see Abbott Laboratories*, 387 U.S. at 148, Midway Farms contends that it could be subject to substantial hardship in the form of possible penalties, both criminal and civil, if it cannot file an administrative petition at this stage of the proceedings. Midway Farms cites 7 U.S.C. § 608c(14), which provides for both criminal fines and civil penalties.[1]

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[1]7 U.S.C. § 608c(14) provides as follows:

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provisions of such order shall, on conviction, be fined not less than $50 or more than $5000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. 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 this 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.

(continued...)

The remedies for both criminal fines and civil penalties provided for in 7 U.S.C. § 608c(14) are self-apparent. A conviction is subject to challenge through the appeals process. Pursuant to § 608c(14)(B), the order assessing a civil penalty "shall be treated as a final order reviewable in the district courts of the United States." Midway Farms in no way demonstrates how, in the context of the threat of these fines and penalties, a decision on its existing petition would have a differing impact from a decision by the USDA in the regular course of proceedings. Under either procedure, a decision that it is subject to the Raisin Marketing Order subjects it to the possibility of a fine or penalty.

In its reply, USDA contends that Midway "mischaracterizes the central issue in this case." USDA claims, "According to plaintiff, the issue is not whether plaintiff is subject to the Marketing Order -- even though the ultimate relief plaintiff seeks is a declaration that is not. *See* Complaint for Review of Agency Action; Declaratory Relief ¶ 17." Defendant's Reply, 1:25-28. The court finds that mischaracterizes the contents of paragraph 17 of the Complaint, which provides as follows:

> 17. Plaintiff therefore alleges that the Judicial Officer's dismissal of this petition and the ALJ's dismissal of this petition was arbitrary, capricious, and not in accordance with law.

Complaint, 5:11-12. This paragraph comes within Midway Farms' statement of its First Claim for Relief, which seeks a declaratory judgment that it did not have to admit that it is a handler in order to bring an administrative petition.

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[1](...continued)

(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 subsection (15) of this section was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this subsection 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 subsection (15) of this section. The Secretary may issue an order assessing a civil penalty under this subsection 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. The validity of such an order may not be reviewed in an action to collect such civil penalty.

Based on the above, the court finds that Midway Farms correctly argues that USDA's ripeness argument is based on a misconception of the issue before the court. The issue before the court is not, as the USDA claims, whether Midway Farms is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Rather, the issue before the court, as set forth in the complaint, is whether or not USDA can dismiss Midway Farms' administrative petition because it does not admit that it is a handler subject to the Raisin Marketing Order. Thus, USDA's ripeness argument, while well-reasoned, is simply not on point.

Accordingly, the court finds that USDA has not demonstrated that the issue presented in Midway Farms' complaint is not ripe, and that USDA's motion for judgment on the pleadings should therefore be denied.

In spite of its failure to prevail on its motion for judgment on the pleadings, one of additional arguments USDA makes in its Reply is directly on point in this case. USDA argues that Midway Farms' arguments rest on the erroneous presumption that it is currently subject to the Raisin Marketing Order. As discussed above in relation to finality under ripeness analysis, the Raisin Administrative Committee's letter advising Midway Farms that it appeared to be a handler does not constitute a final or legally binding agency determination. *See Blincoe v. Federal Aviation Admin.*, 37 F.3d 462, 464-65 (9th Cir. 1994). *Flagship Fed. Sav. Bank v. Wall*, 748 F. Supp. 742, 747 (S.D. Cal. 1990). The applicable statute, 7 U.S.C. § 608c(15)(A) is expressly limited to "any handler subject to an order." Midway Farms claims not that it is a handler subject to a marketing order, but that it is a person "to whom a marketing order is sought to be made applicable." Therefore, accepting Midway Farms' own definition of itself, the court could never find that the dismissal of Midway Farms' administrative petition under 7 U.S.C. § 608c(15)(A) is arbitrary, capricious and not in accordance with law, because USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms.

Accordingly, the court will deny Midway Farms' motion for summary judgment as to its first claim for relief.

In its second claim for relief, Midway Farms contends that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of Midway Farms' documents. As stated above, Midway Farms argues without authority that propriety information should be protected from harmful disclosure in administrative proceedings as it is in District Court, and that if Midway is not subject to the Raisin Marketing Order, USDA is not entitled to its records to begin with. The court finds that these arguments are not sufficient to demonstrate that Midway Farms is entitled to judgment as a matter of law, particularly in light of the USDA's claims regarding its duty of confidentiality regarding records before it.

Accordingly, the court will deny Midway Farms' motion for summary judgment as to its second claim for relief.

II. Sua Sponte Granting of Summary Judgment for USDA

In *Cool Fuel, Incorporated v. Connett*, 685 F.2d 309 (9th Cir. 1982), the plaintiff filed and served a motion for summary judgment. The defendant made no motion, yet the court entered summary judgment for the defendant and dismissed the case. On appeal, the Ninth Circuit discussed this unusual situation as follows:

> It is, nevertheless, true that the overwhelming weight of authority supports the conclusion that if one party moves for summary judgment and, at the hearing, it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may sua sponte grant summary judgment to the non-moving party.

Cool Fuel, 685 F.2d at 311 (citations omitted). The Ninth Circuit went on to state:

> It is, of course, essential that the appellate court carefully review the record and determine that the moving party against who summary judgment was rendered had a full and fair opportunity to ventilate the issues involved in the motion. *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949), is the keystone case. There the court declined to pass on the propriety of a summary judgment for a non-moving party, but held it error to grant such a judgment if the victim had been deprived "of an opportunity to dispute the facts material to that claim." *Id.* at 683, 69 S.Ct. at 755.

Id. at 312. The Ninth Circuit subsequently summarized the rule as follows:

> As a general rule, a district court may not sua sponte grant summary judgment on a claim without giving the losing party ten days' notice and an opportunity to present new evidence as required by Federal Rule of Civil Procedure 56(c). There is an exception to this rule, however: A district court may grant summary judgment without notice if the losing party has had a "`full and fair opportunity to ventilate the issues involved in the motion.'" Waterbury v. T.G. & Y Stores Co., 820 F.2d 1479,1480 (9th Cir. 1987) (quoting Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir.

1982)).

United States v. Grayson, 879 F.2d 620, 625 (1989).

In the instant case, the court finds that it appears that USDA is entitled to summary judgment on the same grounds on which Midway Farms' motion will be denied. The statute under which Midway Farms filed its petition, 7 U.S.C. § 608(c)(15)(A), is expressly applicable to "[a]ny handler subject to an order." Midway Farms claims that it is not a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable," under 7 C.F.R. § 900.51. The USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms. It therefore appears that there is no way in which Midway Farms can prevail on its first claim that it does not have to admit that it is a handler to now proceed with a petition pursuant to 7 U.S.C. § 608(c)(15)(A), which is applicable only to "[a]ny handler subject to an order." It further appears that Midway Farms cannot prevail on its second claim for relief because, as explained above, it provides no authority for the proposition that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of its documents.

Under these circumstances, the court is considering granting summary judgment for USDA. The court will grant Midway Farms 10 days to oppose the entry of summary judgment for USDA. *See United States v Grayson*, 879 F.2d 620, 625 (1989).

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that:

1. Midway Farms' motion for summary judgment is DENIED;
2. USDA's motion for judgment on the pleadings is DENIED;
3. Midway Farms is GRANTED 10 days from the date of service of this order to submit evidence pursuant to Rule 56(c), Federal Rules of Civil Procedure, in opposition to the *sua sponte* entry of summary judgment for USDA by the court;
4. USDA is GRANTED 10 days from the date of service of Midway Farms' opposition to file and serve a response to Midway Farms' opposition.

MIDWAY FARMS, INC., A CALIFORNIA CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 97-5460 AWI SMS.
Decided June 15, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT USDA

This is an action for declaratory relief, based on the review of an administrative proceeding. The court has jurisdiction over this matter pursuant to 7 U.S.C. § 608c(15)(B), part of the Agricultural Marketing Agreement Act.

On May 19, 1998, the court entered a memorandum opinion and order in this case, denying Midway Farms' motion for summary judgment and USDA's motion for judgment on the pleadings. The court further granted Midway Farms ten days to submit evidence in opposition to the *sua sponte* entry of summary judgment for USDA by the court.

On June 1, 1998, the court received from counsel for Midway Farms a statement that it would not be submitting any additional evidence to the court with respect to the court's intended decision.

Accordingly, for the reasons explained at length in the memorandum opinion of May 19, 1998, the court finds that USDA is entitled to summary judgment on the same grounds on which Midway Farms' motion was denied. The statute under which Midway Farms filed its petition, 7 U.S.C. § 608c(15)(A), is expressly applicable to "[a]ny handler subject to an order." Midway Farms claims that it is not a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable," under 7 C.F.R. § 900.51. The USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms. The court finds, therefore, that Midway Farms cannot prevail on its first claim that it does not have to admit that it is a handler to now proceed with a petition pursuant to 7 U.S.C. § 608c(15)(A), which is applicable only to "[a]ny handler subject to an order." The court further finds that Midway Farms cannot prevail on its second claim for relief because, as explained in the memorandum opinion of May 19, 1998, it provides no authority for the proposition that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of its documents.

Under these circumstances, the court finds that there exists no genuine issue as to any material fact and that USDA is entitled to judgment as a matter of law. Accordingly, the court will granted summary judgment to USDA. *See* Fed. R. Civ. P. 56(c); *Cool Fuel, Incorporated v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) (if one party moves for summary judgment and it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may sua sponte grant summary judgment to the non-moving party.

ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:
Summary judgment is GRANTED to USDA, and
The Clerk of the Court is directed to enter final judgment in favor of USDA.

SAULSBURY ENTERPRISES v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. CV-F-97-5136 REC.
Filed June 30, 1999.

Raisins — Civil penalty — Excessive fines clause — Eighth amendment.

Plaintiffs filed a complaint for review in the United States District Court for the Eastern District of California of the Judicial Officer's decision finding that plaintiffs violated the Raisin Order (7 C.F.R. pt. 989) and assessing plaintiffs a civil penalty of $219,000. The Court held that, except for the Judicial Officer's findings concerning plaintiffs' failures to file off-grade raisin reports, the findings were supported by substantial evidence and were not arbitrary or capricious. The Court found that $14,000 of the civil penalty assessed by the Judicial Officer was attributable to plaintiffs' failure to file off-grade raisin reports and since the Judicial Officer found that plaintiffs' raisins were standard raisins, no civil penalty could be assessed for failure to file off-grade raisin reports. Consequently, the Court reduced the civil penalty assessed by the Judicial Officer to $205,000. The Court also found that civil penalty provision in 7 U.S.C. § 608c(14)(B) is subject to the Excessive Fines Clause of the Eighth Amendment and remanded the proceeding to the Judicial officer for further findings concerning whether the civil penalty assessed by the Judicial Officer, as reduced by the Court, is excessive within the meaning of the Excessive Fines Clause.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REMANDING MATTER TO USDA

On May 3, 1999, the court heard the cross-motions for summary judgment of the parties. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants these motions in part and denies them in part as set forth herein. The court further reduces the civil penalties and assessments imposed on plaintiffs by $14,000.00. Finally, the court remands this matter to the United States Department of Agriculture for further findings concerning whether the civil penalties imposed by the Judicial Officer are excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

Saulsbury Enterprises and Robert J. Saulsbury (hereinafter referred to as Saulsbury) have filed a Complaint for Review of Agency Action Under 7 U.S.C. § 608c(14)(B), Agricultural Marketing Agreement Act of 1937 and Declaratory Relief against the United States Department of Agriculture (hereinafter referred to as the Department).

The Agricultural Marketing Service (AMS), an agency of the Department, filed a complaint against Saulsbury, alleging that Saulsbury violated the Marketing Order for Raisins (the Marketing Order), 7 C.F.R. § 989.1 *et seq.*, which was promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 (the Act), 7 U.S.C. § 601 *et seq.* The Complaint alleged that Saulsbury was a raisin handler as defined by the regulations and that, during the 1988-1989, 1989-1990, and 1990-1991 crop years, Saulsbury shipped raisins to Canada without having them inspected, failed to withhold raisins in reserve, failed to file reports, and failed to pay assessments as required by the Order. Saulsbury denied that the product shipped to Canada was raisins or that he was a handler subject to the Order. A two-day evidentiary hearing was held before Administrative Law Judge James W. Hunt (hereinafter referred to as the ALJ) and briefs filed. On June 27, 1995, the ALJ filed his Decision and Order (hereinafter referred to as the ALJ's Order) finding that the product shipped to Canada by Saulsbury was raisins, that Saulsbury violated Section 989.59 of the Marketing Order by shipping off-grade or failing raisins during the crop years in question without having them inspected, and assessing a $1,000 penalty for each year that Saulsbury violated the Marketing Order, for a total penalty of $3,000.00. Saulsbury appealed the ALJ's Decision and Order to Judicial Officer William G. Jenson (hereinafter referred to as the JO). On

May 7, 1996, the JO issued his Decision and Order (hereinafter referred to as the JO's Order) wherein he affirmed the ALJ's conclusion that the product shipped by Saulsbury was raisins, but also disagreed with certain findings and conclusions of the ALJ and imposed a civil penalty in the amount of $219,000, and ordered Saulsbury to pay to the Raisin Administrative Committee $1,673.30 in assessments for the crop years in issue. Saulsbury then filed a Petition for Reconsideration, which petition was denied by the JO in his Order Denying Petition for Reconsideration filed on January 29, 1997.

Saulsbury thereafter filed the Complaint for Review in this court.

A. Standard of Review.

7 U.S.C. § 608c(14)(B) provides in pertinent part:

> 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 subsection 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 . . . .

The court's review of the JO's order is governed by 5 U.S.C. § 706 of the Administrative Procedures Act, which provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
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> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> . . .
>
> (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;
>
> . . .
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

B. Substantiality of Evidence that Product Shipped was Raisins.

Plaintiff argues that the conclusion that the product shipped by plaintiff was raisins is not supported by substantial evidence.

With respect to review pursuant to Section 706(2)(E), the Supreme Court holds that substantial evidence "does not mean a large or considerable amount of evidence, but rather `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "`[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However,

> [t]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight . . . Nor does it mean that even as to matters not requiring expertise a court may displace [the agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside [an agency's] decision when it cannot conscientiously find that the evidence supporting a decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view.

Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 488 (1951).

Prior to 1972, Section 989.5 of the Marketing Order defined raisins as:

> `Raisins' means grapes of any variety grown in the area, from which a part of the natural moisture has been removed by sun-drying or artificial dehydration after such grapes have been removed from the vines.

However, in 1972, the Department determined that product was being dried on the vine and thus competing with sun-dried raisins. Therefore, an amendment was proposed to the Marketing Order because, as an industry representative testified at the hearing on the proposed amendment, "it is the consensus of the raisin industry and the committee that the Marketing Order should be amended to include all dried grapes under the definition of raisins." Section 989.5 of the Marketing Order was amended to provide as follows:

> `Raisins' means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

Section 989.5 as amended was substantially the amendment proposed by the Raisin Administrative Committee.

In arguing that the JO's conclusion that the product shipped was raisins is not supported by substantial evidence, Saulsbury refers to the evidence of "percipient witnesses" to the product shipped by Saulsbury to Canada that the product was not raisins, that the product shipped to Canada was picked at 16% sugar as opposed to the normal 20-22% sugar for raisins, that the vineyard was trellised so that the grapes would receive less sun, that the product was picked up after seven days instead of the normal 20 to 30 days, that the product was not wrinkly and had a substantial amount of moisture when it was picked up and when it was shipped to Canada. Saulsbury argues that Section 989.5 requires that the product have a significant amount of the natural moisture removed to the point where the grape skin develops wrinkles. Saulsbury contends that the product shipped to Canada was a brown and green grape from which significant moisture had not been removed.

The court concludes that there is substantial evidence in the record supporting the JO's conclusion that the product shipped was raisins. There is the testimony of Bond describing the product as having wrinkles like raisins and that Spear praised the product to Bond as being raisins. The JO as well as the ALJ placed primary reliance on Bond's testimony. In addition, even Mayes testified that some of the product had developed wrinkles (although Mayes testified that he attributed the wrinkles to substandard water berries). Saulsbury's evidence and argument that the product was too "trashy" to be processed as raisins, did not taste like raisins and had a lower sugar content than raisins used for processing is not relevant to the determination whether the product shipped to Canada was raisins. To be a raisin within the meaning of Section 989.5 of the Marketing Order, the grape must had removed by drying the natural moisture to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins. Nothing in Section 989.5 bases the definition of raisins on quality.

C. Admission of Evidence and Denial of Right to Confront Witnesses.

Saulsbury further contends that the unsworn statement of a non-testifying witness and/or evidence concerning that statement should not have been allowed into evidence and that the admission of this evidence deprived Saulsbury of its constitutional right to confront the witnesses against it. Saulsbury is referring to the statement of Willie Harris admitted as respondent's Exhibit 4 during the proceedings before the ALJ about which statement AMS Investigator Renee Wassenberg testified.[1]

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[1]Initially, the ALJ did not admit Harris's written statement in evidence. However, after Wassenberg was examined and cross-examined about the statement and her interview of Harris at some length, the ALJ admitted the statement so that he and the record would know what the parties were discussing.

Saulsbury repeatedly argues that the statement, which was handwritten by Wassenberg, was not signed by Harris. The administrative record establishes to the contrary. Exhibit 4 shows that Harris initialed each page of the statement and signed it at the end of it. Wassenberg testified that Harris could read because she asked him if he could. In addition, Wassenberg testified that Harris signed the statement. During cross-examination of Wassenberg by Saulsbury, Saulsbury referred to a letter that Wassenberg sent to Harris on August 22, 1991, which letter stated in pertinent part:

> I thought I should type your statement so you could read it better. I would like for you to sign it and send it back to me. Add or change anything you believe is necessary. It was a pleasure meeting you.

(continued...)

Harris's statement dated August 20, 1991 is as follows:

I was a laborer for Robert Saulsbury for 6 years off an [sic] on. However, I have not worked out there for about two years since they sold their almond property. I live at 521 Maple Street, Madera, Ca.

When I worked for Saulsbury I worked with almonds and grapes. I am from Mississippi and don't know a lot about how raisins are produced. When I worked with the raisins I drove the tractor (see *). I know that a few days later they had to turn the raisins, then after they were dry I drove the tractor and wagon through the rows so they could put the bins on the wagon. I brought the raisins over to the barn where they were sprayed for nats [sic] and flys. The raisins were locked up when they were sprayed (fumigated). The raisins I took from the vineyard to the barn was [sic] exactly the same type raisin I buy in the box from the grocery store. I eat raisins all the time and ate them when I was in the field.

I know a big truck came and and [sic] Saulsbury loaded it for shipment. I was around when they were weighing the bins for shipment.

Robert Saulsbury was always good to me.

* When I worked in the vineyard, they (the crew) (a hired contract for the crew) cut the grapes and let them dry for a few day [sic] and turned them to dry on the other side. Then after they dried I and about 7 other drivers hauled them to skid. Then the foreman would stack them in the shed.

Everybody referred to these as raisin grapes.

Saulsbury contends that, because Wassenberg testified that she did not know if Harris had been subpoenaed to appear at the hearing before the ALJ or how the subpoena had been served, and because Harris lived in Madera, Saulsbury was denied due process when the Department was allowed to introduce percipient

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[1](...continued)
Wassenberg testified that Harris did not sign the typed statement and return it to her. It may be that Saulsbury is relying on this testimony in contending that Harris did not sign the statement admitted into evidence at the hearing before the ALJ. However, as noted, the evidence establishes that the statement was signed and it was the signed statement that was admitted into evidence.

witness testimony through the introduction of Harris's statement.

With regard to the subpoena, although Wassenberg testified that she did not know whether Harris had been subpoenaed, Ms. Carroll, counsel for the Department, stated that Harris had been subpoenaed for the administrative hearing, that he had not appeared, and that he had an unlisted telephone number. Therefore, to the extent that Saulsbury's contention that it was denied due process is premised on the factual assertion that the Department failed to subpoena the witness even though it had the ability to do so, the record does not support the premise.

Furthermore, Willie Harris was listed as a Department witness on its witness list filed in connection with the administrative hearing, and Exhibit 4, the statement handwritten by Wassenberg and signed by Harris, was listed on the Department's exhibit list. Saulsbury also listed Willie Harris as one of its witnesses on its witness list.

The admission of hearsay in administrative proceedings is not governed by the Federal Rules of Evidence. As explained by the Ninth Circuit in *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981):

> We begin with the recognition that strict rules of evidence do not apply in the administrative context . . . Indeed, the Administrative Procedures Act provides that 'Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. 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) . . . .
>
> Perhaps the classic exception to the strict rules of evidence in the administrative context concerns hearsay evidence. Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and fundamentally fair . . . .
>
> We too reject any *per se* rule that holds that hearsay can never be substantial evidence. To constitute substantial evidence, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility — it must have probative value and bear indicia of reliability. Although no bright line test can be established, cases isolate a number of factors that may be helpful in such an analysis. First . . ., the independence or possible bias of the

> declarant must be considered as well as the type of hearsay material submitted . . . Other factors that should be considered are whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn . . ., whether or not the statements are contradicted by direct testimony . . ., whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenaed the declarant . . ., or whether the declarant is unavailable and no other evidence is available . . ., the credibility of the declarant if a witness, or of witness testifying as to the hearsay . . ., and finally whether or not the hearsay is corroborated. Although not controlling, the Federal Rules of Evidence 803(24) standards for the admission of hearsay not specifically covered by any exception but bearing `circumstantial guarantees of trustworthiness' may be of assistance.

626 F.2d at 148-149.

In contending that it had an absolute right to confront the witnesses against it in the administrative hearing, Saulsbury relies primarily on *Goldberg v. Kelly*, 397 U.S. 254 (1970).

In *Goldberg v. Kelly*, New York City residents receiving financial aid under the federally assisted Aid to Families with Dependent Children program or under New York State's general Home Relief program alleged that officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. The district court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the welfare workers that the combination of the existing post-termination "fair hearing" and informal pre-termination review was sufficient. The Supreme Court reversed, holding that a pre-termination evidentiary hearing was necessary to provide the welfare recipient with procedural due process. In so holding, the Supreme Court stated in pertinent part:

> `The fundamental requisite of due process of law is the opportunity to be heard.' . . . The hearing must be `at a meaningful time and in a meaningful manner.' . . . In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

397 U.S. at 267-268.

However, the mere fact that Harris did not appear at the administrative hearing in response to the Department's subpoena does not result in the conclusion that Saulsbury was denied due process. In *Richardson v. Pearles*, 402 U.S. 389 (1971), the Supreme Court addressed the issue of what procedural due process requires with respect to examining physicians reports in a social security disability claim hearing. The Supreme Court ruled:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with an opportunity for cross-examination of the physician.

402 U.S. at 402. The Supreme Court further stated that the holding in *Goldberg v. Kelly* that due process requires an effective opportunity to defend by confronting adverse witnesses was distinguishable:

> *Kelly*, however, had to do with the termination of AFDC benefits without prior notice. It also concerned a situation, the Court said, `where credibility and veracity are at issue, as they must be in many termination proceedings.'
> . . . .
>
> The *Perales* proceeding is not the same. We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice. Notice was given to claimant Perales. The physicians' reports were on file and available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed. Further, the specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctors' credibility or veracity. *Kelly* affords little comfort to the claimant.

Id. at 406-407. The Supreme Court further concluded:

> The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of the consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination.

Id. at 410.

In *United States v. International Broth. of Teamsters*, 941 F.2d 1292, 1297-1298 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992), the Second Circuit relied on *Perales* in rejecting the argument that Senese and Talerico were denied their right to confront and cross-examine the witnesses against them:

> This claim rests principally on the fact that much of the evidence introduced at their hearing was in the form of hearsay. However, procedural due process does not require rigid adherence to technical evidentiary rules in administrative hearings, as long as the evidence is reliable.

In *Cuellar v. Texas Employment Com'n*, 825 F.2d 930, 938 (5th Cir. 1987), the Fifth Circuit, after discussing the Supreme Court's decision in *Perales*, stated in pertinent part:

> To put *Perales* in context, we note that Perales could only request a meaningful *opportunity* to cross-examine. A claimant may choose to waive an opportunity to cross-examine, and is not required to make the case against himself, nor to call all witnesses who may be adverse so as to be able to confront them. The critical question, therefore, is whether the plaintiff is afforded a *viable* opportunity to confront *the witnesses* against him — not just to anticipate or to respond to the substance of their testimony — or has been denied the opportunity to cross-examine such witnesses. In the case of affidavit testimony, this depends critically upon the nature of the hearing, upon notice that the claimant has of the witnesses and their testimony, and upon the opportunities for obtaining and availability of witness subpoenas.
>
> Cuellar expressed his surprise at the production of Salazar's affidavit, and explicitly requested the opportunity to confront his discreditor by obtaining a subpoena. There is no evidence that the affidavit was previously filed

> with the agency or that its existence otherwise was made known to Cuellar prior to the hearing. Witnesses could only be obtained by subpoena at the hearing if they were shown to be 'necessary.' It would take a Shakespearean actor (and an irrational or incompetent lawyer) to object to the affidavit as a surprise and then to request a continuance to permit confrontation, were the affidavit in fact expected and Cuellar's version true. There is *nothing* to gain and everything to lose by such a strategy. We must assume the truth of Cuellar's account and the rationality and competence of his attorney because of the summary posture of this case. Moreover, the affidavit in question is neither inherently reliable nor a product routinely relied upon by administrative or judicial processes. That Cuellar specifically noted reliability failings of the particular affidavit to the hearing examiner could not transform it into reliable hearsay.

In *Woolsey v. National Transp. Safety Board*, 993 F.2d 516, 521 (5th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994), the Fifth Circuit, in ruling that certain documents were properly admitted in an administrative proceeding, held that the admission of the documents did not violate the right of confrontation of adverse witnesses. In so ruling, the Fifth Circuit distinguished the only case cited by Woolsey, *Greene v. McElroy*, 360 U.S. 474 (1959), by noting:

> The petitioner [in *Greene*] had no opportunity whatsoever to confront the evidence against him. In the instant case, by contrast, the FAA presented witnesses and documents which Woolsey was free to confront. Although he objected to the admission of the documents based on the absence of the persons who signed them, he did not claim that the documents were forged or altered in any way. FAA investigators were available for cross-examination as to how they obtained the documents and why it would be reasonable to conclude that the documents ware authentic.

The court concludes that the introduction of Willie Harris's statement did not deprive Saulsbury of the right to confront adverse witnesses against it. As noted, the record establishes that Harris was subpoenaed by the Department and failed to appear. It must be inferred from the witness and exhibit lists filed by the parties in connection with the administrative hearing that Saulsbury was aware of Willie Harris as a witness and was aware of the content of his statement. As noted, Saulsbury also listed Harris as a witness. Therefore, this case is distinguishable from *Cuellar*. It does not appear from the record that Saulsbury made any effort to subpoena Harris or to request a continuance to do so, relying instead on

objecting to the admission of Harris's statement and testimony concerning Harris's statement. There is no indication in the record before the court that Saulsbury would not have been able to subpoena Harris.

Evidentiary rulings in administrative proceedings are reviewed under the abuse of discretion standard. *Atlantic-Pacific Const. Co., Inc. v. N.L.R.B.*, 52 F.3d 260, 263 (9th Cir. 1995). In *Calhoun v. Ballar*, the Ninth Circuit stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair. For admission of hearsay to be reversible error, Saulsbury must show that the admission of this evidence was prejudicial.

Here, the JO's Order specifically finds in pertinent part:

> Wassenberg also testified that Harris, Saulsbury's former employee, told her that the product looked the same as raisins he bought from a store. While Harris did not testify, his description [corroborates] Bond's testimony and there is no information in the record reflecting adversely on Harris' integrity or that he had any reason to make a false statement to Wassenberg. I find that, although hearsay, Harris' statement is sufficiently reliable in the circumstances to add weight to the evidence showing that the product had wrinkles characteristic of raisins . . . However, in making the finding that the product had raisin-like wrinkles, I rely principally on Bond's testimony.

In arguing that the testimony concerning Harris's statement and his statement itself should not have been admitted because it did not have sufficient indicia of reliability, Saulsbury notes that the statement was not written by Harris but by Wassenberg and that no other effort was made by the Department to visit Harris or to talk with him. However, as noted, Harris initialed each page of the statement written by Wassenberg and signed it.

Saulsbury further notes that Wassenberg's interview of Harris took place on August 20, 1991. However, Harris told Wassenberg that he had not worked in the vineyard for two years and that he had only worked off and on for Saulsbury. Saulsbury asserts that there is nothing in Wassenberg's testimony on in Harris's statement that shows that Harris saw the product for the crop years 1988, 1989 and/or 1990. Therefore, Saulsbury argues, this evidence was not sufficiently reliable to be admitted in the administrative proceedings.

The court agrees with this objection to the admission of the testimony concerning Harris's statement. It simply cannot be determined from the record before the court that Harris was describing the product at issue in this proceeding. From the record, Saulsbury had produced raisins in years prior to 1988. That being the case, Harris could have been describing something other than the product

produced in 1988, 1989 and 1990. Therefore, the admission of this evidence was improper because it was not sufficiently reliable and probative.

However, the court cannot conclude that the admission of this evidence was an abuse of discretion requiring reversal of the JO's Order. Saulsbury shows no prejudice to it because of the admission of this evidence. The JO relied on the evidence concerning Harris's statement as corroboration of Bond's evidence. The JO specifically stated that he was relying primarily on Bond's testimony. Therefore, the admission of this evidence cannot be seen to have prejudiced Saulsbury. That being the case, it cannot be stated that the admission of this evidence was an abuse of discretion requiring reversal of the JO's Order.

D. Denial of Due Process — Failure to Provide Exculpatory Evidence.

Saulsbury further contends that it was denied due process of law because the Department "hid" exculpatory evidence from Saulsbury. In so contending, Saulsbury asserts that Wassenberg spoke to the Canadian buyer, Mr. Spear, during her investigation. Wassenberg's notes of this telephone conversation relate that Spear told Wassenberg in pertinent part: "He brought in dried grapes for distillery purposes. He said they were unprocessed grapes in various states of decay. They had stems in them. He said they were partially dried and he sold them to distilleries and liqueur manufacturers." In addition, by letter dated sometime in August, 1991, Spear wrote to David Lewis, Director, Compliance Staff, AMS, in pertinent part 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 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.

Counsel for Saulsbury asserts that he first learned that Spear had advised the Department that the product imported was dried grapes for distillery purposes when he received a letter to that effect from Spear dated February 8, 1995, less than a month before the administrative hearing. During the cross-examination of Wassenberg by Saulsbury, Saulsbury requested and received copies of Wassenberg's notes of the telephone conversation and of Spears' letter to Lewis and

cross-examined Wassenberg about the telephone conversation and the letter. Complaining that it only learned that Spear had provided similar information to the Department when it received Spear's 1995 letter, Saulsbury asserts that "[m]eanwhile USDA has this exculpatory information, fails to disclose or investigate it, and that denies Plaintiff Due Process."

Saulsbury cites absolutely no authority that the failure by the Department to disclose what Saulsbury characterizes as "exculpatory evidence" constitutes a denial of due process. The only case that the court could locate in its research does not completely support Saulsbury's position. In *Mister Discount Stockbrokers, Inc. v. S.E.C.*, 768 F.2d 875 (7th Cir. 1985), the Seventh Circuit held:

> The thrust of petitioners' argument concerning the discovery procedures is that, because the NASD disciplinary procedures are quasi-criminal in nature due to their penal aspects, the petitioners were entitled to examine exculpatory evidence in the possession of the NASD prior to the hearing before the District Committee. Since NASD procedures do not require the disclosure of exculpatory evidence, the petitioners contend that their rights to due process were violated. We hold the petitioners' argument to be without merit.
>
> Petitioners rely solely on *Brady v. Maryland* . . . in which the Court held that the prosecutor's suppression of `evidence favorable to an accused [in a criminal case] upon request violates due process where the evidence is material . . . .' . . . *Brady v. Maryland*, however, involved a criminal prosecution, while the petition currently before the court involves the review of an administrative agency proceeding and not a violation of criminal law. The difference is significant. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings, and the Administrative Procedures Act fails to provide for discovery. Instead, [t]he extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency.' . . . `Nevertheless, the due process clause does insure the fundamental fairness of the administrative hearing.' . . . Consequently, `discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.'

. . . .

In any event, the Department contends that the evidence at issue is not "exculpatory", noting the references made by Spear to "dried grapes", which, assuming that the grape skins have wrinkles, are raisins.

In the criminal context, material favorable evidence must be disclosed by the prosecution if there is a reasonable probability that, if the evidence had been disclosed to the defense, the result of the proceeding would have been different. *See United States v. Sarno, supra.* Assuming that is the standard, the court concludes that Saulsbury has not established a violation of due process. The court concurs with the Department that the evidence is not particularly exculpatory. Moreover, even if the evidence is determined to be exculpatory, Saulsbury has not shown any prejudice to it resulting from the timing of the disclosure. The evidence was provided during Saulsbury's cross-examination of Wassenberg and Saulsbury makes no argument that the timing of the disclosure alone prejudiced it.[2]

E. Arbitrary and Capricious.

Saulsbury contends that the JO's Order is arbitrary and capricious for a number of reasons.

With respect to review pursuant to Section 706(2)(A), the Supreme Court has explained:

> . . . 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.' . . . 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.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). "In order for an agency decision to be upheld under the arbitrary and capricious standard, a court must find that evidence before the agency provided a rational and ample basis

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[2]As noted, Saulsbury further asserts that the USDA's failure to investigate the information set forth in the notes and the letter deprived it of due process. However, other than making the statement, Saulsbury provides no authority or analysis for this assertion. Therefore, the court denies this ground for relief as unsupported.

for its decision." *Northwest Motorcycle Ass'n v. USDA*, 18 F.3d 1468, 1471 (9th Cir. 1994).

1. Credibility Findings.

Saulsbury contends that the JO's Order is arbitrary and capricious because the JO reversed the credibility findings made by the ALJ.

As explained in *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), the standard governing judicial review of agency decisions

> does not change merely because the final decision rejects the ALJ's determinations . . . The decision for court review is that of the agency, here the administrator's decision adopted by the Secretary. The court does not review the ALJ's decision, which is merely part of the record . . . .
>
> But the court must take into account the `whole record.' . . . Because the ALJ's factual findings are part of that record, contrary agency findings are given less weight than they would otherwise receive . . . This principle has greatest force, however, with credibility determinations from demeanor evidence . . . .

In *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 496-497 (1951), the Supreme Court commented:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The `substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is `substantial.'

In *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074 (9th Cir. 1977), the Ninth Circuit addressed the standards governing judicial review of the agency's decision when the ALJ and the JO disagree on the facts. After quoting the Supreme Court's statement in *Universal Camera Corp.*, the Ninth Circuit impliedly held that a finding of fact by the JO which rests *solely* on the testimonial evidence discredited either expressly or by clear implication by the ALJ will not be sustained. 565 F.2d at 1076-1077. Furthermore, the Ninth Circuit held, even when the record contains independent, credited evidence supportive of the JO's decision, a reviewing court will review the JO's factual findings more critically if they are contrary to the ALJ's factual conclusions. *Id.* at 1078. "Thus, evidence in the record which, when taken alone, may amount to `substantial evidence' and therefore support the Board's decision, will often be insufficient when the trial examiner has, on the basis of the witnesses' demeanor, made credibility determinations contrary to the Board's position." *Id.* The Ninth Circuit in *Penasquitos Village* explained the difference in treatment on judicial review of testimonial inferences, i.e., credibility determinations based on demeanor, and derivative inferences, i.e., inferences drawn from the evidence itself:

> Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she `sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.' . . . All aspects of the witness's demeanor — including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, the coloration during critical examination, the modulation or pace of his speech and other non-verbal communication — may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals. But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation of demeanor makes weighty only the observer's testimonial inferences.
>
> Deference is accorded the Board's factual conclusions for a different reason — Board members are presumed to have broad experience and expertise . . . Accordingly, it has been said that a Court of Appeals must abide by the Board's derivative inference, if drawn from not discredited testimony, unless those inferences are `irrational,' . . ., `tenuous' or `unwarranted.' As already noted, however, the Board, as a reviewing body, has little or no

basis disputing an administrative law judge's testimonial inferences.

. . .

We emphasize that we do not hold that the administrative law judge's determinations of credibility based on demeanor are conclusive on the Board. Many circuits, including ours, have held that they are not . . . We simply observe that the special deference afforded administrative law judge's factual determinations based on testimonial inferences will weigh heavily in our review of a contrary finding by the Board. In our view, this position is mandated by the Supreme Court's instruction that `[t]he significance of [the administrative law judge's] report, of course, depends largely on the importance of credibility in the particular case.' . . . .

In arguing that the JO's credibility determinations, to the extent they differ from those of the ALJ, render the JO's order arbitrary and capricious, Saulsbury contends:

. . . The JO rejected the ALJ's findings claiming that Mayes and Saulsbury had very little credibility, that their testimony is self-serving and based upon no real evidence. This is error as a matter of law. Their testimony is based upon real evidence, as they were eye witnesses to the product that was shipped, what was picked and what the buyer stated that he wanted as far as the product was concerned. It must be the Judicial Officer's frame of mind that when USDA accuses someone of committing a violation that the testimony of Respondent must be rejected because it is `self-serving'. Certainly the same could be true with respect to Bond who had an ax to grind with Saulsbury, and certainly it would be true with respect to Wassenberg who was out to get Saulsbury and convict him. In civil and criminal trials, an instruction is given to the jury that the testimony of the accused or testimony of a party is to be judged by the same standard the jurors are to judge other witnesses. This Judicial Officer apparently believes that all those accused by the his agency would lie because it would be `self-serving' for them to lie. The Judicial Officer states that Mayes and Saulsbury's testimony was rebutted by `unrefuted proof that Respondents' scenario did not happen.' . . . It was refuted by Saulsbury, it was refuted by Mayes, and it was refuted by the buyer of the product.

However, the JO's Order sets forth specifically why he did not find either Robert Saulsbury, Mr. Mayes or Mr. Spears to be credible. In part, the JO's credibility determination accepts those of the ALJ, i.e., with respect to the acceptance of Bond's testimony. Where the JO disagrees with the credibility determinations of the ALJ, his disagreement is based on inferences drawn from documents and testimony in the record, i.e., Bond's testimony concerning the description of the product, Bond's testimony concerning Spears' description to her of the product as raisins, his review of Saulsbury's invoices, bills of lading and payroll records as well as the Canadian customs documents, and the testimony of Mr. Murray. These are derivative inferences drawn from not discredited testimony. Therefore, they are entitled to deference. There is nothing in the JO's Order in which the JO disagrees with the ALJ's credibility findings based on testimonial inferences.

2. Burden of Proof.

Saulsbury further argues that the JO's Order is arbitrary and capricious because the JO made a "critically serious error by stating it was up to 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.'" Saulsbury asserts that it had no authority to issue a subpoena to a Canadian citizen to attend these administrative proceedings. While Saulsbury concedes that the USDA could not have issued such a subpoena either, Saulsbury notes that the Department had a Canadian official testify concerning the Canadian customs documents. Saulsbury complains: "[N]ever once did Wassenberg or anybody at USDA request the Canadian official to contact the buyer to find out about the product or to look for proof as to what the product was eventually used for. Certainly that is within the power of Canadian officials yet they were never requested to perform the investigative function, despite the fact that the USDA called the Canadian official to testify about customs documents." Saulsbury continues, that "[s]ince the `end user' was not in the power of Saulsbury to produce for testimony (because there is no subpoena power in Canada), but was certainly within the ability of USDA to investigate, through its cooperation with the Canadian custom officials, the Judicial Officers [sic] refusal to attribute truthfulness to Mr. Spears two letters and his statements to Renee Wassenberg over the phone, and instead to critically claim that they must be lies, is clearly erroneous."

This argument is without merit. First of all, there is no evidence that Saulsbury even attempted to subpoena the "end user" of the product or to obtain a declaration from the "end user" substantiating the use to which the product was put. Therefore,

Saulsbury's argument that it did not have the authority to issue the subpoena is speculation to the extent that it implies that any such subpoena would have been ignored. Secondly, Saulsbury cites no authority that the Department has any power to compel Canadian officials to conduct USDA investigations. Finally, and most importantly, the JO's Order does not conclude that the "end user" for the product testified to by Robert Saulsbury, and Mayes, and described by Spears in his letter to the USDA and in the notes of the telephone conversation with Wassenberg, was not credible because Saulsbury did not subpoena the "end user" of the product. The JO's determination that the"end use" described by Saulsbury's witnesses and documentary evidence was not credible is based on Bond's testimony concerning the description of the product, Bond's testimony concerning Spears' description to her of the product as raisins, his review of Saulsbury's invoices, bills of lading and payroll records as well as the Canadian customs documents, and the testimony of Mr. Murray. The JO's Order concludes from this evidence that the Department carried its burden of proof by a preponderance of the evidence. The JO's comments about Saulsbury's failures to present evidence from the "end user" and from its payroll records and other documents did not constitute a shift the burden of proof from the Department to Saulsbury. Rather, the JO noted that Saulsbury's failure to produce any of this evidence in support of its position lessened the plausibility or credibility of Saulsbury's defense.

3. Champagne Base.

Saulsbury further asserts that the JO's Order is arbitrary and capricious to the extent that the JO concluded that Saulsbury's product could not be used for a champagne base. Noting that the JO's conclusion derives from the testimony of Mr. Murray, Saulsbury contends that the JO fails to recognize that it was the Department's burden to prove that the product was raisins and that, for purposes of assessments, reserve obligations and inspections, was passing raisins under the Marketing Order. Saulsbury argues:

> The fact that Sunmaid, in the heart of the valley where the product is produced, that must obviously get an incredible number of tons of failing raisins, would only pay $150.00 a ton, is no evidence whatsoever as to what someone in Canada would pay for the type of product described by Saulsbury. It is quite obvious that the Judicial Officer desires to ignore the fact that it is USDA's burden of proof, and whatever was missing from its case (which was substantial), the Judicial Officer will merely fill in the holes by drawing inferences that are not supported by the record, or making

> statements out of whole cloth and act as though the Judicial Officer is an expert in distilleries, raisins, and the product in question. Nowhere in the Judicial Officer's opinion does the Judicial Officer set forth any claim as to the Judicial Officer's expertise in this product or its uses. Therefore, for the Judicial Officer to reject Mr. Spear's claim as to what the product was and what it was used for is clearly erroneous.

However, as ruled *supra*, the JO's conclusion that the product was raisins is supported by substantial evidence.

Saulsbury's arguments that the inferences drawn by the JO from Mr. Murray's testimony are arbitrary and capricious because the JO does not set forth any particular expertise in the product or its uses are not persuasive. The JO was drawing inferences from Mr. Murray's expert testimony concerning the possibility of using Saulsbury's product for distillery purposes, including using the product as a base for champagne. There is nothing in the JO's Order wherein he was making statements out of "whole cloth" concerning the "end use" of Saulsbury's product.

To the extent that Saulsbury is asserting that drawing inferences concerning the use of the product in Canada from the expert testimony of Mr. Murray is arbitrary and capricious, it is true that the Department did not present evidence concerning the price being paid in Canada at that time for the product. However, the court cannot conclude that the inferences drawn by the JO from Mr. Murray's expert testimony are arbitrary and capricious merely because of the absence of this evidence.

F. Legality of Civil Penalties Imposed.

As noted, the JO imposed civil penalties of $219,000 and assessments of $1,673.00 on Saulsbury.

Saulsbury contends that the sanctions imposed by the JO's decision "are draconian, violate Due Process, are not substantially related to the harm caused but merely epitomizes 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." In addition, Saulsbury argues that the sanction imposed by the JO's decision violates the excessive fine clause of the Eighth Amendment and are arbitrary and

capricious.[3]

1. Violation of Due Process

As noted, Saulsbury asserts that the sanctions imposed by the JO's Order violate due process.

In so arguing, Saulsbury refers the court to *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) as authority that this court should find that the sanctions imposed violate due process.

BMW of North America is not relevant to this issue. Involved in *BMW of North America* was whether the scope of a punitive damages award in Alabama was so grossly excessive in relation to the State's legitimate interests in punishment and deterrence that it violated the Due Process Clause. In discussing the constitutional issue, the Supreme Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 574. In the case before this court, there is no issue of lack of notice of the severity of the penalty that may be imposed because the penalties imposed are set forth in statutes and in the Marketing Order.

Moreover, from the court's research, "[a] statutorily prescribed penalty violates due process rights `only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' . . . ." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992). Here, Saulsbury makes no argument that the penalties prescribed by Section 608c(14)(B) or the Marketing Order violate due process under this test.

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[3]As quoted above, Saulsbury refers to the "judicial officer's (past and present disdain) for any little guy regulated by a marketing order who is found to have violated it." In its reply brief, Saulsbury asserts that "[t]here have been a number of court of appeal cases that have severely criticized the JO for his punitive mentality." The court is not aware of any evidence in the record before it that would support a finding of Judicial Officer Jenson's past and present disdain for the little guy. In addition, none of the cases cited by Saulsbury in its reply brief as supporting the inference that Courts of Appeal have severely criticized JO Jenson for his "punitive mentality" involved decisions issued by JO Jenson. Rather, they all appear to involve decisions issued by JO Donald A. Campbell.

In addition, the court notes that Saulsbury requests, in the event of a remand, that the court's remand be with the instruction that JO Jenson not be allowed to hear the matter. Saulsbury cites no statutes or case law which would authorize such an order from this court to the USDA. Other than the assertions set forth above, which are not supported by evidence or which involve another judicial officer, there is nothing presented to the court from which such an order could be based. Furthermore, litigants are not entitled to recusal of judges based on rulings that the judges have made nor can recusal be based on scurrilous attacks on the judge by the litigant.

2. Excessive Fines Clause Violation.

a. Applicability of Excessive Fines Clause of the Eighth Amendment.[4]

The threshold issue is whether the Excessive Fines Clause applies to the civil penalties set forth in Section 608c(14)(B).

The Eighth Amendment provides that "excessive fines" shall not be imposed. "Excessive Fines analysis proceeds in two steps: first, whether a payment, `in cash or in kind, [i]s punishment for some offense.' and second, `whether the particular sanction in question is so large as to be "excessive."'" *Grove v. Kadlic*, 968 F. Supp. 510, 516 (D. Nev. 1997). The first step is a question of law. *Id.* at 517.

The excessive fines clause "limits the government's power to extract payments, whether in cash or in kind, `as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-610 (1993). Involved in *Austin* was whether forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) is a monetary punishment subject to the Excessive Fines Clause. The Supreme Court in *Austin* explained;

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained in part to punish. We said in *Halper* that a `civil sanction that cannot fairly be said solely to serve remedial purposes, but rather can only be explained as also serving retributive or deterrent purposes, is punishment, as we have come to understand the term.'

Id. at 610. The Supreme Court further held:

> Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some

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[4]The court notes that Saulsbury did not clearly raise either the applicability of the Excessive Fines Clause of the Eighth Amendment or the alleged violation of the Excessive Fines Clause to the either the ALJ or the JO. The only reference by Saulsbury to the Eighth Amendment is the statement made by Saulsbury in Respondent's Post Hearing Reply Brief wherein Saulsbury contended to the ALJ that the imposition of the $219,000.00 in civil penalties sought by the Department are "draconian, violated the Eighth Amendment, and violate Saulsbury's right to a jury trial." However, in the absence of any contention by the Department that this issue is not properly before the court, the court concludes that Saulsbury's brief and conclusory reference to the Eighth Amendment suffices to have raised the issue in the administrative proceedings.

remedial purpose, the Government's argument must fail. `[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' . . . In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes `payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Id. at 621-622. In *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028 (1998), the Supreme Court held that the forfeiture provisions in 18 U.S.C. § 928(a)(1) constitutes punishment for purposes of the Excessive Fines Clause, holding in pertinent part:

. . . The statute directs a court to order forfeiture as an additional sanction when `imposing sentence on a person convicted of' a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation. Cf. *Austin v. United States* . . . (holding forfeiture to be a `fine' in part because the forfeiture statute `expressly provide[d] an "innocent owner" defense; and thus `look[ed] . . . like punishment').

The United States argues, however, that the forfeiture of currency under § 982(a)(1) `also serves important remedial purposes.' . . . The Government asserts that it has `an overriding sovereign interest in controlling what property leaves and enters the country.' . . . It claims that full forfeiture of unreported currency supports that interest by serving to `dete[r] illicit movements of cash' and aiding in providing the Government with `valuable information to investigate and detect criminal activities associated with that cash.' . . . Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of currency here does not serve the remedial purpose of compensating the Government for a loss . . . Although the

> Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144.
>
> . . .
>
> "We do not suggest there merely because the forfeiture of respondent's currency in this case would not serve a remedial purpose, other forfeitures may be classified as nonpunitive (and thus not `fines') if they serve some remedial purpose as well as being punishment for an offense. Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part. (The Government concedes as much.) This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause. See *Austin v. United States*, 509 U.S. 602, 621-672 . . . .

118 S. Ct. at 2033-2034. In determining whether a civil sanction serves in part to punish, "the court considers factors such as the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction." *Louis v. C.I.R.*, 170 F.3d 1232 (9th Cir. 1999).

Saulsbury relies on *Austin* and *Bajakajian* in contending that the civil penalties provided in Section 608c(14)(B) are intended to serve retributive and deterrent purposes as well as remedial purposes.

Section 608c(14)(B) provides in pertinent part:

> 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 legislative history of Section 608c(14)(B) explains the purpose of the amendment enacting this civil penalty provision:

> Under current law, any handler who violates a marketing order regulation, is subject to a criminal fine of not less than $50 or more than $5,000 for each violation and each day during which the violation occurs. Such violations are referred by the Department of Agriculture to the U.S.

Attorney's Office of the Department of Justice for prosecution. Only the U.S. Attorney's Office may enforce this section and take action against violators of marketing orders.

This criminal prosecution procedure, however, is both time-consuming and cumbersome. In addition, the U.S. Attorneys offices handle an enormous number and variety of cases on behalf of all Federal Government agencies. Because the offices cannot effectively handle the volume of cases that they now receive, many regulatory violations are often not pursued.

In many cases, the U.S. Attorneys Offices have not taken any action against reported marketing order violations. In 1986, for example, out of 52 investigations of alleged violations of fruit, vegetable, and specialty crop marketing orders, only 11 were resolved by the U.S. Attorneys Offices.

To maintain the integrity of the marketing order program, it is necessary that civil penalties (imposed through administrative procedures) be used as an enforcement tool to respond to regulatory violations in addition to the criminal enforcement procedures currently provided. Furthermore, administrative civil penalties will ensure that regulatory violations of marketing orders will be dealt with in a timely, efficient, and effective manner.

Thus, section 1051 contains a provision that gives the Department of Agriculture the authority to initiate an administrative action to assess a civil penalty of not more than $1000 for each violation against any handler who violates a marketing order. Each day during which a violation continues would be considered a separate violation.

The Secretary would be required to give notice and an opportunity for any agency hearing before assessing a civil penalty. A penalty order would be reviewable in the U.S. district court . . . The bill does not eliminate the authority to seek a criminal fine for a marketing order violation, were appropriate. It simply will authorize the Secretary of Agriculture to seek an administrative civil penalty when circumstances indicate that it would be an effective regulatory tool.

H. Rep. No. 391(I), 100th Cong., 1st Sess. 29-30, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-29-30.

There can be little question that the Department's construction of the purpose of Section 608c(14)(B) includes deterrent as well as remedial purposes. The JO's Order quotes extensively from *In re Onofrio Calabrese*, 51 Agric. Dec. 131 (1992), *aff'd on other grounds*, *Balice v. USDA*, No. CV-F-92-5483 AWI. In *Calabrese*, the legislative history of the Act pertaining to marketing order penalties is quoted. In *Calabrese*, the Department ruled:

> It is the intent of Congress that the penalties assessed in this proceeding be a complement to the criminal penalties which the United States Attorneys have the authority to seek, but often do not due to their workload demands. In order to be an effective complement (or alternative) to criminal prosecution, the sanctions imposed in these proceedings should be sufficient to remedy the violations committed by the Respondents, and also sufficient to deter such conduct by Respondents and others in the future. An insufficient penalty might be seen by these Respondents or other potential violators as a tolerable cost of doing business, in light of the potential returns available for operating in violation of the Order requirements.

See also Spencer Livestock Com'n v. Dept. of Agriculture, 841 F.2d 1451, 1456 (9th Cir. 1988) (addressing the Department's "severe sanction" policy wherein, although the Department stated that the purpose was not primarily punishment for a past offense, its purpose is to deter those on whom the sanctions are imposed and other potential violators. Although *Spencer Livestock Com'n* does not discuss the Excessive Fines Clause, it does reiterate the Department's view that the civil penalties serve a punitive as well as a deterrence purpose.)

This court is not bound by the construction given Section 608c(14)(B) by the Department as it relates to the Excessive Fines Clause analysis. However, it is an indication that the agency charged with enforcement of the penalty provision believes that one of the purposes of the civil penalty provision is deterrence.

Although this is an area of the law which appears to be still evolving since the decision in *Austin*, the court concludes, based on the analysis in *Austin* and *Bajakajian* and the legislative history quoted above, that Section 608c(14)(B) is subject to the Excessive Fines Clause.[5]

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[5]During the administrative proceedings and in the Complaint filed with this court, Saulsbury contended that, because the penalties imposed by the JO's Order were penal in nature and amounted to cruel and unusual punishment, Saulsbury is entitled to a jury trial before an Article III court. Saulsbury does not move for summary judgment on this ground. Given the failure to assert this ground

(continued...)

b. Excessiveness Within Eighth Amendment.

Because the court has concluded that the civil penalty provision of Section 608c(14)(B) is subject tot he Excessive Fines Clause, the court must next determine whether the penalties imposed by the JO's Order are excessive within the meaning of the Eighth Amendment.

In making this determination, the court decides whether the civil penalties imposed are "grossly disproportional to the gravity of a defendant's offense." *Bajakajian, supra*, 118 S. Ct. at 2036; *United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 & n.3 (9th Cir. 1999). The Supreme Court in *Bajakajian* held that the district court's factual findings in conducting the excessiveness inquiry must be accepted unless clearly erroneous, but that the "question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 118 S. Ct. at 2037 n.10. The court assumes that these standards apply to judicial review of an administrative imposition of civil penalties.

Here, however, the JO made no findings specifically addressed to the contention that the civil penalties sought and obtained by the Department were or were not excessive as that term has been defined by the Supreme Court. Therefore, the court will remand this action to the Secretary for the purpose of making these findings.[6] The court will retain jurisdiction of this action pending those findings. The parties shall renew their motions for summary judgment before the court on this issue once those findings are final.

4. Arbitrary and Capricious/Substantial Evidence.

Saulsbury further argues that the penalties imposed by the JO's Order are arbitrary and capricious and unsupported by substantial evidence.

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[5](...continued)
for relief in the motion, the court concludes that Saulsbury has abandoned this ground for relief.

[6]Following oral argument, the court ordered the parties to submit supplemental briefs whether this court had the authority to reduce the penalties imposed in an administrative proceeding or whether the matter must be remanded to the Department. The court concludes from the authority cited by the Department, especially *Butz v. Glover*, 411 U.S. 182 (1973) that the court does not have the authority to reduce the civil penalties imposed by the Department unless and to the extent those penalties are not supported by the evidence or are arbitrary and capricious and that the court cannot determine whether the civil penalties imposed violated the Excessive Fines Clause until the findings necessary to such a determination are made by the Department.

As noted, a determination whether the civil penalties imposed are arbitrary and capricious requires a consideration whether the JO's decision concerning the penalties was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, supra*, 402 U.S. at 416. As further noted, substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood, supra*, 497 U.S. at 565.

Saulsbury argues that the civil penalties are arbitrary and capricious because Robert J. Saulsbury is in his 70s and will be bankrupted by the civil penalties imposed by the JO if affirmed. Mr. Saulsbury's age is not relevant to this issue. Moreover, there is no evidence in the administrative record establishing that Saulsbury will be bankrupted by civil penalties.

Saulsbury repeatedly argues that the JO abdicated his decision-making authority by accepting in toto the Department's position concerning the civil penalties to be imposed. However, the JO accepted that position because he agreed with it after considering the record.

An issue concerning evidence of the willfulness of Saulsbury's offenses because of his knowledge of the Marketing Order involves the JO's conclusion that Saulsbury had to know about the Marketing Order's requirements because of the petition pursuant to Section 608c(15)(A) filed in 1987 by Saulsbury Orchards & Almond Processing, Inc. and subsequent review in this court concerning various challenges to the Almond Marketing Order. The JO refers to evidence that the address for Saulsbury Enterprises (the entity plaintiff herein) is the same as that of Saulsbury Orchards & Almond Processing, Inc., that Saulsbury used Saulsbury Orchards & Almond Processing, Inc.'s almonds bins to store its raisins, that Robert J. Saulsbury (the individual plaintiff herein) admitted that he was in the almond business with family members and others at Saulsbury Orchards & Almond Processing, Inc. from 1969 until the late 1980's, that Mayes testified that when he began working for Saulsbury in 1974, it was for Saulsbury's almond business, and that Robert J. Saulsbury and Bond testified that Bond worked with Skip Pettit and Saulsbury's son after being fired from Saulsbury's Enterprises.

Saulsbury argues that the Section 15(A) petition and subsequent litigation brought by Saulsbury Orchards & Almond Processing, Inc. cannot form the basis for an inference that Saulsbury was aware of the requirements of the Raisin Marketing Order. In so doing, Saulsbury notes that the two cases involve different marketing orders and different issues. Saulsbury contends that it is arbitrary and capricious to assume that knowledge of one industry regulation provides

knowledge of another industry regulation.[7]

If the only evidence upon which the JO based his inference that Robert J. Saulsbury was aware of the requirements of the Raisin Marketing Order was the fact of the almond marketing order and the litigation with the Department concerning the Almond Marketing Order brought by Saulsbury Orchards & Processing, Inc., the court would agree with Saulsbury that this evidence is not probative and that the JO's reliance upon it is arbitrary and capricious. However, as noted above, this evidence is not the only evidence upon which the JO bases the inference that Saulsbury was not ignorant of the requirements at the Raisin Marketing Order. Therefore, the court cannot conclude from the record before it that the JO's conclusion that Saulsbury was aware of the requirements of the Marketing Order was arbitrary or capricious or unsupported by substantial evidence.

With regard to the $1,673.30 sanction imposed by the JO because of violations of the Marketing Order's assessment requirements,[8] Section 989.80 of the Marketing Order requires that handlers of raisins pay certain assessments determined pursuant to a formula set forth in Section 989.80. The ALJ did not require Saulsbury to pay these assessments for the crop years in question because the ALJ concluded that the assessments are based on "standard raisins" and that the raisins Saulsbury sold to Canada "were off-grade raisins which would have failed to qualify as standard (Grade A) raisins." The JO concluded that, because "the raisins [Respondents] sold to the Canadian distillery were, as noted, [sold at a price which would] qualify as (Grade A) raisins" and because assessments are based on the raisins being standard raisins, Saulsbury would be required to pay the assessments calculated from the tonnage shipped by Saulsbury during the crop

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[7]Brian Leighton, counsel for plaintiffs herein and counsel for Saulsbury Orchards & Processing, Inc., asserts in a footnote that, during the 12 years that the litigation concerning Saulsbury Orchards & Processing, Inc.'s challenges to the almond marketing order has been proceeding, he, Brian Leighton, has never discussed any matters concerning the almond operation and the litigation with Robert J. Saulsbury. That Mr. Leighton never discussed the almond matter with Robert J. Saulsbury is not probative that Robert J. Saulsbury was unaware of the requirements of the almond marketing order and of the issues raised in the almond litigation.

[8]"This total amount is broken down as follows: (1) $557.33 for 1988-1989; (2) $564.68 for 1989-1990; and (3) $521.29 for 1990-1991.

years in question.[9] In addition, the JO based his conclusion on the fact that Saulsbury did not have the raisins inspected, "so there is no reason for presuming that they would have failed inspection or received any particular grade simply because Saulsbury and Mayes said so."

The court concludes that the imposition of the assessments is not arbitrary and capricious or unsupported by substantial evidence. The inferences drawn by the JO from the prices received by Saulsbury for the product, shipped to Canada when compared to the prices received by handlers of raisins during the same time period supports the JO's conclusion.

The JO imposed civil penalties in the amount of $59,000 with regard to the reserve requirements of the Marketing Order. Section 989.66 of the Marketing Order requires a handler of raisins to hold a percentage of his raisins in storage under the Raisin Administrative Committee notifies the handler that he is relieved of that responsibility. Therefore, the JO imposed a penalty pursuant to Section 608c(14)(B) of $1,000 for each of the 59 months that Saulsbury failed to hold the applicable percentage of raisins in reserve pursuant to the reserve requirement of the Marketing Order for the crop year in question. The ALJ did not impose any sanction because of Saulsbury's failure to comply with the Marketing Order's reserve requirements because of the ALJ's conclusion that Saulsbury's raisins were "off-grade raisins which would have failed to qualify as standard (Grade A) raisins." The JO, as noted, disagreed with the ALJ's conclusion for the reasons discussed in connection with the assessments. For the reasons set forth above concerning the assessments, the JO's conclusion that the evidence established that

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[9]Section 989.24 of the Marketing Order defines the various grades of raisins as follows:

(a) `Standard raisins' means raisins which meet the then effective minimum grade and condition standards for natural condition raisins.

(b) `Offgrade raisins' means raisins which do not meet the then effective minimum grade and condition standards for natural condition raisins: *Provided*, That raisins which are certified as off-grade raisins shall continue to be such until successfully reconditioned or become `other failing raisins.'

(c) `Other failing raisins' means any raisins received or acquired by a handler, either as standard raisins or off-grade raisins, which are processed to a point where they qualify as packed raisins but fail to meet the applicable minimum grade standards for packed raisins.

(d) `Raisin residual material' means defective raisins, steamer waste, sweepings, and other residue accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins.

Saulsbury failed to hold the raisins for a total of 59 months because Saulsbury sold 100% of its raisins during the crop years in question, thus holding no raisins in reserve is not arbitrary and capricious or unsupported by substantial evidence.

With respect to the $40,000 penalty imposed in the JO's Order for failing to file reports as required the Marketing Order, Section 989.73 of the Marketing Order and the evidence presented at the administrative hearing establishes that handlers are required to file reports of inventory, acquisition, disposition, shipment, and status of raisins. The ALJ found that Saulsbury failed to file a total of 20 reports required by the Marketing Order during the crops years in question but did not impose a specific penalty for these violations of the Marketing Order.[10] The JO concluded that Saulsbury had failed to file a total of 40 reports required by the Marketing Order[11] during the crop years in question and imposed a $1,000.00 penalty for each failure to file the report, stating in pertinent part:

> The [ALJ] agreed that Saulsbury had failed to file `any of the RAC reports required of handlers,' but found that he was only required to file 20 of them, on the assumption that Saulsbury's raisins were `off-grade' or `failing.' As discussed above, the [ALJ's] finding is erroneous. One cannot assume that [Respondents were] exempt from filing all 40 reports, and [their] failure to do so is serious and warrants the imposition of the full $1,000 civil penalty for each violation.

As discussed above, the inferences drawn by the JO from the record concerning the quality of Saulsbury's raisins are not arbitrary and capricious or unsupported by

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[10]The ALJ found that Saulsbury failed to file: (a) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection; (b) eight RAC-30 Forms, reporting off-grade raisins; (c) three RAC-32 Forms, reporting the disposition of off-grade or failing raisins, or residual material; (d) three RAC-35 Forms, applying to sell, ship or dispose of raisins or raisin residual materials; and (e) three RAC-51 Forms, reporting inventory of off-grade raisins by variety.

[11]The JO found that Saulsbury failed to file: (a) eight RAC-1 Forms, reporting standard raisin acquisitions; (b) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection; (c) three RAC-7 Forms, reporting the status of reserve pool raisins; (d) three RAC-20 Forms, reporting the disposition of free tonnage raisins; (e) three RAC-21 Forms, reporting free tonnage shipments to foreign countries; (f) eight RAC-30 Forms, reporting off-grade raisins; (g) three RAC-32 Forms, reporting the disposition of off-grade or failing raisins, or residual material; (h) three RAC-35 forms, applying to sell, ship, or dispose of raisins or raisin residual materials; (i) three RAC-50 Forms, reporting inventory of free tonnage raisins, by variety; and (j) three RAC-51 Forms, reporting inventory of off-grade raisins, by variety.

substantial evidence.

However, the court concludes from the record herein that the imposition of a $40,000 civil penalty is not supported by the record. $14,000 of the $40,000 penalty imposed for failing to file reports required by the Marketing Order is attributable to the failure to file reports reporting off-grade raisins, the disposition of off-grade or failing raisins, and the reporting of off-grade raisins by variety. The court concludes that the JO cannot impose a penalty for failing to file these particular reports, given tho JO's conclusion that Saulsbury's raisins were standard raisins. Therefore, the civil penalty imposed on Saulsbury because of violations of Section 989.73 of the Marketing Order will be reduced by $14,000.00.

With regard to the penalty imposed for Saulsbury's failure to have the raisins inspected, Section 989.58(d) of the Marketing Order requires the inspection and certification of all natural condition raisins acquired or received by a handler and Section 989.102 *et seq.* sets forth how and where natural condition raisins are inspected and certified. The ALJ found that Saulsbury did not have the raisins inspected for shipment to Canada. The ALJ did not impose any penalty for these violations of the Marketing Order because Saulsbury's raisins were not have qualified as standard (Grade A) raisins and could not have been sold in competition with other standard (Grade A) raisins subject to the Marketing Order even if inspected. The JO concluded that Saulsbury made 60 shipments of raisins to Canada during the crop years at issue "without having either incoming or outgoing inspections, thus committing 120 violations of the [Raisin] Order" and imposed a $1,000 penalty for each violation for a total penalty for failure to inspect of $120,000.00.

Again, the court concludes that the inferences drawn by the JO from the record concerning the quality of Saulsbury's raisins were not arbitrary and capricious or unsupported by substantial evidence.

As noted, the JO refers to "incoming and outgoing inspections" and concludes that, because there were 60 shipments of raisins to Canada, there were 120 violations.

Saulsbury complains that the JO has imposed a double penalty for the same conduct.

Saulsbury's objection is without merit. The record establishes that the raisins were stored at a warehouse for several weeks before being shipped to Canada. Section 989.58(d)(1) provides in pertinent part that "[e]ach handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by him . . . ." Section 989.59(d) provides in pertinent part:

[E]ach handler shall, at his own expense, before final shipping or otherwise

making final disposition of raisins, cause and [sic] inspection to be made of such raisins . . . Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted a copy of such other certificate together with such other documents or records as the committee may require.

Because the regulations require inspections when the handler receives the raisins and inspections when the raisins are disposed of, the JO did not impose a double penalty.

Finally, Saulsbury argues that the civil penalties imposed are arbitrary and capricious because the "junk" raisins shipped to Canada would not have competed with raisins for consumer consumption. However, as noted, the court concludes that the inferences concerning the quality of the raisins shipped to Canada made by the JO are neither arbitrary and capricious or unsupported by substantial evidence

5. Small Business Regulatory Enforcement Fairness Act of 1996.

Saulsbury contends that the penalties imposed by the JO's Order are clearly contrary to Section 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, codified as a note to 5 U.S.C. § 601.[12] Specifically, Saulsbury

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[12]Section 223(a) provides in pertinent part as follows:

(a) In general. — Each agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section [Mar. 29, 1996] to provide for the reduction, and under appropriate circumstances for the waiver of, civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.

(b) Conditions and exclusions. — Subject to the requirements of limitations of other statutes, policies or programs established under this section shall contain conditions or exclusions which may include, but shall not be limited to —

(1) requiring the small entity to correct the violation within a reasonable correction period;

(2) limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a State;

(3) excluding small entities that have been subject to multiple enforcement actions by the

(continued...)

complains, the JO did not consider whether Saulsbury had the ability to pay the penalties imposed, whether the penalties imposed would put Saulsbury out of business "or any of the factors under the Act."

However, Saulsbury did not raise this contention during the administrative proceedings. Generally, parties must raise objections to agency proceedings during the actual proceeding. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Furthermore, Saulsbury could not have asserted any contentions based on Section 223(a) because, as noted, its effective date was two months after the Department took final action in this case.

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that the JO's Order is affirmed with the exception of $14,000.00 in civil penalties.

IT IS FURTHER ORDERED that this action is remanded to the Department for further findings concerning whether the civil penalties imposed by the JO, as reduced by the court herein, are excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

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[12](...continued)
agency;

(4) excluding violations involving willful or criminal conduct;

(5) excluding violations that pose serious health, safety or environmental threats; and

(6) requiring a good faith effort to comply with the law.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Decision and Order filed February 23, 1999.

Dismissal of petition — Modification of or exemption from order — Premature petition.

The Judicial Officer affirmed the Decision and Order by Administrative Law Judge Baker (ALJ) under 7 U.S.C. § 608c(15)(A), which dismissed a petition filed by a handler subject to the New England Milk Marketing Order (7 C.F.R. pt. 1001). The Judicial Officer held that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from referring to other documents for the administrative law judge's reasons for a decision upon a motion to dismiss and that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from adopting reasons from other documents, as the administrative law judge's reasons for a decision upon a motion to dismiss. The Judicial Officer held that the petition contains neither a request for modification of the New England Milk Marketing Order nor a request to be exempted from the New England Milk Marketing Order; thus, dismissal of the petition was not error. Moreover, the Judicial Officer found that the petition was premature because it challenged an order that the Secretary of Agriculture had not issued; but was based solely on petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, which petitioner contends will violate the Agricultural Marketing Agreement Act of 1937, as amended, and the equal protection guarantees of the United States Constitution.

Donald A. Tracy, for Respondent.
John Vetne, Newburyport, Massachusetts, for Petitioner.
Initial Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

New England Dairies, Inc. [hereinafter Petitioner], instituted this proceeding on September 14, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice], by filing: (1) a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) [hereinafter Petition]; (2) an answer to an amended petition filed by Stew Leonard's in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1; (3) a petition to intervene in *In re Stew Leonard's, supra* [hereinafter Motion to Intervene]; and (4) a petition to consolidate this proceeding with *In re Stew Leonard's, supra* [hereinafter Motion to

Consolidate].[1]

Petitioner alleges in its Petition that the relief requested by Stew Leonard's in *In re Stew Leonard's, supra*, is not in accordance with the AMAA or the New England Milk Marketing Order or, in the alternative, if Stew Leonard's is found exempt from the pricing provisions of the New England Milk Marketing Order, the pricing obligations imposed on Petitioner under the New England Milk Marketing Order are not in accordance with the uniform pricing provisions of the AMAA (7 U.S.C. § 608c(5)(A)) and the equal protection guarantees of the United States Constitution (U.S. Const. amend. V) (Pet. at 4).

On October 30, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Motion to Dismiss Petition and to Have the Case Assigned to Judge Baker [hereinafter Motion to Dismiss]. Respondent requests dismissal of Petitioner's Petition because the Petition: (1) requests neither modification of, nor exemption from, the New England Milk Marketing Order, as required by section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); (2) does not comply with the content requirements in section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)); and (3) challenges an order by the Secretary of Agriculture, which the Secretary of Agriculture has not issued.

On December 15, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued Dismissal of Petition [hereinafter Initial Decision and Order] in which the ALJ dismissed Petitioner's Petition, Motion to Intervene, and Motion to Consolidate.

On January 19, 1999, Petitioner appealed to, and requested oral argument before, the Judicial Officer; on February 12, 1999, Respondent filed Respondent's Reply to Petitioner's Appeal; and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 900.65(b)), is refused because the issues have been fully briefed by the parties; thus, oral argument would

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[1]Petitioner captioned each of its September 14, 1998, filings "*In re Stew Leonard's*, 98 AMA Docket No. M 1-1" and "*In re New England Dairies*, 98 AMA Docket No. M 1-_." I infer, based upon the caption on each of Petitioner's September 14, 1998, filings, that Petitioner intended to file each of its September 14, 1998, filings in this proceeding and in *In re Stew Leonard's, supra*. However, I find Petitioner's filing an answer and a motion to intervene in this proceeding perplexing. In order to avoid any possible confusion regarding the records in this proceeding and *In re Stew Leonard's, supra*, Petitioner is strongly urged in any future filing in this proceeding and in *In re Stew Leonard's, supra*, to specify the proceeding to which the filing relates.

appear to serve no useful purpose.

Based upon a careful consideration of the record and pursuant to section 900.66(a) of the Rules of Practice (7 C.F.R. § 900.66(a)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order, as restated.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(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(15)(A).

ALJ'S INITIAL DECISION AND ORDER (AS RESTATED)

This Decision and Order is based upon the whole record, including Respondent's Motion to Dismiss, filed October 30, 1998, which sets forth compelling reasons why Petitioner is attempting to intervene in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, and why Petitioner has filed an inappropriate, baseless Petition not in conformity with the AMAA or the Rules of Practice.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

As an initial matter, Respondent appeals not only the Initial Decision and Order issued in this proceeding, but also the "Rulings on Respondent's Motion to Strike Agri-Mark, Inc.'s, `Answer' and Agri-Mark, Inc.'s, Motion for Consolidated Hearing; Rulings on New England Dairies, Inc.'s `Answer' to Amended Petition of Stew Leonard's . . . and Petition to Intervene and Consolidate for Hearing," which the ALJ issued in *In re Stew Leonard's, supra*, on September 22, 1998. Petitioner cannot in this proceeding appeal the ALJ's rulings issued in another proceeding. Therefore, I restrict my additional conclusions in this proceeding to the issues raised by Petitioner that relate to the ALJ's Initial Decision and Order issued on December 15, 1998, in this proceeding.

Petitioner raises three issues in Petitioner's Appeal of New England Dairies, Inc., to the Judicial Officer [hereinafter Appeal Petition]. First, Petitioner contends that:

> Judge Baker's dismissal of [Petitioner's] Petition as it relates to past agency action was entered in violation [of] procedural and substantive requirements of 7 C.F.R. § 900.52(c)(2) expressly requiring "reasons" for any dismissal[.]

Appeal Pet. at 4.

I agree with Petitioner that an administrative law judge must state the reasons for dismissal of a petition, and I find that the ALJ's Initial Decision and Order does state her reasons for dismissing Petitioner's Petition. Section 900.52(c)(2) of the Rules of Practice provides, as follows:

§ 900.52 Institution of proceeding.

. . . .

(c) *Motion to dismiss petition.* . . .

(2) *Decision by Administrative Law Judge.* The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided,* That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

7 C.F.R. § 900.52(c)(2).

The ALJ's Initial Decision and Order states, in its entirety:

The following Order is issued after a consideration of the record as a whole, including Respondent's Motion to Dismiss the Petition, filed October 30, 1998. Respondent has set forth compelling reasons why the Petitioner herein is attempting to intervene in another 15A proceeding and has filed an inappropriate baseless Petition and one which is not in conformity with the law and regulations, all as more fully set forth by Respondent in its Motion to Dismiss.

New England Dairies, Inc.'s Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608(c)(15)(A); and, its Affirmative Claims of Intervenor/Petitioner filed September 14, 1998, are Dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 15th day of December, 1998
/s/
Dorothea A. Baker
Administrative Law Judge
(202) 720-8305

The ALJ clearly states in the Initial Decision and Order that the reasons for the Initial Decision and Order are set forth in Respondent's Motion to Dismiss. An administrative law judge is not prohibited by section 900.52(c)(2) of the Rules of Practice from referring to other documents filed in the proceeding for the administrative law judge's reasons for a decision upon a motion to dismiss. Moreover, an administrative law judge is not prohibited by section 900.52(c)(2) of the Rules of Practice from adopting reasons from other documents filed in the proceeding, as the administrative law judge's reasons for a decision upon a motion to dismiss. The ALJ's reference to, and adoption of, the reasons in Respondent's Motion to Dismiss for her decision regarding Respondent's Motion to Dismiss meet the requirement in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) that an administrative law judge must state the reasons for his or her decision regarding a motion to dismiss.

Second, Petitioner contends that:

> [T]he action of the administrative law judge denying declaratory relief requested by [Petitioner] is erroneous as a matter of law[.]

Appeal Pet. at 4.

Petitioner requests declaratory relief in its Petition, as follows:

> WHEREFORE, Petitioner . . . respectfully prays:
>
> . . . .
>
> D. That if the Secretary deems that Stew Leonard's is qualified as a producer handler under the provisions of 7 C.F.R. § 1001.10, the Secretary in such case declare that the provisions of § 1001.10 are unauthorized, or otherwise not in accordance with law.
>
> E. That the Secretary find and declare, as matter of fact and law, that farm and dairy herd leasing by a handler does not vest the lessee handler

complete and unshared enterprise and risk in the milk producing facilities.

Pet. at 5.

I disagree with Petitioner's contention that the ALJ's dismissal of Petitioner's requests for declaratory relief is error. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) provides that 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 with any such order is not in accordance with law and praying for a modification of the order or to be exempted from the order. The Petition contains neither a request for modification of the New England Milk Marketing Order nor a request to be exempted from the New England Milk Marketing Order. Therefore, the ALJ properly dismissed the Petition.

Moreover, even if I found the Petition to contain a request for modification of, or to be exempted from, the New England Milk Marketing Order, the ALJ properly dismissed the Petition because it is premature.

The record reveals that Petitioner believes that, in connection with another proceeding instituted under the AMAA, *In re Stew Leonard's, supra*, the Secretary of Agriculture will determine that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. The gravamen of Petitioner's Petition is a challenge to what Petitioner believes is the Secretary of Agriculture's imminent determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order and the declaratory relief requested in the Petition is relief from the Secretary of Agriculture's alleged imminent determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order.

However, the Secretary of Agriculture has not determined that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. Therefore, the Petition requests declaratory relief from an order which the Secretary of Agriculture has not issued. The ALJ's dismissal of the Petition, which is based on Petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's, supra*, which Petitioner contends will violate the AMAA and the equal protection guarantees of the United States Constitution, is not error.

Third, Petitioner contends that:

> [T]he decision of the ALJ denying a regulatory exemption to [Petitioner], so that it may purchase and market milk under essentially the same pricing terms as handlers exempted under 7 C.F.R. § 1001.10, is erroneous as a matter of statutory and constitutional law.

Appeal Pet. at 4.

Petitioner describes the basis for its requested "regulatory exemption" in its Petition, as follows:

> . . . [I]f Stew Leonard's, Inc., is or may be deemed exempt from the minimum pricing provisions of the New England Milk Marketing Order, [P]etitioner . . . claims that pricing obligations imposed upon [Petitioner] under the [New England Milk Marketing] Order, including those set forth in 7 C.F.R. §§ 1001.70 through 1001.74[] and 1001.85, are not in accordance with law in that said obligations are in conflict with the requirements of 7 U.S.C. § 608c(5)(A), requiring that regulated prices be uniform as to all handlers, and also operate in conflict with equal protection guarantees of the U.S. Constitution, in that the regulatory discrimination which would favor Stew Leonard's and disfavor [Petitioner] is not supported by rational basis or serve to further a legitimate government interest.

Pet. at 4.

I disagree with Petitioner's contention that the ALJ's dismissal of Petitioner's request for a "regulatory exemption" is error.

Petitioner's request for a "regulatory exemption" is based on Petitioner's contention that a determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order and a failure to determine that Petitioner has the same status would violate both the uniform pricing provisions in section 8c(5)(A) of the AMAA (7 U.S.C. § 608c(5)(A)) and the equal protection guarantees of the United States Constitution (U.S. Const. amend. V). Thus, the basis for Petitioner's request for a "regulatory exemption" is Petitioner's expectation that the Secretary of Agriculture will determine that Stew Leonard's is a producer-handler under the New England Milk Marketing Order.

However, the Secretary of Agriculture has not determined that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. Therefore, the Petition requests a "regulatory exemption" based on an order which the Secretary of Agriculture has not issued. The ALJ's dismissal of the Petition, which is based on Petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's, supra*, which Petitioner contends will violate the AMAA and the equal protection guarantees of the United States Constitution, is not error.

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

Order

Petitioner's Petition filed in this proceeding on September 14, 1998, is dismissed, and Petitioner's Motion to Intervene and Motion to Consolidate, filed in this proceeding on September 14, 1998, are denied.

DEPARTMENTAL DECISIONS

In re: DANIEL E. MURRAY.
A.Q. Docket No. 98-0003.
Decision and Order filed January 22, 1999.

Default — Failure to file timely answer — Civil Penalty.

The Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision assessing a civil penalty of $500 against Respondent. The Judicial Officer held that Respondent's failure to file a timely answer to the Complaint 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 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.

Susan C. Golabek, 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 Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under sections 2 and 3 of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. §§ 78.1-.44 (1996)); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 15, 1998.

The Complaint alleges that on or about June 12, 1996, Daniel E. Murray [hereinafter Respondent], "in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cattle [sic] to a recognized slaughtering establishment without being accompanied by a permit or 'S' brand permit, as required" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on January 24, 1998.[1] 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.

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[1]Domestic Return Receipt for Article Number p368421153 signed by "Katie Murray" stating that the date of delivery was "1/24/98."

§ 1.136(a)).

On August 18, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on August 24, 1998.[2] Respondent filed an objection to Complainant's Motion for Default Decision, but gave no basis for his objection.[3]

On September 23, 1998, pursuant to 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 Default Decision and Order in which the Chief ALJ: (1) found that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint; and (2) assessed a civil penalty of $500 against Respondent (Default Decision and Order at second unnumbered page).

On October 27, 1998, 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

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[2]Domestic Return Receipt for Article Number p093143432 signed by "Dan Murray" stating that the date of delivery was "8-24-98."

[3]Respondent's objection to Complainant's Motion for Default Decision states, in its entirety, as follows:

Sept. 12, 1998

To: Susan C. Golabek
Attorney for Complainant
USDA/OGC

I Daniel E[.] Murray am in objection of the Motion for Decision and want to appeal this decision.
A.Q[.] Docket No. 98-0003

Daniel E. Murray
1756 Whitetail Rd.
Decorah IA 52101
(319) 382-8496

proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[4]

On January 20, 1999, Complainant filed Complainant's Opposition to Respondent's Appeal Petition of the Default Decision and Order, and on January 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

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

APPLICABLE STATUTORY PROVISIONS AND REGULATION

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

. . . .

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

. . . .

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

. . . .

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious,

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[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

§ 122. Offenses; penalty

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. §§ 111, 122.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

. . . .

SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 78—BRUCELLOSIS

. . . .

Subpart B—Restrictions on Interstate Movement of Cattle Because of Brucellosis

. . . .

§ 78.8 Brucellosis exposed cattle.

Brucellosis exposed cattle may be moved interstate only as follows:

(a) *Movement to recognized slaughtering establishments.* . . .

(2) Brucellosis exposed cattle may be moved interstate directly to a recognized slaughtering establishment if such cattle are:

. . . .

(ii) Accompanied by a permit or "S" brand permit[.]

9 C.F.R. § 78.8(a)(2)(ii).

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

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, on August 18, 1998, Complainant filed Motion for Default Decision. Respondent filed an objection to Complainant's Motion for Default Decision, which gave no basis for the objection. The allegations in the Complaint having been admitted and there being no valid reason before me for not entering a default decision, the material allegations in the Complaint are adopted and set forth in this Decision and Order as the Findings of Fact, and this Decision and

Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Daniel E. Murray, Respondent, is an individual with a mailing address of 1756 Whitetail Rd., Decorah, Iowa 52101.

2. On or about June 12, 1996, Respondent, in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cow to a recognized slaughtering establishment without being accompanied by a permit or "S" brand permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, Respondent has violated 9 C.F.R. § 78.8(a)(2)(ii).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises one issue in a letter dated October 24, 1998, and addressed to the Chief ALJ, which I infer to be Respondent's appeal petition [hereinafter Respondent's Appeal Petition]. Respondent admits in Respondent's Appeal Petition that on or about June 12, 1996, a cow was moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, but denies that he moved, or caused the movement of, the cow interstate, as alleged in the Complaint. Respondent's denial of the material allegations of the Complaint is too late. Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint because Respondent failed to file an answer within 20 days after he was served with the Complaint.

A copy of the Complaint and a copy of the Rules of Practice were served on Respondent on January 24, 1998.[5] Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

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[5]See note 1.

§ 1.136 Answer.

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

. . . .

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

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

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

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on January 24, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, 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 within the prescribed time shall constitute an admission of all the allegations in this complaint and a waiver of a hearing.

Compl. at 2.

Likewise, Respondent was informed in the letter of service, which accompanied the Complaint and 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, as follows:

CERTIFIED RECEIPT REQUESTED

January 15, 1998

Mr. Daniel E. Murray
1756 Whitetail Road
Decorah, Iowa 52101

Dear Mr. Murray:

Subject: In re: Daniel E. Murray, Respondent -
A.Q. Docket No. 98-0003

Enclosed is a copy of a Complaint, which has been filed with this office under . . . Section 2 of the Act of February 2, 1903, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth

any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

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

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

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

Sincerely,
/s/
Regina A. Paris
Legal Technician

Letter dated January 15, 1998, from Regina A. Paris, Legal Technician, USDA, Office of Administrative Law Judges, Hearing Clerk, to Mr. Daniel E. Murray (emphasis in original).

On February 18, 1998, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time (Letter dated February 18, 1998, from Joyce A. Dawson, Hearing Clerk, to Mr. Daniel E. Murray). Respondent did not respond to the Hearing Clerk's February 18, 1998, letter.

On August 18, 1998, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent filed an

objection to Complainant's Motion for Default Decision, but Respondent provided no basis for his objection.[6] On September 23, 1998, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued the Default Decision and Order in which he found that Respondent admitted the allegations in the Complaint by reason of default and assessed a civil penalty of $500 against Respondent.

Respondent's answer, which is contained in Respondent's Appeal Petition, was filed on October 27, 1998, 9 months and 3 days after Respondent was served with the Complaint. Respondent's answer, which was due February 13, 1998, is filed too late, and Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint. Thus, I find that the Default Decision and Order was properly issued.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[7] Respondent has shown no basis for setting aside the Default Decision and Order and allowing Respondent to file an

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[6]See note 3.

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

Answer.[8] The Rules of Practice clearly provide that an answer must be filed within

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[8]*See generally In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (holding that the default decision was proper where respondents filed an answer 49 days after they were served with the complaint); *In re Conrad Payne*, 57 Agric. Dec. ___ (Dec. 8, 1998) (holding that the default decision was proper where respondent failed to answer the complaint); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. ___ (July 16, 1998) (holding the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision 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. 517 (1997) (holding the default decision 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) (holding that the 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) (holding the 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. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was 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) (holding the 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) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the 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) (holding the

(continued...)

[8](...continued)
default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a 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) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was 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) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was 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) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the
(continued...)

20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's answer was filed 9 months and 3 days after Respondent was served with the Complaint.

Further, 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 USDA to handle its workload in an expeditious and economical manner. USDA's three administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 30 to 50 cases per year. As such, 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.'"[9] If Respondent was 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.

Accordingly, the Default Decision and Order 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

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[8](...continued)
consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the 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) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood USDA's procedural requirements, when there is no basis for the misunderstanding).

[9]*See 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 also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that 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) (stating that 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) (stating that 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).

Amendment to the United States Constitution.[10]

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

Order

Respondent Daniel E. Murray is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0003.

In re: DANIEL E. MURRAY.
A.Q. Docket No. 98-0003.
Order Denying Petition for Reconsideration filed March 8, 1999.

Default — Mailing — Filing.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed his Answer within 20 days after he was served with the Complaint, his Answer would not be timely because Respondent's Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent.

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

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under sections 2 and 3 of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. §§ 78.1-.44 (1996)); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 15, 1998.

The Complaint alleges that on or about June 12, 1996, Daniel E. Murray [hereinafter Respondent], "in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cattle [sic] to a recognized slaughtering establishment without being accompanied by a permit or `S' brand permit, as required" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on January 24, 1998.[1] 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)).

On August 18, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on August 24, 1998.[2] Respondent filed an objection to Complainant's Motion for Default Decision, but gave no basis for his objection.[3]

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[1]See Domestic Return Receipt for Article Number p368421153 signed by "Katie Murray" stating that the date of delivery was "1/24/98."

[2]See Domestic Return Receipt for Article Number p093143432 signed by "Dan Murray" stating that the date of delivery was "8-24-98."

[3]Respondent's objection to Complainant's Motion for Default Decision states, in its entirety, as follows:

(continued...)

On September 23, 1998, pursuant to 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 Default Decision and Order in which the Chief ALJ: (1) found that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint; and (2) assessed a civil penalty of $500 against Respondent (Default Decision and Order at second unnumbered page).

On October 27, 1998, Respondent appealed to the Judicial Officer. On January 20, 1999, Complainant filed Complainant's Opposition to Respondent's Appeal Petition of the Default Decision and Order, and on January 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On January 22, 1999, I issued a Decision and Order in which I concluded that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint, and assessed Respondent a civil penalty of $500. *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7, 16 (Jan. 22, 1999).

On February 8, 1999, Respondent filed a Petition for Reconsideration, and on March 4, 1999, Complainant filed Complainant's Opposition to Respondent's Petition to to [sic] Reconsider the Decision of the Judicial Officer. On March 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued January 22, 1999.

Respondent raises one issue in his Petition for Reconsideration. Respondent asserts that a document which he mailed for filing in this proceeding was not made a part of the record, as follows:

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[3](...continued)

Sept. 12, 1998

To: Susan C. Golabek
Attorney for Complainant
USDA/OGC

I Daniel E[.] Murray am in objection of the Motion for Decision and want to appeal this decision.
A.Q[.] Docket No. 98-0003

Daniel E. Murray
1756 Whitetail Rd.
Decorah[,] IA 52101
(319) 382-8496

Feb. 7, 1999

Subject Daniel E[.] Murray Respondent
A.Q. Docket No. 98-0003

I want to file for a petition for reconsideration. From your Jan. 22, 1999[,] letter[,] I found out that you don[']t have in your files my first appeal which was sent between Jan[.] 30 and Feb[.] 28 from the US Post Office in Creston, IA on a Friday. I have a copy of that letter which I made when I made 3 copys [sic] for you and am enclosing a copy. The reason I didn't . . . respond to your letter sent to me in Feb[.] 18, 1998[,] because I thought the letters crossed in the mail. I am in contact with the Post Office in Creston[,] IA.

Dan Murray
1756 Whitetail Rd.
Decorah[,] IA 52101
(319) 382-8496

The Chief ALJ filed the Default Decision and Order on September 23, 1998, and Respondent was served with the Default Decision and Order on September 28, 1998.[4] Respondent filed a timely appeal on October 27, 1998. Therefore, I infer that Respondent's reference in his Petition for Reconsideration to his "first appeal" as having been mailed between January 30th and February 28th is error, and I further infer that Respondent's reference is to an Answer which Respondent allegedly mailed between January 30, 1998, and February 28, 1998, at a United States Post Office in Creston, Iowa.

Respondent attached a copy of his Answer to his Petition for Reconsideration, and his Answer was filed in this proceeding on February 8, 1999, 1 year and 15 days after Respondent was served with the Complaint. Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service of the complaint, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint

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[4]See Domestic Return Receipt for Article Number p093143452 signed by "Millie Murray" stating that the date of delivery was "9-28-98."

. . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

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

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

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

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Respondent contends in his Petition for Reconsideration that he may have mailed his Answer within 20 days after he was served with the Complaint. However, Respondent's Answer states that it "is being sent even though it is late." Therefore, it appears that Respondent admits in his Answer that he mailed his Answer more than 20 days after he was served with the Complaint.

Even if I found that Respondent mailed his Answer within 20 days after he was served with the Complaint, Respondent's Answer cannot be accepted as timely. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) requires that a respondent *file with the Hearing Clerk* an answer within 20 days after service of the Complaint, and section 1.147(g) of the Rules of Practice provides that the effective date of filing is the date a document reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Therefore, even if I found that Respondent mailed his Answer within 20 days after he was served with the Complaint, his Answer would not be timely because Respondent's Answer was not *filed* with the Hearing Clerk within 20 days after service of the Complaint on Respondent.[5] The record reveals that Respondent filed his Answer with his Petition for Reconsideration, on February 8, 1999, 1 year and 15 days after Respondent was served with the Complaint.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 22, 1999, *In re Daniel E. Murray, supra*, Respondent's Petition for

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[5]*See In re Severin Peterson*, 57 Agric. Dec. ___ slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk). *Cf. In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by the party filing the pleading does not constitute the date that the pleading is filed with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that unsuccessful attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

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] Respondent's Petition for Reconsideration was timely filed and automatically stayed the January 22, 1999, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed January 22, 1999, is reinstated, with allowance for time passed.

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

Order

Respondent Daniel E. Murray is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

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[6] *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0003.

ANIMAL WELFARE ACT

COURT DECISIONS

VOLPE VITO, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 97-3603.
Filed January 7, 1999.

Animal Welfare Act — ALJ credibility determinations — Willful — Civil penalty — License revocation.

Petitioner appealed the Judicial Officer's (JO) Decision and Order: (1) finding that Petitioner violated the Animal Welfare Act (AWA) and the regulations and standards issued under the AWA; (2) assessing a $26,000 civil penalty against Petitioner; (3) ordering Petitioner to cease and desist from violating the AWA and the regulations and standards issued under the AWA; and (4) revoking Petitioner's AWA license. The Court affirmed the JO's Decision and Order. The Court held that the JO is not required to accept administrative law judge (ALJ) findings of fact, even when those findings are based on credibility determinations, and the JO did not err when he overturned the ALJ finding that the United States Department of Agriculture inspector was biased. The Court held that no showing of malicious intent is necessary to support a finding that a violation is willful and that the Petitioner's violations were willful. The Court held that the sanction imposed by the JO was permitted by the AWA and justified by the facts and that the Court would not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases.

United States Court of Appeals
Sixth Circuit

Before: MARTIN, Chief Judge, RYAN, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge.

Petitioner Volpe Vito, Inc. appeals a decision by the Secretary of the United States Department of Agriculture ("Secretary"), under the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-59. The Secretary imposed against Volpe Vito a $26,000 civil penalty, issued a cease and desist order, and revoked Volpe Vito's license to operate an animal park. For the reasons that follow, we **affirm** the decision of the Secretary.

I.

Volpe Vito operates the Four Bears Water Park and Recreation Area ("park"),

a 125-acre park in Utica, Michigan, displaying animals such as zebras, elephants, goats, camels, and chimpanzees. Since 1983, Volpe Vito has been licensed to exhibit animals in compliance with AWA regulations concerning the transportation, housing, handling, treatment, and inspection of its animals. Sites such as Volpe Vito are inspected at least once annually by the Animal and Plant Health Inspection Service ("APHIS"), an agency within the Department of Agriculture, to ensure compliance with the AWA.

Dr. Lisa Dellar, an APHIS veterinarian, inspected the park in 1988 after it was first licensed. Dr. Dellar observed several AWA violations. Despite her discussions with park employees regarding compliance with the act, she noted both recurring and new violations on each of her subsequent visits. Following her ninth visit in February 1994, APHIS filed an administrative complaint against Volpe Vito. The Administrative Law Judge ("ALJ") issued an Initial Decision and Order ("Initial Decision") finding that Volpe Vito had violated five provisions of the AWA. The ALJ dismissed several of the allegations in the complaint, however, finding that Dr. Dellar was biased in her written comments regarding animal care and husbandry. The ALJ issued a cease and desist order and revoked Volpe Vito's license.

Volpe Vito appealed the Initial Decision to a Judicial Officer ("JO"), the final deciding officer in administrative proceedings. APHIS filed a cross-appeal. The JO affirmed in part and reversed in part. The JO upheld the ALJ's finding of five violations and the ALJ's dismissal of twenty-three of the other allegations. The JO failed to find bias on the part of Dr. Dellar, however, and reversed the ALJ's dismissal of the remaining allegations. Pursuant to the JO's decision, the Secretary issued a cease and desist order, revoked Volpe Vito's license, and also imposed a $26,000 fine. Volpe Vito filed a petition for reconsideration, which the JO denied. Volpe Vito subsequently filed a timely notice of appeal.

II.

Our review of an administrative decision is narrow; we set aside an agency's action only if it is not supported by substantial evidence. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 416 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Volpe Vito first argues that the JO erred in overturning the ALJ's finding that Dr. Dellar was biased. We find this argument unpersuasive. The JO is not required to accept the ALJ's findings of fact, even when those findings are based on

credibility determinations, *see Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) (citing 5 U.S.C. § 557(b)), and the JO is authorized by statute to substitute his or her judgment for that of the ALJ. *See Parchman v. United States Dept. of Agriculture*, 852 F.2d 858, 860 (6th Cir. 1988) (citing *Mattes*, 721 F.2d at 1129). Moreover, given an established presumption that policymakers with decision-making power exercise their power with honesty and integrity, *see Navistar Int'l Transp. Corp. v. United States Envtl. Protection Agency*, 941 F.2d 1339, 1360 (6th Cir. 1991) (internal cites omitted), the burden of overcoming the presumption of impartiality rests on the party making the assertion of bias. *See id.* (internal cites omitted). In the present case, the park was unable to convince the JO of bias on the part of Dr. Dellar, and the evidence proffered by APHIS clearly supports his findings.

The park next contends that the complaint should be dismissed in its entirety because the ALJ found Dr. Dellar to be biased. This argument lacks merit. The JO rejected the ALJ's finding on this matter. The park mischaracterizes Dr. Dellar's inspection reports, which were promptly prepared after *all* inspections, regardless whether violations were found or litigation was anticipated. Therefore, Volpe Vito is misguided in its reliance on *Young v. United States Dep't of Agric.*, 53 F.3d 728, 730-31 (5th Cir. 1995) (disallowing documents after determining that they were prepared solely for administrative proceedings).

Volpe Vito further contends that the Secretary acted inappropriately by imposing a $26,000 sanction and argues that its actions were neither willful nor intentional. According to Volpe Vito, the Secretary also failed to consider mitigating circumstances in Volpe Vito's favor: no prior convictions of state or local regulatory violations involving the treatment of animals; the city water main break that flooded the entire park moments prior to Dr. Dellar's arrival; Volpe Vito's decision to fire a park manager for contributing to the violations; its compliance with the AWA following the complaint; and the ailing health of Mr. Stramaglia, Volpe Vito's president. The park further contends that because the $26,000 penalty was harsher than that imposed on other parties who committed more egregious violations under the AWA, the Secretary's motive was punitive, not remedial, and contrary to the purpose of the AWA.

A sanction under the AWA, if within the bounds of the agency's lawful authority, is subject to very limited judicial review. We determine only whether the agency properly applied the regulations, and whether the sanction is warranted in law and justified in fact. *See Woodward v. United States*, 725 F.2d 1072, 1077 (6th Cir. 1984) (internal cites omitted). Provided that violations are willful, the Secretary is empowered under the AWA to impose a civil penalty up to $2,500 for each violation. *See* 7 U.S.C. § 2149(a), (b). "Willful" means action knowingly

taken by one subject to the statutory provisions in disregard of the action's legality; no showing of malicious intent is necessary. *See Donovan v. Capital City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (internal cites omitted). In imposing a penalty, 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).

We are unpersuaded by Volpe Vito's arguments. Dr. Dellar's nine inspections clearly revealed that Volpe Vito committed violations willfully: notwithstanding Dr. Dellar's efforts to improve the park's compliance with AWA regulations following each inspection, the park allowed 51 recurring and new violations. The mitigating circumstances proffered by the park do not make its actions less deliberate, intentional, or reckless. Furthermore, this court will not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases, provided that the sanction is "permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged." *Garver v. United States*, 846 F.2d 1029, 1030 (6th Cir. 1988). "This court does not review administrative agency sanctions for reasonableness, or for whether they comport with our ideas of justice." *Id.* In this case, we find that the license revocation was justified by the reported violations, and the $26,000 fine was permitted under the AWA and were substantially lower than the statutory maximum.

Volpe Vito's final claim, that its compliance with the AWA following the filing of the administrative complaint constitutes a mitigating factor, is without merit. Subsequent compliance, while laudable, does not absolve 51 prior violations.

III.

For the reasons stated above, we **affirm** the decision of the Secretary of the Department of Agriculture.

TAMMI LONGHI AND L&H ASSOCIATES v. ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 97-3897.

Decided January 25, 1999.

(Cite as: 165 F.3d 1057)(6th Cir.).

Animal Welfare Act — Multiple licenses.

Petitioners petitioned for review of the Judicial Officer's (JO) Decision and Order denying L & H Associates' application for an Animal Welfare Act (AWA) license on the ground that one of the partners in L & H Associates was a shareholder of a corporation that had an AWA license and that granting an AWA license to L & H Associates would result in that partner holding two AWA licenses in violation of 9 C.F.R. § 2.1(c). The Court reversed the JO, stating that 9 C.F.R. § 2.1(c) prohibits any person from having more than one license and that the regulations issued under the AWA define the word *person* as any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity. Hence, 9 C.F.R. § 2.1(c) prohibits the entities identified in the definition of *person* from having more than one license and refusing to grant an AWA license to L & H Associates, a partnership that was not already licensed, was inconsistent with 9 C.F.R. § 2.1(c).

United States Court of Appeals,
Sixth Circuit.

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

DAVID A. NELSON, Circuit Judge.

OPINION

This matter comes before us on a petition for review of an Agriculture Department order denying an application for a Class "A" dealer's license under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* Piercing the corporate veil of an existing Class "B" licensee, the agency denied the application on the ground that if the Class "A" license were granted there would be a violation of a regulatory prohibition against any "person" having more than one license.

We conclude that the challenged decision was not in accordance with law, no proper justification having been given for the veil-piercing exercise. The petition for review will therefore be granted.

I

The existing licensee is a corporation known as Hodgins Kennels, Inc. This company, a Class "B" licensee under the definition set forth in 9 C.F.R. § 1.1, deals in stray dogs that are sold for use in medical research. The company operates a kennel on Lange Road in Howell, Michigan. Until early 1995 it also had a facility located on Judd Road in nearby Fowlerville, Michigan.

Ownership of the corporate stock of Hodgins Kennels, Inc., is divided between Janice Hodgins and her husband, Fred Hodgins. Petitioner Tammi Longhi, a longtime employee of Hodgins Kennels, is the daughter of Janice and Fred Hodgins.

In February of 1995, or thereabouts, Mrs. Longhi and her mother formed a Michigan partnership—petitioner L & H Associates—that applied for a Class "A" license under the Animal Welfare Act. (Class "A" licensees are not authorized to traffic in stray animals; their animals must be bred and raised on the premises. See 9 C.F.R. § 1.1.) The partnership's license application gave a Lange Road mailing address, but it showed an address on Judd Road as the site where animals would be housed. The application listed both Mrs. Longhi and Mrs. Hodgins as partners in L & H Associates.

A second application—dated two days after the first—listed only Mrs. Longhi as an owner/partner of L & H Associates. The change was made at the suggestion of Dr. Joseph Walker, a veterinarian employed as a supervisor in the Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS").

Under cover of a letter dated March 27, 1995, Dr. Walker returned the second of the L & H license applications to Mrs. Longhi. Dr. Walker's letter, the content of which apparently reflected the advice of his superiors in Washington, said that "your facility should be designated a site of Hodgins Kennel, Inc. . . . ."

Mrs. Longhi, who wanted to start a business separate and apart from Hodgins Kennels, wrote Dr. Walker to request an explanation of the "specific legal basis" for the agency's refusal to accept the L & H application. Dr. Walker forwarded this request to headquarters, where it met an unknown fate.

In May of 1995 L & H Associates submitted a new Class "A" license application. The new application was substantially identical to its immediate predecessor, except that the mailing address of L & H Associates was now shown as Judd Road in Fowlerville rather than Lange Road in Howell.

No license was forthcoming, so Mrs. Longhi, writing on behalf of L & H Associates, sent Dr. Walker a letter requesting an administrative hearing. Dr. Walker then returned the May application and advised that the hearing request had been referred to the Department for scheduling.

The Department responded with a show cause order, issued by the Administrator of APHIS on July 28, 1995, directing Mrs. Longhi and L & H Associates to answer allegations that they were ineligible to be licensed for reasons set forth in the order. Among the reasons stated were these: (1) that Mesdames Longhi and Hodgins had violated 9 C.F.R. § 2.4 by verbally abusing and harassing APHIS personnel during one or more Hodgins Kennels inspections,[1] and (2) that "[t]he issuance of a license to the respondents would violate 9 C.F.R. § 2.1(c)." Section 2.1(c) provides that "[n]o person shall have more than one license."

The petitioners filed timely answers denying the APHIS allegations, and hearings were then conducted before an administrative law judge. (The licensing hearing was consolidated with a hearing on an APHIS disciplinary proceeding against Hodgins Kennels. A separate petition for review is pending before this court in connection with the latter proceeding.)

In June of 1996 the ALJ issued an initial decision and order in the licensing matter. Although the ALJ found that neither Mrs. Longhi nor Mrs. Hodgins had been guilty of harassing or abusing any APHIS official, the ALJ accepted the argument that § 2.1(c) of the regulations precluded issuance of a license to L & H Associates. The ALJ's legal conclusion was expressed in these terms:

> "Respondents Tammi Longhi and L & H Associates are not eligible to receive a license under section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) because one of the partners in L & H Associates is Janice Hodgins, who already had a license through her ownership of Hodgins Kennel."

As permitted under the applicable procedural regulations, the ALJ's decision was appealed to the Judicial Officer of the Department of Agriculture. (Pursuant to authority delegated by the Secretary of Agriculture, the Judicial Officer has the last word for the Department in adjudicatory proceedings of this type.) After accepting briefs from both sides, but having denied a request by the petitioners for oral argument, the Judicial Officer issued his final decision and order on July 11, 1997.

Upholding the ALJ's conclusion of law, the Judicial Officer rejected an argument by the petitioners that Hodgins Kennels, Inc., and L & H Associates are separate "persons" under the agency's own regulations. The petitioners'

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[1]Section 2.4, captioned "Non-interference with APHIS officials," says that "[a] licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties."

interpretation of the regulations, the Judicial Officer observed, "would allow an individual to own and control multiple legal entities licensed under the Animal Welfare Act, thus rendering section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) a nullity."

The Judicial Officer did not find that the principals of Hodgins Kennels, Inc., were utilizing the corporate form to perpetuate fraud or subvert justice. Neither did he find any failure to comply with the technicalities of Michigan corporation law. The Judicial Officer seems to have acted, rather, on the understanding that a shareholder in a closely held corporation is necessarily an *alter ego* of the corporation.

This unusual understanding of the law is reflected in the following passage of the Judicial Officer's decision:

> "APHIS denied L & H Associates' application for a license because Janice Hodgins is the owner of and a principal in Hodgins Kennel, Inc. (a Class B licensee), and a partner in L & H Associates. As such, Janice Hodgins is an *alter ego* of both Hodgins Kennel, Inc., and L & H Associates; therefore, if Hodgins Kennel, Inc., and L & H Associates each held a license under the Animal Welfare Act, Janice Hodgins would hold two Animal Welfare Act licenses in violation of section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c))."

The next paragraph of the decision contains a reminder "that an agency's interpretation of its own regulations must be given controlling weight unless the interpretation is plainly erroneous. . . ." In their brief to this court, the petitioners suggest that the interpretation reflected in the Judicial Officer's decision is indeed plainly erroneous. We agree that it is.

II

As noted above, 9 C.F.R. § 2.1(c) prohibits any "person" from having more than one license. This prohibition is found in Subchapter A of Title 9 of the Code of Federal Regulations, the Agriculture Department's *vade mecum* of regulatory provisions relating to animal welfare.

Part 1 of Subchapter A, 9 C.F.R. § 1.1, sets forth definitions for many of the terms used in the subchapter. "For the purposes of this subchapter," § 1.1 begins, "unless the context otherwise requires, the following terms *shall* have the meanings assigned to them in this section." (Emphasis supplied.)

The definitions are very detailed. "*Dog*," to take a random example, "means any live or dead dog (*Canis familiaris*) or any dog-hybrid cross," while "*Dwarf hamster*," the next term defined in § 1.1, "means any species of hamster such as the Chinese and Armenian species whose adult body size is substantially less than that attained by the Syrian or Golden species of hamsters." The drafters of the regulations obviously strove diligently—and, it seems to us, successfully—to achieve a high level of precision and to avoid ambiguity.

The meaning that § 1.1 assigns to the term "person" manifests the same care and attention to detail exhibited in the rest of the definition section. "*Person*," according to § 1.1, "means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity."[2] Except where the context otherwise requires, therefore, we have it on the authority of the regulations themselves that just as an individual is a "person" within the meaning of Subchapter A, so also a partnership is a "person," a corporation is a "person," and any other legal entity is a "person." The context in which the term "person" is used in § 2.1(c) certainly does not require that the term be assigned some other meaning. That being so, what 9 C.F.R. § 2.1(c) says, in the plainest of English, is that none of the entities named—no individual, no partnership, no corporation, etc.—shall have more than one license.

The Judicial Officer, as we have seen, had the idea that an individual who is both a shareholder in a licensee organized as a corporation and a partner in a licensee organized as a partnership must *ipso facto* be a dual licensee. This notion flies directly in the teeth of the traditional corporate law concept—a concept faithfully reflected in the statute and the regulations—that a corporation is a legal person in its own right, separate and distinct from the person or persons holding stock in the corporation. See *Burnet v. Clark*, 287 U.S. 410, 415, 53 S.Ct. 207, 77 L.Ed. 397 (1932) ("A corporation and its stockholders are generally to be treated as separate entities").

There are circumstances, to be sure, under which the corporate veil may be pierced. The question whether such circumstances have been shown to exist in a particular case is to be determined by state law. See *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 580 (6th Cir. 1997) (*en banc*), *vacated on other grounds, United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The state law applicable in the case at bar is that of Michigan,

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[2]When used in the statute itself, similarly, "[t]he term 'person' includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a).

and "Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil." *Id. Cf. Bestfoods*, 118 S.Ct. at 1885 ("the corporate veil may be pierced . . . when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf").

In the instant case neither the ALJ nor the Judicial Officer suggested that the corporate form had been misused to accomplish fraud or some other wrongful purpose. Any such suggestion would have been misguided, for the administrative record simply does not show that the corporate form has been abused here.

The principle that seems to have informed the decisions of the ALJ and the Judicial Officer was one not of law, but of policy: "If an individual has two dealer licenses," the Department tells us, "one under her own name and another as a principal in a legal entity such as a partnership, that person could easily evade and frustrate APHIS' enforcement efforts [by moving animals from one facility to another]." The policy underlying 9 C.F.R. § 2.1(c) would be ill-served, the Judicial Officer suggested, if individuals were not prohibited from owning and controlling "multiple legal entities licensed under the Animal Welfare Act. . . ."

But if the Department of Agriculture thinks it would be sound policy to prohibit individuals from owning and controlling multiple entities licensed under the Animal Welfare Act, there is a right way to effect the prohibition and a wrong way. The wrong way would be to adopt the prohibition as an "agency litigating position" wholly unsupported by the text of the existing regulations. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The right way would be to amend the regulations—and to do so through a rulemaking proceeding conducted in accordance with the requirements of the Administrative Procedure Act.

If it wished to do so, obviously, the Department could issue a notice of proposed rulemaking advising the public that it was thinking about amending its regulations to say (for example) that an individual who is a corporate shareholder will be deemed an *alter ego* of the corporation if she holds a controlling interest, or some specified percentage, in the company. The Department could propose a change in the regulations, similarly, to say that just as no person shall have more than one license, no person shall exercise control over more than one legal entity that has a license. Under the scheme adopted by Congress, the publication of such a notice in the Federal Register would be followed first by an opportunity for public comment, and then—if the agency still thought the amendment desirable—by publication of a Federal Register notice announcing adoption of the change. See 5 U.S.C. § 553.

The Department of Agriculture has taken none of these steps under the Administrative Procedure Act. Unless and until it does so, the Department is obviously bound by its existing regulations. See *Fluor Constructors, Inc. v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988) ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation").

The reason assigned by the Department for refusing to grant a Class "A" license to L & H Associates was "inconsistent with the plain language of the [existing] regulation[s]. . . ." See *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 557 (6th Cir. 1995). The refusal to grant a license must therefore be held unlawful and set aside under 5 U.S.C. § 706(2)(A) (the court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .").

The petition for review is **GRANTED**, and the Department's conclusion that L & H Associates is not eligible to receive a license under 9 C.F.R. § 2.1(c) is **SET ASIDE** as unlawful.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: KEVIN ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Decision and Order filed October 2, 1998.

Civil penalty - Cease and desist order - License disqualification.

Administrative Law Judge Dorothea A. Baker issued an order assessing a civil penalty of $5,000.00, a cease and desist order and a three-year license disqualification because of Respondent's violations of the Animal Welfare Act and the Regulations thereunder.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding under the Animal Welfare Act as amended (7 U.S.C. §§ 2131 *et seq.*), instituted by a Complaint, dated July 23, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The Complaint alleged that the Respondents Kevin Ackerman and Vicki Ackerman willfully violated the Act and the regulations and standards issued pursuant thereto (9 C.F.R. §§ 1.1 *et seq.*). A Consent Decision and Order has been issued as to Respondent Vicki Ackerman and she is no longer a party to this proceeding.

An oral hearing was held in Pierre, South Dakota, on April 7, 1998, before Administrative Law Judge Dorothea A. Baker at which time the Complainant was represented by Robert Ertman, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondent appeared *pro se*. In due course the party filed briefs, the last brief having been filed July 17, 1998.

The sanction sought by the Complainant includes a cease and desist order, a $25,000.00 civil penalty, and, either permanent disqualification from becoming licensed under the Act, or, in the alternative, disqualification for a stated period of time.

The following Findings of Fact are premised upon the record made at the oral hearing. All requests, suggestions and motions of the parties have been carefully

considered. To the extent that they are not adopted or are inconsistent with this Decision and Order, they are hereby denied.

Findings of Fact and Conclusions

1. Kevin Ackerman, doing business as Ackerman's Puppy Palace, hereinafter referred to as Respondent, is an individual whose address is R. R. 1, Box 66, Mound City, South Dakota. The Secretary has jurisdiction in this matter.

2. Respondent, at all times material hereto, was licensed and operated as a dealer as defined in the Act and the regulations. The Respondent voluntarily surrendered his license on May 20, 1997.

3. The allegations of the Complaint and the evidence adduced at the oral hearing relate principally to inspection reports of Respondent's premises which inspections were undertaken by APHIS animal care Inspector Donovan Borchert on numerous occasions including: February 13, 1995; April 26, 1995; May 31, 1995; October 17, 1995; February 12, 1996; March 19, 1996; May 14, 1996; and November 26, 1996. On the March 19, 1996 inspection, Inspector Borchert was accompanied by APHIS Investigator Larry Neustel. On the May 14, 1996 inspection, Inspector Borchert was accompanied by Dr. Bruce Mammeli, APHIS Supervisory Animal Care Specialist. At the time of the hearing Inspector Borchert had no present recollection of the events to which he was testifying and, for his testimony, relied upon the written inspection reports.

The Respondent believes that the Complainant, through Inspector Borchert, was harassing and intimidating him and writing him up needlessly for minor infractions or no infractions at all.

4. 9 C.F.R. § 2.75(a)(1) of the regulations states:

§ 2.75 Records: Dealers and exhibitors.

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

Respondent was found to have violated this regulation on February 13, 1995, in that when an inspection was made of Respondent's premises and records, it was found that the Respondent had failed to maintain complete records showing the acquisition, disposition and identification of the animals, contrary to the requirements of 9 C.F.R. § 2.75(a)(1). This same violation was found to have occurred on October 17, 1995; February 12, 1996; May 14,1996; and November 26, 1996. Although the Respondent maintains that he did have ample records in various places and that on one occasion he was in the process of transferring his written records to a computer, his proof in this regard is lacking.

Pursuant to the record keeping requirements, it is necessary to maintain complete records showing the acquisition, disposition and identification of animals. It appears from the testimony of Inspector Borchert that there have been violations of this regulation in the manner set forth in Inspector Borchert's testimony. He indicated in his reports such instances as the records of animals on hand did not show the identification numbers of at least nine, ten and fifteen dogs, nor the dates they arrived on the premises, nor information on the buyer. Also, acquisition records did not show the source of two dogs. In addition, Mr. Borchert testified that disposition records were incomplete because the required form provides one line for each animal but multiple animals were recorded on a single line, resulting in the absence of some of the information on identification of the animals. Multiple listings on one line have not been found to be a violation. A finding has been made that Respondent kept incomplete records. The burden is on the Complainant to show by convincing evidence whether or not a violation exists. Respondent did not adequately dispute the evidence of Complainant.

As concerns the time when Respondent was changing his records over to a computer, and had not obtained a variance, Respondent maintains that he was not asked for his records. The Respondent is not charged herein with failure to get a variance but rather with failure to maintain adequate records to show the acquisition and disposition of the animals. From Inspector Borchert's own testimony (Tr. 76-77) it appears that the Respondent still had his old records and there is no indication that the Complainant inspected those old records and made a determination that they were inadequate. It is Respondent's position that the old records referring to the source of the data which was being transferred to the computerized system were adequate. Respondent did not prove this even if his old records were adequate. (Tr. 67-69, 75-77).

[Cross-examination of Inspector Borchert]

Q. * * * On the October 17th, 1995 inspection, it said the respondents

failed to maintain complete records showing acquisition, disposition and identification of animals in willful violation of Section 10 of the Act. Could you explain that one to me a little bit?

A. You were cited, number one, records of stock on hand needed nine dogs, their ID and who they were acquired from. The second thing, sales records must be filled out one puppy per line. Four puppies were listed per line.

Q. Okay, records of stock on hand, need nine dogs' IDs and two who acquired from. Is it true a person could have been filling out some more forms and you probably didn't see them and there was a complete form probably next to the one that we were filling out that didn't have the requirements in there?

A. I would think when I asked you about it, you would have showed me that if it existed.

Q. Well, if I recall correctly, you very seldom asked me about much of anything until you wrote it up; is that correct?

A. I don't believe so.

Q. It says sales record -- do you recall which dogs them were that didn't have the ID numbers?

A. No.

Q. It says sales records must be filled out one puppy per line. Currently four puppies are being listed per line. You have also got it's gotta be corrected by 10-17, which is that same day. Do you recall what kind of puppies were listed there?

A. No.

Q. Do you recall if I mentioned to you anything about being short on USDA forms and I didn't know what to do?

A. No.

Q. You don't recall that, huh? When did they switch them USDA forms?

A. I don't know.

Q. Was it very possibly like in August and then they were short for a long time previously and a lot of the breeders were out of the USDA forms, do you recall anything about this?

A. I don't recall the dates it happened. I recall, yeah, there was --

Q. They were short on records. What were they supposed to do if they did not have the appropriate forms to fill them out, not sell dogs?

A. I was told that the breeders were instructed from the regional office to make photocopies and use them until the new ones got there.

Q. If we were out and didn't have one to make a photocopy, I guess I don't ever recall seeing that letter. Do you have a copy saying when it was sent to me?

A. No, I don't' have a copy. One photocopied copy of the sales record was sent with each one so they would have a copy.

Q. If we were out of forms, we used our last one for the last set of dogs and we supposedly got this letter, what were we supposed to do? If we would have photocopied them, they would have already had the writing in, correct?

A. When you reordered, you were sent a photocopied copy to use to make other photocopies until we had the new forms sent to you.

Q. Was that in triplicate or would you have had to fill three of them out?

A. You would have had to use carbon paper or something. (Tr. 67-69).

* * * * *

Q. Now we will go to the February 12th inspection. It says, the respondent's premises and records were inspected and found that the respondent had failed to maintain complete records showing the adequate acquisition, disposition and identification of animals. Could you explain that a little bit to me?

A. Under records?

Q. Yeah.

A. The first item, licensee is starting to use a computer to keep records. Licensee must get approval from the regional office and then there's the regional office's address.

Q. Could you stop right there?

A. Yes.

Q. Where does it state in the regulations that you have to get approval to use a computer?

A. In 2.75. I believe it states that you need to request a variance.

Q. Could you tell me what part? Would you like a copy? Can you show me where it's at there?

A. You have an old copy of the regs. Mr. Ertman has a copy from 1996 or '95.

Q. What year is this regulation book?

A. I'm not sure. As close as I can see, the printing date is '92 on yours. There's a new one mailed out each year with your application.

Q. What do the regulations say on the variance?

A. Provided that if a dealer or exhibitor who uses a computerized record keeping system believes that the APHIS form 7005 form and APHIS form 7006 are unsuitable for him to keep and maintain information required in

this paragraph, the dealer or exhibitor may request a variance from the requirement from the APHIS -- from the use of the APHIS 7005 and 7006.

JUDGE BAKER: What was the effective date of that?

A. I do not -- let me go a little farther. I don't see an effective date on this.

JUDGE BAKER: Very well.

Q. (BY MR. ACKERMAN) So it states that I need to get a variance. If I was putting records onto the computer, would I not have still the old records? Where would I get that information from? I should still have the old records to put it on the computer; isn't that correct?

A. I would hope so.

Q. So you just wrote me up for this just because I was transferring it to a computer and didn't get a variance?

A. You were notified that you needed to request approval to use your computer and given the address to request approval and that's all that this says, that you need to do that before it can be approved.

Q. I still should have had my old records; is that correct?

A. I guess. It doesn't say that you didn't.

Q. So basically I could have still used the old records, just because I didn't get a variance, and I could have used the computer for my convenience until I got approval; is that correct?

A. Yes.

Q. The rest of it, I was written up for that part. Where exactly is this at about the acquisition and disposition, which page?

A. On the inspection report?

Q. Yeah.

A. Page five.

Q. The last part?

A. I believe so. (Tr. 75-77).

Although I have no choice but to find that there were record keeping deficiencies, I am of the opinion that the discord which existed between Respondent and this inspector may have contributed to the inspector not going out of his way to thoroughly ascertain what records Respondent had, even though they may not have been in the form the inspector could require. Nevertheless, Complainant has adequately carried its burden of proof. Respondent's cross-examination was not sufficient to disprove the Complainant's evidence.

Accordingly, Respondent willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations.

5. 9 C.F.R. § 3.1(a) provides in part as follows:

§ 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.

Respondent was in violation of the provisions thereof when his facilities were inspected on February 13, 1995; April 26, 1995; May 31, 1995; October 17, 1995; February 12, 1996; May 14, 1996; and November 26, 1996.

Said violations arose from the inspector's observations and findings that the 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. The violations included the following. The primary enclosures were constructed with a framework of PVC pipe which had broken and needed to be repaired. Also, some fiberglass board walls were broken and wire dividing the enclosures was broken; there were sharp points protruding into the enclosures; divider panels had rusted off; broken wire was torn away between two pens; doors to shelters were broken; shelters had holes in the sides and tops and windows were broken out; a patch had torn away from a wall, leaving

sharp and jagged metal exposed; strapping had blown away, also leaving sharp and jagged metal exposed; supports holding runs outside a trailer had torn away; and a pen had broken wire floor. Patches in floor wire left exposed wire points, tin walls were rusting through, and tin was torn away, large holes were exposed in siding, floor wire was loose and torn away from supports; a floor had a hole with sharp points exposed, and wire on run floors and dividers was broken.

Respondent willfully violated section 2.100(a) of the regulations and section 3.1(a) of the standards (9 C.F.R. § 3.1(a)).

6. 9 C.F.R. § 3.2(d) states as follows:

> **§ 3.2 Indoor housing facilities**
>
> * * * * *
>
> (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).

On February 12, 1995, an inspection of the Respondent's facility revealed violations of said regulation.

It was found at the aforesaid inspection that the walls and floors of the indoor housing facilities, and other surfaces in contact with the animals were not impervious to moisture; that fiberglass sheets used for flooring were peeling, leaving gaps which allowed water and urine to run in, and fiberglass sheets used for walls were broken and needs to be sealed. Respondent adduced no substantive proof to refute the results of the inspection report.

Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.2(d) of the standards (9 C.F.R. § 3.2(d)).

7. 9 C.F.R. § 3.6(a)(2)(xi) provides in part as follows:

> § 3.6 **Primary enclosures.**
>
> * * * * *
>
> (a) *General requirements.*
>
> * * * * *
>
> (2) *Primary enclosures* must be constructed and maintained so that they:
>
> * * * * *
>
> (xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

The inspection reports of February 13, 1995; April 26, 1995; February 12, 1996; and May 14, 1996, and the testimony of Inspector Borchert indicated such deficiencies such as the primary enclosures for dogs were not constructed so that they provided 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. Four puppies were kept in a small "pet taxi" enclosure which only had sufficient room for two puppies. Also, Afghan Hounds did not have the required six inches of headroom. Four adult Dalmatians were in an enclosure providing fifty-six square feet when sixty-four square feet were required. Four shelties were in a pen providing twenty-four square feet when thirty-six square feet were required.

Inspector Borchert did not measure any of the puppies in arriving at a determination that the Respondent had failed to provide the required space for dogs. At Transcript 49 he was asked the question:

"Q. Did you measure any of the puppies?

A. No."

Based upon the evidence of record it is concluded that upon the aforesaid inspections, at the times so stated, it was ascertained by the inspector that the primary enclosures for the dogs were not constructed so that they provided 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 as required by the regulations. Respondent maintains that because the inspector did not measure the cages and the animals, that it could not be ascertained if Respondent was not in compliance. The inspector testified he utilized the wires of the cages to make his determinations. The Respondent failed to adduce sufficient proof to overcome the Complainant's evidence.

Respondent willfully violated section 2.100 of the regulations (9 C.F.R. § 2.100(a) and section 3.6(a)(2)(xi) of the standards (9 C.F.R. § 3.6(a)(2)(xi)).

8. 9 C.F.R. 3.8 provides as follows:

§ 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. The plan, at a minimum, must comply with each of the following:

(a) *Dogs housed individually.* Dogs over 12 weeks of age, except bitches with litters, housed, held, or maintained by any dealer, exhibitor, or research facility, including Federal research facilities, must be provided the opportunity for exercise regularly if they are kept individually in cages, pens, or runs that provide less than two times the required floor space for that dog, as indicated by § 3.6(c)(1) of this subpart.

(b) *Dogs housed in groups.* Dogs over 12 weeks of age housed, held, or maintained in groups by any dealer, exhibitor, or research facility, including Federal research facilities, do not require additional opportunity for exercise regularly if they are maintained in cages, pens, or runs that provide in total at least 100 percent of the required space for each dog if maintained separately. Such animals may be maintained in compatible groups, unless:

(1) Housing in compatible groups is not in accordance with a research proposal and the proposal has been approved by the research facility Committee;

(2) In the opinion of the attending veterinarian, such housing would adversely affect the health or well-being of the dog(s); or

(3) Any dog exhibits aggressive or vicious behavior.

(c) *Methods and period of providing exercise opportunity.* (1) The frequency, method, and duration of the opportunity for exercise shall be determined by the attending veterinarian and, at research facilities, in consultation with and approval by the Committee.

(2) Dealers, exhibitors, and research facilities, in developing their plan, should consider providing positive physical contact with humans that encourages exercise through play or other similar activities. If a dog is housed, held, or maintained at a facility without sensory contact with another dog, it must be provided with positive physical contact with humans at least daily.

(3) The opportunity for exercise may be provided in a number of ways, such as:

(i) Group housing in cages, pens or runs that provide at least 100 percent of the required space for each dog if maintained separately under the minimum floor space requirements of § 3.6(c)(1) of this subpart;

(ii) Maintaining individually housed dogs in cages, pens, or runs that provide at least twice the minimum floor space required by § 3.6(c)(1) of

this subpart;

(iii) Providing access to a run or open area at the frequency and duration prescribed by the attending veterinarian; or

(iv) Other similar activities.

(4) Forced exercise methods or devices such as swimming, treadmills, or carousel-type devices are unacceptable for meeting the exercise requirements of this section.

(d) *Exemptions.* (1) If, in the opinion of the attending veterinarian, it is inappropriate for certain dogs to exercise because of their health, condition, or well-being, the dealer, exhibitor, or research facility may be exempted from meeting the requirements of this section for those dogs. Such exemption must be documented by the attending veterinarian and, unless the basis for exemption is a permanent condition, must be reviewed at least every 30 days by the attending veterinarian.

(2) A research facility may be exempted from the requirements of this section if the principal investigator determines for scientific reasons set forth in the research proposal that it is inappropriate for certain dogs to exercise. Such exemption must be documented in the Committee-approved proposal and must be reviewed at appropriate intervals as determined by the Committee, but not less than annually.

(3) Records of any exemptions must be maintained and made available to USDA officials or any pertinent funding Federal agency upon request. (Approved by the Office of Management and Budget under control number 0579-0093)

The Respondent is charged with having violated the provisions of the aforesaid regulations on February 13, 1995 and April 26, 1995.

The Respondent was alleged to have violated the aforesaid regulations because he failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise and the exercise plan had not been reviewed and signed by the attending veterinarian and did not include the size of the enclosures.

With respect to the alleged violation respecting the exercise plan, Inspector Borchert testified as follows:

Q. As far as the exercise plan, how long is that good for?

A. Once it's signed and dated and nothing changes, as long as you have the same veterinarian.

Q. You wrote me up for exercise plan not being filled out by the vet but the previous inspection it was not written up. Could you explain that one, and it should have still been the same one, correct?

A. I believe we had a different method at that time that the exercise plan was going to be used.

Q. What would the different method have been?

A. I believe we had decided on a different interpretation of what the exercise plan would encompass.

Q. Well, did the regulations change?

A. No, just the interpretation of them.

Q. Then why would we have to change the exercise plan if the regulations didn't change? If they didn't change, they should have been okay, huh?

A. To meet the new interpretation of the exercise requirement.

Q. What was the difference in the interpretation?

A. I don't recall.

The Respondent should not be held accountable for a change in interpretation as testified to by Inspector Borchert.

However, the allegations relating to exercise for the dogs were abandoned by Complainant and not pursued.

Therefor no finding is necessary nor made.

9. 9 C.F.R. § 3.1(b) provides as follows:

§ 3.1 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, and stored material, but may contain materials actually used and necessary for clearing 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.

An inspection of the Respondent's premises found that the Respondent was not in compliance with the aforesaid regulations on May 31, 1995 and February 12, 1996 because the housing facilities were not kept neat and free of clutter, including equipment, furniture, and stored material. The Respondent maintains that because of work projects he left things out instead of putting them away. The Complainant's evidence (CX 10; Tr. 22) is not of sufficient persuasiveness to make a finding that a violation occurred as to 9 C.F.R. § 3.1(b). This inspector utilized a high degree of subjectiveness and his idea of neatness and clutter should not prevail over Respondent's explanation as set forth in his cross-examination.

10. 9 C.F.R. § 3.11(a) and (b) provides as follows:

§ 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.

12. 9 C.F.R. § 3.3(e)(1)(i) and (iii) provides as follows:

§ 3.3 Sheltered housing facilities.

. . .

(e) *Surfaces.* (1) The following areas in sheltered housing facilities must be impervious to moisture:

(i) Indoor floor areas in contact with the animals;

* * * * *

(iii) All walls, boxes, houses, dens, and other surfaces in contact with the animals.

Said regulations required that surfaces of sheltered-housing facilities for dogs that are in contact with the animals be impervious to moisture. The Respondent is found to have violated the aforesaid provisions.

The surfaces of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture. Fiberglass sheets were broken and chewed. Although the fiberglass sheets were on the exterior of the trailer, they were inside the primary enclosures; this is shown in photographs taken on later inspections, e.g.. (CX 13.19-13.20). The trim around the dogs' doors needed to be resealed because there were gaps and holes where old caulk had fallen out. Also, raw wood exposed to the dogs needed to be resealed.

The Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.3(e)(1)(i) and (iii) of the standards (9 C.F.R. 3.3(e)(1)(i) and (iii).

13. 9 C.F.R. § 3.12 provides as follows:

§ 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.

Respondent was found to have violated this requirement when his facilities were inspected. The requirements of the aforesaid regulations resulted in Respondent being charged with not having enough employees to carry out the required level of husbandry practices and care, as set forth in the provisions of the afore-quoted regulations. However, the findings of the inspector were conclusory in nature, were not specific as to how many employees would have been needed. Also, it appears that the deficiencies in Respondent's performance were due, at least in part, to him having a full-time job, the burning of his barn, and personal problems, which, had they not been present, would have enabled him to devote more attention to his facilities.

The Complainant's evidence is not sufficient to sustain this allegation.

14. 9 C.F.R. § 2.40 provides as follows:

Subpart D--Attending Veterinarian and Adequate Veterinary Care

§ 240 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.

Respondent is said to have violated the provisions of this section on more than one occasion.

Respondent's Exhibit J is a letter dated March 19, 1998 and signed by Dr. David M. Elsom, DVM, Oahe, Veterinary Hospital, in which it is stated, among other things that:

> Oahe Veterinary Hospital provided Kevin Ackerman Kennels with veterinary services until June 4, 1996. During the several years of our association we had occasion to do several kennel inspections, in addition to the individual animal health care. On these visits we found conditions to be sanitary and within normal limits of animal husbandry.

Thus it is apparent from the aforesaid letter that there were veterinary services provided to the Respondent until June 4, 1996, which included the provisions for individual animal health care.

The Complainant has not sustained its burden of proof as to this allegation.

15. 9 C.F.R. § 3.1(b) provides as follows:

§ 3.1 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, and stored material, but may contain materials actually used and necessary for clearing 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.

Respondent is alleged to have violated the aforesaid regulations on May 31, 1995 and subsequently.

Specifically, Respondent was charged with failing to see that the animal areas inside of the housing facility were kept neat and free of clutter, including equipment, furniture, and stored material.

Neither the photographs nor the testimony supports this contention of Complainant which is given to a high degree of subjectiveness. Respondent maintains that he left things out he was currently using. The evidence does not show accumulations of trash, waste material, junk, weeds, or other discarded materials of such nature as contemplated by the regulations to be violative thereof.

16. 9 C.F.R. § 3.7(c) provides in part as follows:

§ 3.7 Compatible grouping.

. . .

(c) Puppies or kittens 4 months of age or less may not be housed in the same primary enclosure with adult dogs or cats other than their dams or foster dams, except when permanently maintained in breeding colonies;

The Respondent is alleged to have violated the aforesaid section of the regulations on October 17, 1995.

Complainant has not supported this allegation with adequate proof.

17. 9 C.F.R. § 3.1(e) and (f) provides as follows:

. . .

(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 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 back flow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

The Respondent is said to have violated the aforesaid regulations in that the inspector found that the housing facilities were not equipped with disposal facilities and drainage systems that were constructed and operated so that animal waste and water were rapidly eliminated and animals stayed dry. There was algae-filled standing water; the sewer had overflown. Holes under and around the runs needed to be filled to eliminate standing water and waste.

The housing facilities were not equipped with disposal facilities and drainage systems that were constructed and operated so that animal waste and water was rapidly eliminated and the animals could stay dry. The pens and shelters were full of ice, melting snow, and water. There were large accumulations of feces in the runs, run wire, and between the top and bottom enclosures and under raised wire runs.

Supplies of food were not stored in a manner that protected them from spoilage, contamination, and vermin infestation. Feed was stored in a pickup box trailer which was missing the end gate, allowing feed sacks to get wet, although none was found to be wet. In addition, it was found that toxic substances (bottles of bleach) were improperly stored in animal areas.

With respect to the "toxic" substances alleged to be bleach, the inspector did not ascertain the contents, which Respondent indicated was milk for the puppies. There is some doubt that the storage of food supplies, although not perfect, rose to the degree of violations.

The evidence does support Complainant's contention with respect to violation of the regulation pertaining to drainage and waste disposal. Accordingly, Respondent is found to have willfully violated section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and section 3.1(e) and (f).

18. 9 C.F.R. § 3.4(b) provides as follows:

§ 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.

The Respondent is said to have violated the aforesaid regulations on various occasions in that 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 provide necessary shelter. Doors to shelters were broken; shelters had holes in the sides and tops and windows were broken out; a patch had torn away from a wall, leaving sharp and jagged metal exposed; strapping had torn away, also leaving sharp and jagged metal exposed; supports holding runs outside a trailer had torn away; and a pen had broken wire floor.

The requirements of the aforesaid regulations set forth that dogs in outdoor housing facilities must be provided with adequate protection from the elements.

Dogs in outdoor housing facilities were not provided with adequate protection from the elements. Not only was there standing water and ice in the pens, but within the shelters; shelters were broken and in bad repair and were lacking doors to provide protection from wind, rain, and snow. Also, the outdoor housing facilities for dogs did not contain shelter structures large enough to allow each animal to sit, stand, and lie in a normal manner, and to turn about freely. Primary enclosures for dogs were not constructed so that they provide sufficient space.

Respondent willfully violated section 2.100(a) of the regulation (9 C.F.R. § 2.100(a)) and section 3.4(b) of the standards (9 C.F.R. § 3.4(b)).

19. There is sufficient evidence of record to sustain willful violation relating to the structure of the housing facilities for the dogs, 9 C.F.R. § 3.1(a), and the compatible grouping requirement found in 9 C.F.R. § 3.7.

20. The Complainant's principal concern relating to 9 C.F.R. § 2.75, relating to records, is that the Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals. This has been noted *supra*. The acquisition records did not show the date acquired, source, age, or identification number. Disposition records did not show age, description, and sex. On one inspection, some dogs had lost identification tags and dogs with tattoos that could not be seen or read needed to be re-identified. Also, cage cards for weaned puppies (not individually identified) needed the Dams Identification number. On another inspection, at least fifteen dogs need identification and the records of animals on hand lacked identification numbers for at least nine dogs. Acquisition records did not show the source of two dogs. Disposition records were said to be incomplete because the required form provides one line for each animal but multiple animals were recorded on a single line, resulting in the absence of some of the information on identification of the animals. The absence of information would constitute a violation, not the recording of multiple entries on one line. The Respondent maintained he did not have the necessary forms. On another inspection the Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals inasmuch as the records of animals on hand did not show the identification numbers of at least ten dogs, nor

the date they arrived on the premises. Also, the records of sales were lacking required information on the buyers, such as license numbers and vehicle license plate numbers and state of issuance.

Based on the evidence of record it is necessary to find that Respondent was in willful violation of 9 C.F.R. § 2.75.

21. 9 C.F.R. § 2.126 provides:

§ 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.

The regulations require that Respondent allow the inspectors to inspect his premises. With respect to the attempted inspection Investigator Larry Neustel testified relating thereto, including the fact that he took an affidavit from Mr. Borchert on March 19, 1996, with respect to the attempted inspection of the Ackerman facility. (Tr. 129). It appears that the investigators, Mr. Neustel and Mr. Borchert, went to the Respondent's facility in the morning and he was not available and they indicated that although he did not appear to be on the premises they thought that he was because his truck was in the driveway. This is an unsubstantiated inference. The inspectors returned at a later time and the Respondent indicated that he wanted to wait for an inspection until either his lawyer or the sheriff arrived. The inspectors declined to do that and indicated that in the absence of the sheriff or his lawyer the Respondent declined inspection. However, it is noteworthy that notwithstanding their statement that Respondent declined inspection they made a number of observations such as they observed that

it needed to be cleaned; that there was a buildup of feces in the runs both on the ground and wire run; and there was a buildup out in front of the runs and in the runs themselves on the north side of the building. The inspectors could see further states of uncleanliness as well as other matters which normally would be within the scope of inspection. So they certainly at least achieved a partial inspection.

Respondent contends he did not refuse to have his premises inspected but sought to delay it pending arrival of the sheriff or his attorney. The evidence shows that when the two government officials returned later in the afternoon of the day in question, they saw the Respondent in the yard, from which he went into his house. When they knocked on the door Respondent answered and wanted to know what the inspectors wanted. They "told him [Mr. Ackerman] we were there to do an inspection and he refused the inspection." (Tr. 39). The manner in which he refused the inspection is not clearly set forth. When he was told they wanted to inspect the facility he said he wanted to contact his attorney and that they would have to wait until his attorney arrived before they could inspect. Respondent then later advised that if his attorney was not there he wanted to have the sheriff there. Mr. Neustel indicated that they told Respondent: "We were not going to wait for the sheriff to come and Mr. Borchert and I then left." (Tr. 131). Notwithstanding the fact that the inspectors indicated they could not make an inspection, nevertheless, they testified that while they were at Respondent's facility on the day referenced they did make a number of observations as to the condition of Respondent's premises. However, under applicable regulations, the APHIS inspectors were entitled to a full inspection.

The provisions of the applicable regulations did not require the inspectors to wait for Respondent's attorney or the sheriff. Thus, they were denied access for inspection of the property.

The persuasive evidence of record shows that Respondent willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations in not permitting an inspection as required.

With respect to the affidavit of Mr. Borchert taken by Mr. Neustel relative to Mr. Ackerman's utilization of the bobcat, as can be seen from the evidence of record, it appears that the Respondent was on his bobcat attempting to remove feces and debris from various areas when the two inspectors put on their boots and approached the Respondent. It was at that time that they claimed that the Respondent's bobcat brushed against the leg of one of them. I am discounting this incident because the Respondent did not approach the inspectors, they are the ones who walked towards him and placed themselves in front of the bobcat. They were the ones who went to Mr. Ackerman who was on a bobcat and they walked down to him and "* * * in his line of pushing to get him to stop and talk to us." Thus, the

Respondent did not approach the government inspectors, they approached him while he was operating the bobcat. As the result thereof, Mr. Borchert testified that Mr. Ackerman "* * * just kind of eased his bobcat against my foot and leg to show me that he was going to drive away if I didn't step out of the road." (Tr. 39). Although I have found that inspection was refused, I have discounted the bobcat incident where the inspectors walked toward and in front of the bobcat. How they placed themselves with respect to the utilization of the machine, how far the machine was from them, the extent of the so-called brushing, and any other matters which could be relevant to a determination as to whether or not this incident took place and if so the extent thereof, is not apparent in the record and accordingly no finding of fact had been made with respect thereto and it has not been considered a factor in arriving at the sanction herein.

Discussion

The evidence of the violations is based largely on the written reports of the inspector, which reports were made a part of the evidence herein. To some extent there is corroboration by way of photographs and by the testimony of the inspector's supervisor who was present at one inspection and also by a senior investigator who was present at another inspection and an attempted inspection. Thus, the inspection reports are the focal point of the Complainant's case.

Summarily stated, the Respondent maintains that there was a deficiency in the evidence presented because the inspector did not have present recall and simply relied upon reading what was already set forth in the inspection reports; that the violations alluded to were the result of subjective judgment on the part of the inspector; that with respect to certain violations there was not a sufficient definition of various items in the regulations to determine whether or not there was a violation; and that such violations were not supported by the published regulations. Additionally, Respondent maintains, correctly so, that in no instance did the inspector observe any injured or sick animals.

As concerns certain specifics detailed by the inspector, it is further contended by the Respondent that by reason of the fact that the inspector did not measure any of the dogs, it could not be determined whether or not they had sufficient space. The inspector testified that he did not measure the cages or the dogs. Instead, he relied upon a "wire" count. Respondent also maintains that by reason of work projects, working tools and such were left out but that did not preclude the observance of the facilities as being neat and orderly in manner. With respect to the allegations of toxic substances being in the animal area (Clorox bottles) the Respondent maintains that they contained milk and that the inspector never

checked to see what was in the bottles. Further, the Respondent contends he did not prevent an inspection of his facilities but requested that a lawyer and a sheriff be present at the time of inspection.

With respect to another one of the Respondent's contentions, it is deserving of more than passing moment. The Respondent identified several instances when Inspector Borchert, wrote alleged violations on the Agency's copy which did not appear on the copies given to Respondent. That is to say, the copy given to Respondent did not reflect all of the alleged violations which Mr. Borchert subsequently added to the Agency's copy. Although Complainant seeks to explain this away, nevertheless, in evaluating the concerns of this case, I am disregarding those statements which appeared on the Agency's copy, of which the Respondent had no knowledge. The Complainant argues that the added statements can be viewed in the context of the remainder of the reports. For the purposes of this Decision the added statements are being disregarded.

The instances identified where there were additional statements put on the Agency's copy that were not reflected on the Respondent's copy relate to the inspection report of June 6, 1994 (CX 6) wherein Inspector Borchert added a reference to "accumulations of feces and hair along outside of wash down gutters at front of enclosures" to Item 14, Waste Disposal. On the inspection report of July 5, 1994, Inspector Borchert added under Item 11, Condition and Site, a reference to a need to remove barn swallows. (EX B; CX 7, p. 2). Inspector Borchert also added a reference to an accumulation of hair under Item 14, Waste Disposal. (EX B; CX 7, p. 2). Furthermore, Inspector Borchert added Item 36, Pest Control: "many flys [sic] present at time of inspection which need to be controlled by pest control program."

On the inspection report of February 28, 1994, Inspector Borchert added under Item 10, Structure and Construction, a reference to "enclosure wire which allows dogs heads to pass through it." (EX F, CX 5, p. 2). In the same inspection report, Inspector Borchert added to Item 39, Social Grouping, noting that large breed puppies needed to be separated from small breed puppies. (EX C). Apparently this was not regarded as a deficiency. (EX 5, p. 1). Complainant's Exhibit 9 notes another instance where Inspector Borchert added a notation to the Agency's copy which was not put on the Respondent's copy relating to the fact that in the prior two weeks there had been sixty inches of snow and that "there [sic] sewage system has caved in."

Fundamental standards of fairness require that the Respondent not be held accountable for alleged violations which were subsequently written in on the Agency's copies of the inspection reports and of which the Respondent had no knowledge. The Complainant maintains that the additional data written in by the

inspector actually were covered under other items of violations. However, to the extent that any reliance had been placed upon these additional notations, such reliance has been misplaced at least in this Decision. It is noteworthy that although the Complainant seeks to mitigate the significance of the added statements, nevertheless, Complainant acknowledges: "This should not have occurred." (Complainant's brief, p. 21).

Another aspect of this proceeding is reflected in the record and relates to the manner in which Respondent (and others) viewed the inspector involved who wrote up the violations. Although his supervisor testified he regarded the inspector as one of his better inspectors, the supervisor did acknowledge that he had received complaints about him from two or three other licensees in both North and South Dakota and that such complaints were also directed to congressional persons in those various States. Dr. Mammeli indicated he met with the congressional representatives who were satisfied with Dr. Mammeli's explanations and since then he has not received anymore complaints. (Tr. 155).

I have carefully reviewed the entire record herein. It is apparent that the Complainant's case is premised principally upon the written reports made by the inspector during his various inspections. To the extent feasible, I have eliminated certain of the allegations as not having been substantiated by convincing proof or even a preponderance of the proof. Some of the elements set forth in the reports were not sufficiently specific and did not identify the alleged violation in such terms as one could determine whether or not such violation in fact existed. I believe this process of closely examining the reports was necessary in view of the presence of evidence in the transcript that this was an inspector against whom numerous complaints had been filed, various breeders had submitted affidavits which were admitted into evidence over objection, and who had been the subject of complaints to his superior as well as to certain congressional persons. Respondent Exhibit No. L is a statement from Dean Bahr, a government employee working for the United States Department of Agriculture, as an Agriculture Credit Officer for the Farm Service Agency. His affidavit relates to his opinion of Inspector Donovan Borchert as being an unfair inspector and of engaging in unprofessional conduct which appeared to be undue harassment. Therefore, to the extent appropriate, I have eliminated those allegations which would appear to be so minimal as to not be in violation or, which had not been sufficiently identified as related to the Respondent's facility.

However, I am convinced, and there is a preponderance of evidence to substantiate the violations I have found. The Respondent 's facility did lack certain cleanliness and housekeeping requirements as set forth in the regulations. Moreover, such conditions appeared to be of a chronic nature and were repetitive

violations during this rather lengthy period of inspections. In addition, I believed the deficiencies in the structural aspects of the facilities used to house the dogs were proven. It appears that Respondent became overwhelmed with the amount of work required for the proper maintenance of his facility. However, there is no indication of injury to the animals and there is appropriate indication that the Respondent did have a good faith desire to see that his animals were well-cared for. He apparently was not able to reach the level of compliance required by APHIS' regulations.

Respondent maintains that he could not have willfully violated any of the regulations inasmuch as the dogs were pets to him and he loved and cared for them with all his heart, that they were just like family and children to him.

Even if what Respondent maintains is true with respect to his care of the animals for which there was no evidence of injury, nevertheless the Respondent's actions fall within the legal definition of willful, as that term is utilized in these administrative proceedings. It has been stated many times that a willful act is one which is done intentionally, irrespective of evil intent or is done with careless disregard of statutory requirements.

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.[1]

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[1]*See, e.g., Toney v. Glickman,* 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA,* 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied,* 502 U.S. 860 (1991); *Finer Foods Sales C.o v. Block,* 708 F.2d 774, 777-778 (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 Scamcorp, Inc.,* 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce,* 56 Agric. Dec. 1884, 1905-1906 (1997), *appeal docketed,* No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms,* 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.,* 56 Agric. Dec. 917, 925 (1997), *appeal docketed,* No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.,* 56 Agric. Dec. 880, 895-896 (1997); *In re Havana Potatoes of New York Corp.,* 55 Agric. Dec. 1234, 1244 (1996), *aff'd,* 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.,* 55 Agric. Dec. 1204, 1232-1233 (1996), *appeal docketed,* Nos. 96-3558 and 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.,* 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.,* 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.,* 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1330 (1995), *aff'd,* 104 F.3d 139 (8th Cir. 1997), *cert. denied, sub nom., Heimann v. Department of Agric.,* 118 S. Ct. 372 (1997); *In re National Produce Co.,* 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.,* 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v.* Glover Livestock Common Co., 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois*

(continued...)

Willfulness in the subject case is reflected by Respondent's violations which extended over a long-period of time. The act or omissions thereof which resulted in the violations were the result of intentional failure to comply with statutory requirements or a careless disregard thereof.

The Complainant maintain that the Respondent's refusal to allow an inspection was particularly willful. At the oral hearing testimony was given with respect to the circumstances of such alleged refusal. Although the Respondent attempts to explain the situation on brief, nevertheless, his declining to take the stand and set forth his own interpretation of events which transpired on that day mitigate against his contentions in regard thereto.

Mr. Bahr, who testified at the oral hearing, was vice-president of the Dakota Animal Breeders Association and had viewed numerous kennels, including that of the Respondent. The Complainant did not cross-examine this witness but rather on brief pointed out that his license was surrendered because of his inability to get along with Inspector Donovan Borchert. The essence of Mr. Bahr's testimony was that he believed Mr. Borchert was "a very unfair inspector." (Tr. 160). Also, that Mr. Bahr had seen various inspection reports for other kennels which reports were inconsistent from one kennel to another. "It appears to me that it makes a difference who you are and not what your kennel is like when Borchert does your inspection." (Tr. 160). Mr. Bahr testified that Mr. Borchert was very unprofessional as a government employee; that he engaged in undue harassment; and because of the actions of Mr. Borchert, Mr. Bahr surrendered his license. In the course of his testimony Mr. Bahr indicated that he had been to Respondent's kennel many times and that he had never seen any injured dogs and believed that

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[1](...continued)
Central R.R., 303 U.S. 239, 242-243 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'"

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. 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 were willful.

Respondent's kennel was always a "topnotch operation" and was very clean and that the Respondent displayed a great amount of concern for his dogs and the welfare thereof. Mr. Bahr indicated that on one or two occasions right after the Respondent's dairy barn burned down and he was having other problems, Mr. Bahr noticed a little bit of slackness on the part of fecal buildup and cleanliness but it in no way affected the dogs. From the testimony of Mr. Bahr, who had viewed many kennels, including that of the Respondent many times, it can be inferred that Mr. Bahr did not observe any outstanding conditions which would have warranted the extent of the alleged violations attributed to Respondent's facility by Inspector Borchert. I have given Mr. Bahr's testimony full credence. His demeanor was that of a truthful witness.

It was indicated by Dr. Elsom that he had done "several" kennel inspections of Respondent's facilities and found the conditions to be sanitary and within the normal limits of animal husbandry.

Another witness called by the Respondent was Mr. Greg Bommelman who is in partnership with Judy Hansen in Wild Wind Kennels. The testimony of Mr. Bommelman substantiated the admission made by Mr. Borchert that he, as a matter of practice, would write things down on the inspection report that went back to the Agency but of which the licensee had no knowledge. (Tr. 168). In other words he added additional data after the initial report had been given to the licensee. Mr. Bommelman had been at Respondent's kennel four times, during which he felt that the kennel was fine and that the dogs were healthy. "I came down twice to the kennel unannounced and I did not see any accumulation of feces that I thought was excessive." (Tr. 170). Mr. Bommelman had purchased dogs from the Respondent's facility and had he believed that the facility was in any way deficient, he would not have done so. (Tr. 172). Mr. Bommelman agreed with the veterinarian's assessment of the Respondent's facility and animal care. (Tr. 171-172). Mr. Bommelman's testimony was credible and worthy of belief.

With respect to the photographs presented by the Complainant Mr. Bommelman had an apt critique thereof: "This is a one time picture that you have taken and you have tried to create the worst possible condition that you can possibly get. Now, have you looked at the kennel conditions before this or after this?" (Tr. 174).

Mr. Bommelman further corroborated the opinion that some had of Inspector Borchert as one engaged in harassment and entrapment. Through Mr. Bommelman, Exhibit G was admitted into evidence being questionnaires which were sent out to licensees with respect to the conduct of Inspector Borchert. Although there are a number of responses in Exhibit G indicating difficulties which various persons experienced with Mr. Borchert, nevertheless, Mr. Bommelman indicated he did not get a lot of response because the breeders in North Dakota

were afraid of retaliations. (Tr. 169). Complainant would discredit the testimony of Mr. Bommelman because of his partnership with Judy Hansen who was doing business as Wild Wind Petting Zoo and was assessed a civil penalty and her license was suspended by Order issued in AWA Docket No. 96-0048 on January 30, 1998, from which an appeal has been taken. This fact alone, namely alleged noncompliance with the regulations, as set forth by the Complainant is not sufficient to detract from the credibility of the witness Mr. Bommelman nor of the witness Mr. Bahr. An observance of the demeanor and responsiveness of these individuals to the questions propounded to them leads one to the conclusion that their testimony is entitled to full credibility.

As previously noted, the overwhelming thrust of the Complainant's evidence consists of the written inspection reports which were made by Inspector Borchert, whom the Respondent, along with several other licensee breeders, viewed as unreasonable, dishonest, and bullying. It is not the purpose of this proceeding to go into the merits of such views. They are mentioned solely to indicate possible bias in the inspection reports, as contrasted to the testimony of Respondent's witnesses. There can be no other conclusion drawn from the evidence other than that Inspector Borchert and the Respondent did not view each other with mutual respect and understanding with respect to the requirements and enforcement of the applicable regulations. There was a lack of help and understanding as to the requirements of meeting the responsibilities of the regulations and a perception that same were not enforced with fairness and integrity.

It is incumbent upon the government to prove its case by a preponderance of the evidence. This has not been done with respect to certain allegations as noted herein. Nevertheless, there has been sufficient proof, through the utilization and introduction of the inspection reports, and the oral testimony, to conclude that the Respondent was in violation of numerous regulations. In the absence of affirmative refutation by the Respondent by credible evidence on behalf of the Respondent I am required to accept the inspection reports and testimony that were introduced into evidence. The Respondent's Proposed Findings of Fact consist to a large extent of argument relating to the Complainant's Proposed Findings of Fact. Except as noted above, the Respondent introduced little or no evidence to support his contentions and to refute the evidence adduced by the Complainant. Accordingly, many of his contentions are simply not supported by the evidence of record, even if they were correct. The Respondent chose not to introduce his own evidence in refutation other than as noted above through several exhibits and the testimony of Mr. Bahr and Mr. Bommelman. Without the Complainant's evidence being refuted by the Respondent I am bound to accept that evidence which is on the record herein. Accordingly, to the extent noted above I have made findings that

this Respondent was in violation of numerous regulations over a lengthy period of time.

Sanction

In imposing a sanction four factors must be taken into consideration: The size of Respondent's business, gravity of the violations, good faith and history of previous violations. The Complainant herein is seeking the imposition of a cease and desist order, permanent disqualification of the Respondent from being licensed or for a specified time of disqualification together with the imposition of the civil penalty of $25,000.00.

The Complainant produced a sanction witness who testified with respect to his opinion as to the severity of the violations. He indicated that several fell into the category of being severe violations, including the incident relative to the alleged failure to permit inspection and utilization of the Respondent of his bobcat tractor. Complainant maintains that Respondent's business is "relatively large" with about a 180 adult dogs and 60 to 100 puppies.

The size of Respondent's operation did not remain constant. The inspection report of October 12, 1993 (EX 2) indicates 59 dogs and 2 puppies; inspection report of January 24, 1994 (EX 4) indicates 105 dogs and 55 puppies; the inspection report of February 28, 1994 (EX 5) indicates 103 dogs and 60 puppies; the inspection report of June 1, 1994 (EX 6) indicates 138 dogs and 80 puppies; the inspection report of July 5, 1994 (EX 7) indicates 142 dogs and 75 puppies; the inspection report of February 13, 1995 (EX 8) indicates 163 dogs and 50 puppies; the inspection report of April 26, 1995 (EX 9) indicates 162 dogs and 45 puppies; the inspection report of May 31, 1995 (EX 10) indicates 162 dogs and 35 puppies; the inspection report of October 17, 1995 (EX 11) indicates 145 dogs and 61 puppies; and the inspection report of February 12, 1996 (EX 12) indicates 179 dogs and 57 puppies.

Although Complainant's sanction witness indicated he regarded Respondent's operation as "large," there is no indication in the record as to what Complainant regards as a "small," "medium" or "large" operation.

There is no real basis, other than opinion, for labeling Respondent's business as relatively large. It is more likely, it fell within the "medium" range and, at one time, was done in connection with Respondent's milking cows.

The Respondent has surrendered his license. The Respondent has no prior adjudicated violations against him. Notwithstanding the legal definition of willfulness, which has been set forth previously in this Decision, namely, that an act, if intentionally done, becomes willful for administrative proceedings,

nevertheless, there is sufficient testimony of evidence through Mr. Bahr and Mr. Bommelman that the Respondent did in fact act in good faith in attempting to take care of his dogs and puppies. Although the evidence shows deficiencies in regard thereto, nevertheless there was no evidence with respect to any injury to the dogs and it appears that the Respondent at all times had the welfare of the animals as a top concern. Therefore, with respect to the four factors to be considered under 7 U.S.C. § 2149, it appears to me that the size of the Respondent's business was medium, that he exhibited good faith toward his animals, and that there was no history of prior violations. Therefore, that leaves us with a evaluation of the Complainant's witness with respect to the gravity of the violations. Even though some of the violations were described by the Complainant's witness as being severe, nevertheless in the absence of injury or mistreatment of the dogs it appears that such violations had not accelerated or had not presented themselves as a harm to the animals.

Therefore, although the evidence does show numerous violations over an extended period of time, the purposes of the Act and the imposition of a penalty upon the Respondent can just as adequately be carried out through the imposition of a civil penalty lesser than the one recommended by the Complainant, namely $25,000.00. An evaluation of all the facts to be taken into consideration, as well as the surrounding circumstances of this proceeding, indicates that a civil penalty of $5,000.00 will carry out the purposes of the Act just as well, in addition to which a cease and desist order should be issued. This is a severe penalty for this Respondent.

Order

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

(a) Failing to provide animals with adequate shelter from the elements;

(b) Failing to provide for the rapid elimination of excess water from housing facilities for animals;

(c) 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;

(d) Failing to individually identify animals, as required;

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

(f) 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;

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

(h) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(i) Failing to maintain primary enclosures for animals in a clean and sanitary condition; and,

(j) Failing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices.

2. Respondent is assessed a civil penalty of $5,000.00, which shall be paid by certified check made payable to the order of the Treasurer of the United States.

3. The Respondent is disqualified from becoming licensed for a period of three (3) years and continuing thereafter until and unless the Respondent demonstrates to APHIS that he is in full compliance with the Act, the regulations and standards issued thereunder, and this Order, including payment of the civil penalty assessed herein. The Respondent shall not, directly or indirectly as an independent contractor or through any corporate or other device, engage in any business for which a license is required under the Act without being licensed.

All the various requests, proposals and suggestions of the parties have been carefully considered and this Decision and Order are arrived at upon consideration of the entire record herein and on the record as a whole. This Respondent is admonished to take whatever actions are necessary to fully comprehend the broad scope of the cease and desist order herein.

This Decision and Order will become final thirty-five (35) days after service upon the parties unless there is an appeal to the Judicial Officer within thirty (30) days, all as more fully set forth in 7 C.F.R. §§ 1.131 *et seq.*, 1.145).

[This Decision and Order became final on December 21, 1998.-Editor]

In re: ANNA MAE NOELL AND THE CHIMP FARM, INC.
AWA Docket No. 98-0033.
Decision and Order filed January 6, 1999.

Default — Failure to file timely answer — Filing with hearing clerk — Federal Rules of Civil Procedure — Cease and desist order — License revocation — Civil penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $25,000 against Respondents, revoking Respondents' Animal Welfare Act (Act) license, and directing Respondents to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondents' 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 Respondents were 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 Respondents due process. The Judicial Officer held that the age, ill health, and hospitalization of one of the Respondents and the lack of legal representation at the time the Complaint was served on Respondents are not bases for setting aside the Default Decision. Moreover, the Judicial Officer held that even if he found that Complainant would not be prejudiced by allowing Respondents to file a late answer and Respondents would be irreparably harmed by the denial of their request to set aside the Default Decision, those findings would not constitute bases for setting aside the Default Decision. The Federal Rules of Civil Procedure (FRCP) are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Act, in accordance with the Rules of Practice (7 C.F.R. §§ 1.130-.151); therefore Rule 60(b) of the FRCP, under which a court may relieve a party from judgment for, *inter alia*, excusable neglect, is not applicable to administrative proceedings conducted in accordance with the Rules of Practice.

Brian T. Hill, for Complainant.
Martin A. Pedata, St. Petersburg, Florida, for Respondents.
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, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 10, 1998.

The Complaint alleges that: (1) on November 15, 1995, Anna Mae Noell and the Chimp Farm, Inc. [hereinafter Respondents], violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.40, 2.75(b)(1), 2.100(a), 2.131(a)(1), 2.131(b)(1), and 2.131(c)(2) of the Regulations (9 C.F.R. §§ 2.40, .75(b)(1), .100(a), .131(a)(1), (b)(1), (c)(2)), and sections 3.75(a), 3.75(c)(1)(i)-(ii), 3.80(a)(1), 3.80(a)(2)(v), and 3.81 of the Standards (9 C.F.R. §§ 3.75(a), (c)(1)(i)-(ii), .80(a)(1), (a)(2)(v), .81) (Compl. ¶ II); (2) on October 9, 1996, Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .100(a)) and sections 3.53(a), 3.75(a), 3.75(c)(1)(i)-(ii), 3.75(f), 3.80(a)(2)(xi), 3.81, 3.84(d), 3.128, and 3.129 of the Standards (9 C.F.R. §§ 3.53(a), .75(a), (c)(1)(i)-(ii), (f), .80(a)(2)(xi), .81, .84(d), .128, .129) (Compl. ¶ III); (3) on July 22, 1997,

Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40 .100(a)) and sections 3.52(a), 3.75(a), 3.75(c), 3.75(e)-(f), 3.80(a)(1), 3.81, 3.84(d), and 3.125(a) and (c) of the Standards (9 C.F.R. §§ 3.52(a), .75(a), (c), (e)-(f), .80(a)(1), .81, .84(d), .125(a), (c)) (Compl. ¶ IV); and (4) on April 1, 1998, Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40 .100(a)) and sections 3.75(a), 3.75(c)(1)(i), 3.75(e), 3.80(a)-(b), 3.84(c)-(d), 3.125(c), and 3.131(c) of the Standards (9 C.F.R. §§ 3.75(a), (c)(1)(i), (e), .80(a)-(b), .84(c)-(d) .125(c), .131(c)) (Compl. ¶ V).

Respondents were served with the Complaint on August 13, 1998. Respondents failed to answer the Complaint within 20 days after service of the Complaint on Respondents, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On October 1, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Proposed Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. Also, on October 1, 1998, Respondents filed a letter, dated September 14, 1998 [hereinafter Answer], in which they denied the material allegations of the Complaint.

On November 3, 1998, 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: (1) found that Respondents violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) issued a cease and desist order, directing that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of $25,000 against Respondents jointly and severally; and (4) revoked Respondents' Animal Welfare Act license.

On December 3, 1998, Respondents 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 December 23, 1998, Complainant filed Complainant's Opposition to Motion by Respondents Anna Mae Noell and the Chimp Farm, Inc.[,] to Vacate Default [hereinafter

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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); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Complainant's Response]. On December 29, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

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

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

The Hearing Clerk served a copy of the Complaint and the Rules of Practice on Respondents on August 13, 1998. Respondents were informed in the letter of service which accompanied the Complaint and 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.

Respondents 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 for the purposes of this proceeding by Respondents' failure to file a timely answer, are adopted and set forth in this Decision and Order, *infra*, as Findings of Fact and Conclusions of Law.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact and Conclusions of Law

I

A. Respondent Anna Mae Noell is an individual whose mailing address is 4612 Alternate 19 North, Palm Harbor, Florida 34683. Respondent The Chimp Farm, Inc., is a Florida corporation and has the same mailing address as Anna Mae Noell.

B. At all times material to this proceeding, Respondents were licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations.

II

A. On November 15, 1995, the Animal and Plant Health Inspection Service [hereinafter APHIS] inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and

adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On November 15, 1995, APHIS inspected Respondents' premises and records and found that Respondents had failed to maintain complete records on the premises 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)).

C. On November 15, 1995, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Regulations specified in paragraph II(C)(1)-(3) of these Findings of Fact and Conclusions of Law:

1. Two chimpanzees named "Congo" and "Harry" were handled in a manner that caused unnecessary discomfort (9 C.F.R. § 2.131(a)(1));

2. During public exhibition, there was not sufficient distance and/or barriers between the animals and the general viewing public (9 C.F.R. § 2.131(b)(1)); and

3. A responsible, knowledgeable, and readily identifiable employee or attendant was not present at all times during periods of public contact (9 C.F.R. § 2.131(c)(2)).

D. On November 15, 1995, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph II(D)(1)-(6) of these Findings of Fact and Conclusions of Law:

1. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

2. Housing facilities for nonhuman primates contained excessive rust which affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

3. Housing facilities for nonhuman primates contained jagged edges or sharp points that might injure animals (9 C.F.R. § 3.75(c)(1)(ii));

4. Primary enclosures were not designed and constructed so as to be structurally sound for the species of nonhuman primates contained in them (9 C.F.R. § 3.80(a)(1));

5. Primary enclosures were not maintained so that they enabled the nonhuman primates to remain dry and clean (9 C.F.R. § 3.80(a)(2)(v)); and

6. Respondents failed to follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates (9 C.F.R. § 3.81).

III

A. On October 9, 1996, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On October 9, 1996, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph III(B)(1)-(10) of these Findings of Fact and Conclusions of Law:

1. An enclosure for a brown bear was not constructed to allow sufficient space for normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128);

2. Food in the goat pen was not free from contamination and of sufficient nutritive value to maintain the animals in good health (9 C.F.R. § 3.129);

3. A primary enclosure for a rabbit was not structurally sound and maintained in good repair to protect the rabbit from injury (9 C.F.R. § 3.53(a));

4. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

5. Housing facilities for nonhuman primates contained excessive rust which affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

6. Housing facilities for nonhuman primates contained jagged edges or sharp points that might injure animals (9 C.F.R. § 3.75(c)(1)(ii));

7. The housing facility for a nonhuman primate (Sheila) was not equipped with drainage systems that operate to rapidly eliminate waste and water in order to keep the animal clean and dry (9 C.F.R. § 3.75(f));

8. An enclosure for a nonhuman primate (capuchin) did not provide sufficient space for the animal to make normal postural adjustments with freedom of movement (9 C.F.R. § 3.80(a)(2)(xi));

9. The environmental enhancement plan did not include specific provisions to address the social needs of the nonhuman primates (9 C.F.R. § 3.81); and

10. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

IV

A. On July 22, 1997, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On July 22, 1997, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph IV(B)(1)-(10) of these Findings of Fact and Conclusions of Law:

1. Housing facilities for goats were not structurally sound and maintained in good repair so as to contain the animals and protect them from injury (9 C.F.R. § 3.125(a));

2. Supplies of food were not adequately protected against deterioration and molding (9 C.F.R. § 3.125(c));

3. Rabbits were housed outdoors without an artificial cooling system with the atmospheric temperature exceeding 90 degrees Fahrenheit (9 C.F.R. § 3.52(a));

4. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

5. Housing facilities for nonhuman primates were not constructed in a manner which allowed the housing facilities to be readily cleaned and sanitized, and housing facilities for nonhuman primates in fact were not regularly cleaned and sanitized (9 C.F.R. § 3.75(c));

6. Supplies of food and bedding for nonhuman primates were not stored in a manner that protects them from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.75(e));

7. Housing facilities for nonhuman primates were not equipped with properly constructed, installed, and maintained drains (9 C.F.R. § 3.75(f));

8. Primary enclosures for nonhuman primates were not designed and constructed or maintained so that they were structurally sound for the species contained in them (9 C.F.R. § 3.80(a)(1));

9. The environmental enhancement plan did not include specific provisions to address the social needs of the nonhuman primates (9 C.F.R. § 3.81); and

10. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being

of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

V

A. On April 1, 1998, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On April 1, 1998, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph V(B)(1)-(9) of these Findings of Fact and Conclusions of Law:

1. Supplies of food were not adequately protected against deterioration and molding (9 C.F.R. § 3.125(c));

2. The premises were not kept clean and in good repair so as to protect the animals from injury (9 C.F.R. § 3.131(c));

3. Housing facilities for nonhuman primates were not kept in good repair, in order to protect the animals from injury (9 C.F.R. § 3.75(a));

4. The surfaces of housing facilities contained excessive rust that prevented the required cleaning and sanitation and affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

5. Nonhuman primates' supply of food was not stored in a manner that protected it from spoilage and contamination (9 C.F.R. § 3.75(e));

6. Primary enclosures for nonhuman primates were not structurally sound and kept in good repair (9 C.F.R. § 3.80(a));

7. Primary enclosures for two adult chimpanzees did not meet the minimum space requirements (9 C.F.R. § 3.80(b));

8. The premises were not kept clean and in good repair in order to protect the nonhuman primates from injury (9 C.F.R. § 3.84(c)); and

9. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The Order issued in this Decision and Order, *infra*, is authorized by the Animal Welfare Act and warranted under the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents request in their Motion to Vacate Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Appeal Petition], filed December 3, 1998, that I vacate the Default Decision and allow Respondents to defend this matter (Appeal Pet. at unnumbered last page).

Sections 1.136(a) and (c), 1.139, and 1.141(a) 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) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an

answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondents on August 13, 1998, with the Rules of Practice, clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

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

Compl. at 7.

Likewise, the letter from the Hearing Clerk, accompanying the Complaint and the Rules of Practice, expressly advises Respondents of the effect of failure to file a timely answer or deny any allegation in the Complaint, as follows:

CERTIFIED RECEIPT REQUESTED

August 10, 1998

Ms. Anna Mae Noell
and the Chi[m]p Farm, Inc.
4612 Alternate 19 North,
Palm Harbor, Florida 34683

Dear Sir/Madam:

Subject: **In re: Anna Mae Noell, and the Chimp Farm, Inc., Respondents -**
AWA Docket No. 98-0033

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 three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

August 10, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Anna Mae Noell and the Chimp Farm, Inc., at 1 (emphasis in original).

Respondents' Answer was due no later than September 2, 1998. Respondents filed their Answer on October 1, 1998,[2] 49 days after the Complaint was served on

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[2]Respondents contend that they filed an Answer on or about September 14, 1998 (Appeal Pet. at first unnumbered page). However, the record establishes that Respondents' Answer was filed at 3:30 p.m., October 1, 1998, as evidenced by the date and time stamped on the upper right-hand corner of Respondents' Answer by the Hearing Clerk. Section 1.136(a) of the Rules of Practice provides that "[w]ithin 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" (7 C.F.R. § 1.136(a) (emphasis added)), and section 1.147(g) of the Rules of Practice provides that "[a]ny document . . . required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk" (7 C.F.R. § 1.147(g)). While Respondents dated their Answer "September 14, 1998[,]" a date typed on a pleading by the party filing the pleading does not constitute filing with the Hearing Clerk, as required by section 1.136(a) of the Rules of Practice. *Cf. In re Severin Peterson*, 57 Agric. Dec. ___ slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that unsuccessful attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997). Moreover, Respondents' Answer was due September 2, 1998. Therefore, even if I found that

(continued...)

Respondents and 29 days after Respondents' Answer was due. Respondents' 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 1, 1998, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Proposed Default Decision and a Proposed Default Decision based upon Respondents' 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 October 1, 1998, from the Hearing Clerk were served on Respondents by certified mail on October 8, 1998. The October 1, 1998, letter from 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:

> CERTIFIED RECEIPT REQUESTED
>
> October 1, 1998
>
> Mr. [sic] Anna Mae Noell
> 44612 [sic] Alterante [sic] 19 North
> Palmer [sic] Harbor, Florida 34683
>
> Dear Mr. [sic] Noell:
>
> Subject: In re: Anna Mae Noell - Respondent - AWA Docket No. 98-00033 [sic]
>
> 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

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[2](...continued)
Respondents' Answer was filed on the date typed on the Answer by Respondents, Respondents' Answer would be late and the Default Decision would not be set aside.

three copies of objections to the Proposed Decision.

October 1, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Anna Mae Noell.

Respondents failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days after service of the Motion for Proposed Default Decision and Proposed Default Decision on Respondents, as provided in 7 C.F.R. § 1.139, and on November 3, 1998, the ALJ filed the Default Decision, which was served on Respondents on November 9, 1998.

On December 3, 1998, Respondents filed their Appeal Petition in which they assert that they were not represented by counsel at the time they were served with the Complaint and that they were "not in a position to respond to the [C]omplaint within the time frame allotted by the [R]ules [of Practice]" because Ms. Noell was in the hospital, very ill, and 85 years of age on or about the time that Respondents were served with the Complaint (Appeal Pet. at unnumbered first page). Respondents contend that under the circumstances their failure to file a timely answer constitutes "excusable neglect" and not a willful violation of any rule or an effort to delay this proceeding (Appeal Pet. at unnumbered second page). Further, Respondents contend that Complainant would suffer no prejudice if Respondents were permitted to respond to the Complaint and that Respondents would suffer irreparable harm if their request to set aside the Default Decision is denied (Appeal Pet. at unnumbered second page).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[3] Respondents have shown no basis for

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[3]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision 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) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, (continued...)

setting aside the Default Decision.[4] The Rules of Practice, a copy of which was

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[3](...continued)
40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[4]*See generally In re Conrad Payne*, 57 Agric. Dec. ___ (Dec. 8, 1998) (holding that the default decision was proper where respondent's first filing was 60 days after the complaint was served on respondent); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision 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. 517 (1997) (holding the default decision 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) (holding that the 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) (holding the 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. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995
(continued...)

[4](...continued)
WL 523336 (6th Cir. 1995) (holding the 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) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the 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) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a 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) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was 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) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was 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) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was 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) (holding the default order proper
(continued...)

served on Respondents on August 13, 1998, with a copy of the Complaint, clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondents' first filing in this proceeding was filed October 1, 1998, 49 days after Respondents were served with the Complaint and 29 days after Respondents' Answer was due. Moreover, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed decision (7 C.F.R. § 1.139). Respondents did not file any objections to Complainant's Motion for Default Decision and Proposed Default Decision.

Further, the requirement in the Rules of Practice that Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its workload in an expeditious and economical manner. USDA's three administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 30 to 50 cases per year.

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 Respondents were

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[4](...continued)
where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the 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) (holding the 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) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[5]*See 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) (stating that 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) (stating that 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) (continued...)

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 establishes that Respondents were provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondents waived their right to a hearing by failing to file a timely answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondents' 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)).

The age, ill health, and hospitalization of one of the Respondents and the lack of legal representation at the time the Complaint was served on Respondents are not bases for setting aside the Default Decision issued in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Moreover, even if I found, as Respondents contend, that Complainant would not be prejudiced by allowing Respondents to file a late answer and that Respondents would be irreparably harmed by my denial of their request to set aside the Default Decision, those findings would not constitute bases for setting aside the Default Decision.[6]

Respondents cite a number of cases[7] as a basis for their contention that the Default Decision should be set aside because their failure to file a timely answer was the result of excusable neglect. All of the cases cited by Respondents concern

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[5](...continued)
(stating that 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).

[6]*See In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting respondent's contention that complainant must allege or prove prejudice to complainant's ability to present its case, before an administrative law judge may issue a default decision; stating that the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced complainant's ability to present its case).

[7]*FSLIC v. Kroenke*, 858 F.2d 1067 (5th Cir. 1988); *Wallace v. McManus*, 776 F.2d 915 (10th Cir. 1985); *United States v. United States Currency in the Sum of Three Hundred Ninety-Three Thousand Nine Hundred Sixty-Seven Dollars More or Less*, 775 F. Supp. 43 (E.D.N.Y. 1991); *United States v. United States Currency in the Amount of Seven Thousand Five Hundred Thirty-One Dollars*, 716 F. Supp. 92 (E.D.N.Y. 1989); *Hicks v. Secretary of the Air Force*, 594 F. Supp. 690 (D. Me. 1984); *Packard Press Corp. v. Com Vu Corp.*, 584 F. Supp. 73 (E.D. Pa. 1984); *United States v. Mutual Const. Corp.*, 3 F.R.D. 227 (E.D. Pa. 1943); *In re Penn Screw & Mach. Works, Inc.*, 48 B.R. 138 (Bankr. E.D. Pa. 1985).

motions filed under Rule 60(b) of the Federal Rules of Civil Procedure[8] and are inapposite.

Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

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

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.[9] Moreover, unlike

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[8]Rule 60(b)(1) of the Federal Rules of Civil Procedure provides, as follows:

> **Rule 60. Relief From Judgment or Order**
>
> . . . .
>
> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

Fed. R. Civ. P. 60(b)(1).

[9]*See generally Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 19-20 (Mar. 4, 1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 12 (Feb. 20, 1998) (Order Denying Pet. for Recons.)
(continued...)

Rule 60(b) of the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980). There is no basis for allowing Respondents to present matters by way of defense at this time.

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

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the 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 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 maintain primary enclosures for animals in a clean and sanitary condition;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

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[9](...continued)
(stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to USDA's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before USDA).

assistance of a doctor of veterinary medicine;

(d) Failing to provide sufficient space to allow animals adequate freedom of movement;

(e) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(f) Failing to provide animals with wholesome and uncontaminated food.

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

2. Respondents are jointly and severally assessed a civil penalty of $25,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

The certified check or money order shall be forwarded to, and received by, Brian T. Hill within 65 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 98-0033.

3. Respondents' license under the Animal Welfare Act and the Regulations is revoked, effective on the 65th day after service of this Order on Respondents.

In re: JAMES E. STEPHENS and WATER WHEEL EXOTICS, INC.
AWA Docket No. 98-0019.
Decision and Order filed May 5, 1999.

Veterinary care — Animal and food waste — Housing facilities — Water — Food — Pest control — Records — Inspection — Sanction — Preponderance of the evidence — Willful — License disqualification — Cease and desist order — Civil penalty — Correction of violations — Expert witness testimony.

The Judicial Officer affirmed the decision by Administrative Law Judge Edwin S. Bernstein that Respondents: (1) failed to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); (2) failed to maintain complete records (7 U.S.C. § 2140; 9 C.F.R. § 2.75(b)(1)); (3) failed to permit

APHIS officials to conduct a complete inspection of the facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)); (4) failed to provide housing facilities for animals that were structurally sound and maintain housing facilities for animals in good repair (9 C.F.R. § 3.125(a)); (5) failed to store supplies of food so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c)); (6) failed to provide for the removal and disposal of animal and food wastes (9 C.F.R. § 3.125(d)); (7) failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); (8) failed to provide adequate lighting in indoor housing facilities (9 C.F.R. § 3.126(c)); (9) failed to provide a suitable method to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c)); (10) failed to construct and maintain enclosures so as to provide sufficient space for each animal (9 C.F.R. § 3.128); (11) failed to provide animals with wholesome and uncontaminated food (9 C.F.R. § 3.129(a)); (12) failed to keep primary enclosures clean (9 C.F.R. § 3.131(a)); and (13) failed to establish and maintain an effective program for the control of pests (9 C.F.R. § 3.131(d)). The Judicial Officer reduced the civil penalty assessed by the ALJ based on the Judicial Officer's finding that Complainant failed to prove five of the alleged violations by a preponderance of the evidence. Respondents' violations were serious in that they exposed Respondents' animals to a risk of serious illness and death. Respondents' violations were also willful in that Respondents displayed a careless disregard of statutory and regulatory requirements over a 4-month period. The Judicial Officer held that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is not unfair or unjust and the civil penalty assessed was not excessive. The Judicial Officer held that the ALJ did not err when he allowed an expert in the field of care, handling, feeding, and nutritional requirements of exhibition animals to testify about conditions at Respondents' facility based upon observation of pictures of the conditions at Respondents' facility.

Robert A. Ertman, for Complainant.
Matthew A. Hartley, Sewickley, PA, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 16, 1998.

The Complaint alleges that James E. Stephens and Water Wheel Exotics, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards. On May 11, 1998, Respondents filed Answer to Complaint in which they denied the material allegations of the Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing on October 6 and 7, 1998, in Pittsburgh, Pennsylvania. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Matthew A. Hartley, represented

Respondents.

On December 14, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]; on December 22, 1998, Respondents filed Respondents' Post Hearing Written Submissions; on December 29, 1998, Respondents filed Respondents Reply Brief; and on January 4, 1999, Complainant filed Complainant's Reply Brief.

On January 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards; (2) directed Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed Respondents a $32,000 civil penalty; and (4) permanently disqualified Respondents from obtaining an Animal Welfare Act license (Initial Decision and Order at 7-12, 33-35).

On March 10, 1999, Respondents appealed to, and requested oral argument before, the Judicial Officer; on May 4, 1999, Complainant filed Complainant's Memorandum in Response to Appeal; and on May 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' request for oral argument and decision.

Respondents' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondents have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's Initial Decision and Order; except that I do not find that Complainant proved by a preponderance of the evidence[1] that on March 25, 1998, Respondents

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[1]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 Judie Hansen*, 57 Agric. Dec. ___, slip op. at 43 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 19 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 (continued...)

violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a). Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order, with modifications to reflect my finding that Complainant did not prove by a preponderance of the evidence that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

Complainant's exhibits are referred to as "CX", and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

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[1](...continued)
Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *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 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).

§ 2132. Definitions

When used in this chapter—

. . . .

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

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

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. . . . The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this

chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2132(h), 2140, 2146(a), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

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

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinarian care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and

Provided, further, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

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.

. . . .

§ 2.129 Confiscation and destruction of animals.

(a) If an animal being held by a dealer, exhibitor, intermediate handler, or by a carrier is found by an APHIS official to be suffering as a result of the failure of the dealer, exhibitor, intermediate handler, or carrier to comply with any provision of the regulations or the standards set forth in

this subchapter, the APHIS official shall make a reasonable effort to notify the dealer, exhibitor, intermediate handler, or carrier of the condition of the animal(s) and request that the condition be corrected and that adequate care be given to alleviate the animal's suffering or distress, or that the animal(s) be destroyed by euthanasia. In the event that the dealer, exhibitor, intermediate handler, or carrier refuses to comply with this request, the APHIS official may confiscate the animal(s) for care, treatment, or disposal as indicated in paragraph (b) of this section, if, in the opinion of the Administrator, the circumstances indicate the animal's health is in danger.

. . . .

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

. . . .

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any

disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.126 Facilities, indoor.

. . . .

(b) *Ventilation.* Indoor housing facilities shall be adequately ventilated by natural or mechanical means to provide for the health and to prevent discomfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, fans, or air-conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation.

(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.

. . . .

§ 3.127 Facilities, outdoor.

. . . .

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

§ 3.128 Space requirements.

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

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

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

. . . .

§ 3.131 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.

. . . .

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

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .126(a), .129(a); 3.125(a), (c)-(d) .126(b)-(c), .127(c), .128, .129(a), .131(a), (d).

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

Findings of Fact

1. Respondent James E. Stephens is an individual with a mailing address of RD 2, Box 297-A, 1034 Old Ridge Road, Avella, Pennsylvania 15312 (CX 57, CX 61; Tr. 17, 337).

2. Respondent Water Wheel Exotics, Inc., is a corporation and has the

same mailing address as Respondent James E. Stephens (CX 57, CX 61; Tr. 389-90).

3. During the period December 10, 1997, through March 30, 1998, Respondents were licensed and operating as an exhibitor as defined in the Animal Welfare Act and the Regulations and the actions of Respondent Water Wheel Exotics, Inc., were directed, managed, and controlled by Respondent James E. Stephens (CX 57, CX 58, CX 61; Tr. 389-90). Respondents are not currently licensed under the Animal Welfare Act.

4. From December 10, 1997, through March 30, 1998, Respondents' facility and animals were inspected by experienced veterinary medical officers and experienced animal care inspectors employed by the Animal and Plant Health Inspection Service [hereinafter APHIS], USDA. Respondents' animals were also examined by the chief veterinarian for the Cleveland Metro Park Zoo. (Tr. 14-19, 26-27, 56-61, 81-87, 265-68, 278-89.) These inspections revealed that Respondents were not in compliance with the Animal Welfare Act and the Regulations and Standards (CX 1-CX 53). After each inspection, APHIS employees informed Respondents that the inspections had disclosed violations of the Animal Welfare Act and the Regulations and Standards (Tr. 19, 85-86). APHIS employees prepared an inspection report after each inspection and gave Mr. Stephens a copy of the inspection report (Tr. 423). Each inspection report served as a written notice to Respondents that the APHIS employees found that certain items were not in compliance with the Animal Welfare Act and the Regulations and Standards (Tr. 88-89).

5. On December 10, 1997, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 1 at 3; Tr. 103-05).

6. On December 10, 1997, APHIS employees inspected Respondents' facility and records and found that Respondents had failed to maintain complete records showing the acquisition and disposition of animals (CX 1 at 2; Tr. 102-03).

7. On December 10, 1997, APHIS employees inspected Respondents' facility and animals (CX 1-CX 12; Tr. 91-115) and found that:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Indoor housing facilities did not have lighting sufficient to permit routine inspection and cleaning;

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required; and

G. An effective program for the control of pests was not established and maintained.

8. On February 9, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 13 at 4; Tr. 118-20).

9. On February 9, 1998, APHIS employees inspected Respondents' facility and animals (CX 13-CX 26; Tr. 116-42) and found that:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times;

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required; and

G. An effective program for the control of pests was not established and maintained.

10. On March 23, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 27 at 3; Tr. 153-55).

11. On March 23, 1998, APHIS employees inspected Respondents' facility and records and found that Respondents had failed to maintain complete records showing the acquisition and disposition of animals (CX 27 at 1; Tr. 144-45).

12. On March 23, 1998, APHIS employees inspected Respondents' facility and animals (CX 27-CX 41; Tr. 142-67) and found that:

A. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain

the animals;

B. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;

C. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

D. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required;

G. An effective program for the control of pests was not established and maintained; and

H. Enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.

13. On March 25, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 42 at 2; Tr. 170-71).

14. On March 25, 1998, Respondents refused to permit APHIS officials to conduct a complete inspection of Respondents' facility (CX 42 at 2; Tr. 171-72).

15. On March 25, 1998, APHIS employees inspected Respondents' facility and animals (CX 42-CX 47 Tr. 167-74) and found that:

A. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Animals were not provided with wholesome and uncontaminated food; and

C. An effective program for the control of pests was not established and maintained.

16. On March 30, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 48-CX 50; Tr. 174-77).

17. On March 30, 1998, Respondents refused to permit APHIS officials to conduct a complete inspection of Respondents' facility (CX 48; Tr. 177).

Conclusions of Law

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

2. Respondents are an exhibitor as defined in the Animal Welfare Act and the Regulations.

3. On December 10, 1997, Respondents willfully violated section 2.40 of the Regulations (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 by failing to provide veterinary care to animals in need of care.

4. On December 10, 1997, Respondents willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records showing the acquisition and disposition of animals.

5. On December 10, 1997, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

B. Indoor housing facilities did not have lighting sufficient to permit routine inspection and cleaning (9 C.F.R. § 3.126(c));

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

E. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

6. On February 9, 1998, Respondents willfully violated section 2.40 of the Regulations (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 by failing to provide veterinary care to animals in need of care.

7. On February 9, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

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));

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

E. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

8. On March 23, 1998, Respondents willfully violated section 2.40 of the Regulations (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 by failing to provide veterinary care to animals in need of care.

9. On March 23, 1998, Respondents willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records showing the acquisition and disposition of animals.

10. On March 23, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals (9 C.F.R. § 3.125(a));

B. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

C. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

D. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

E. Animals were not provided with wholesome and uncontaminated

food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a));

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)); and

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

11. On March 25, 1998, Respondents willfully violated section 2.40 of the Regulations (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 by failing to provide veterinary care to animals in need of care.

12. On March 25, 1998, Respondents willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) by refusing to permit APHIS officials to conduct a complete inspection of Respondents' facility.

13. On March 25, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

B. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a)); and

C. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

14. On March 30, 1998, Respondents willfully violated section 2.40 of the Regulations (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 by failing to provide veterinary care to animals in need of care.

15. On March 30, 1998, Respondents willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) by refusing to permit APHIS officials to conduct a complete inspection of Respondents' facility.

Discussion

I. Jurisdiction

In Respondents' Answer to Complaint, Respondents admitted the jurisdictional allegations contained in paragraphs I(A) and I(C) of the Complaint. Respondents denied the portion of the allegation contained in paragraph I(B) of the Complaint that Water Wheel Exotics, Inc., is a corporation. However, at the hearing, Mr. Stephens testified that Water Wheel Exotics, Inc., was a corporation and that he was the only owner (Tr. 389-90). Therefore, jurisdiction is not an issue in this proceeding.

II. The Violations of the Animal Welfare Act and the Regulations and Standards

I found the testimony of Complainant's witnesses to be credible. I was particularly impressed with the testimonies of Drs. Norma Jean Harlan, Kurt Hammel, and Albert Lewandowski. I found them to be thorough and consistent in testifying, and I believe they testified truthfully. The only witness that Respondents presented to dispute the alleged violations, with the exception of the failure to allow inspection violations, was Respondent James E. Stephens. He did not deny many of the allegations in the Complaint and where he disputed Complainant's witnesses, I found him less credible than Complainant's witnesses.

1. The APHIS Inspection on December 10, 1997

On December 10, 1997, an experienced veterinary medical officer, Dr. Harlan, inspected Respondents' facility and found that Respondents' facility did not comply with the Animal Welfare Act and the Regulations and Standards (CX 1-CX 12; Tr. 81-115). Dr. Harlan testified in detail to her normal inspection procedure (Tr. 83-85). She testified further that she had an opportunity to review the December 10, 1997, inspection report (CX 1) with Respondents as part of the process of educating and communicating with Animal Welfare Act licensees (Tr. 85-87, 91). Dr. Harlan testified that she observed the following deficiencies:

a. Failure to store food properly

Dr. Harlan testified that she observed deer carcasses for the large cats stored on

the ground uncovered and exposed to the elements (CX 1 at 1, CX 2; Tr. 91-92, 106). She also observed hay that was wet and exposed to the weather (CX 1 at 1, CX 3; Tr. 93, 107). Finally, she observed outdated dairy products being stored at room temperature in open barrels and open barrels of feed (CX 1 at 1, CX 6; Tr. 93-94, 108-09). Dr. Harlan characterized a failure to store food properly as a serious deficiency because food is one of the major elements of animal care. Dr. Harlan also testified that a failure to store food properly risks contamination and deterioration of the food and that contaminated or deteriorated food fed to animals could impair the health of the animals. Dr. Harlan discussed Respondents' failures to store food properly with Mr. Stephens and instructed him on how food should be stored. (Tr. 92-94.)

Mr. Stephens testified that he picked up the deer carcasses the night before the inspection and the following morning he put them on the ground until he returned at 10 a.m. (Tr. 338-39). He stated that he usually butchers carcasses within 8 hours after finding them and if he feels a carcass is "not right," he does not feed the carcass to Respondents' animals. (Tr. 339-40.) Mr. Stephens claimed that he would not feed the dairy products to Respondents' animals if the dairy products were bad (Tr. 394). However, he acknowledged that there was "bad hay" (Tr. 358-60).

When Dr. Albert Lewandowski, the chief veterinarian for the Cleveland Metro Park Zoo, was asked about Respondents' deer carcass storage practices, he responded:

> A. This is the storage? I mean, it looks to me like they're laying in the middle of the road. I mean, if I were feeding carcasses, and there's nothing wrong with feeding fresh carcass, it should be refrigerated. It should be cleaned. I wouldn't have it laying in the middle of the aisle.
>
> It appears that there's massive fecal contamination. It also appears that some of these bodies are a little less than fresh. You can see some drying of the eyes and some glazing. You can see a couple of these carcasses. They are wet, but they also look as though they've been sitting for awhile. As they sit, they get slimy. It has a sheen that would indicate that, and they're laying in what looks to be a manure contaminated driveway. I mean, this isn't -- this is no way to keep food.

Tr. 290.

Dr. Lewandowski also testified that the dairy products should have been refrigerated if they were going to be fed to the animals and should not be fed 2 days

past the expiration date (Tr. 291-92).

b. Failure to remove and dispose of animal and food wastes

Dr. Harlan testified that she observed open barrels of waste in the lower garage area (CX 1 at 1, CX 5; Tr. 94) and six deer carcasses lying in the alleyway in the cat area (CX 2; Tr. 95). She characterized a failure to remove and dispose of waste as a significant deficiency because proper waste disposal is a key component of good animal husbandry in order to avoid disease transmission (Tr. 95). She instructed Mr. Stephens to dispose of the waste in a safe manner away from the animals (Tr. 95).

Mr. Stephens testified that he did not have the ability to remove the open barrels of waste in the lower garage area and could not get to the pit in which he disposes of bad deer carcasses (Tr. 357, 359). However, Mr. Stephens never offered any specific explanations for his inability to dispose of animal and food waste on December 10, 1997.

c. Failure to have ample lighting in an indoor housing facility

Dr. Harlan testified that she observed inadequate lighting in the upper barn behind the house (CX 1 at 1; Tr. 95). She testified further that this condition made examination of a black pig without using a flashlight difficult. Dr. Harlan told Mr. Stephens to repair any broken lights so he could examine Respondents' animals daily. (Tr. 96.) Mr. Stephens acknowledged that in cold weather some of Respondents' neon lights do not work. He agreed that Dr. Harlan did identify one light that was not working. (Tr. 358.)

d. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed camels in an enclosure having difficulty reaching their food and water because the enclosure was full of mud and muck (CX 1 at 2, CX 7; Tr. 96-97). She was concerned that this condition could affect the camels' health and asked Mr. Stephens to move the camels to a dryer enclosure (Tr. 97-98). Dr. Harlan also observed that many of the large cat pens had standing water in them (CX 8; Tr. 98).

Dr. Lewandowski testified about the methods Respondents could have employed to improve the drainage in their animal housing facilities. He also testified regarding the importance of proper drainage in maintaining an animal's health and preventing the transmission of diseases. (Tr. 295-99.)

Mr. Stephens acknowledged that there were drainage problems at Respondents' facility (Tr. 345-48, 352).

e. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed a carcass being quartered and a quarter of the carcass being dragged through the dirt into the cat enclosure to provide feed for the big cats (CX 1 at 2; Tr. 98). She testified that the meat was very contaminated. Dr. Harlan characterized carcasses dragged through dirt as totally unacceptable as feed because any number of diseases can be transmitted by contaminated meat which could kill the animals. (Tr. 98.) She also testified that there were other feeding problems at Respondents' facility (CX 1 at 2, CX 6, CX 9). Dr. Harlan instructed Mr. Stephens as to methods by which to provide wholesome and uncontaminated food to Respondents' animals (Tr. 99).

Mr. Stephens did not refute Dr. Harlan's testimony on these specific feeding issues. In fact, Mr. Stephens acknowledged that dragging carcasses to the cat enclosure was inappropriate (Tr. 393).

f. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed numerous animal enclosures that were in need of cleaning (CX 1 at 2, CX 10; Tr. 99-100, 111-12). She testified further that the failure to clean enclosures was a significant deficiency that could affect the animals' health (Tr. 100). Dr. Harlan told Mr. Stephens that the enclosures needed to be cleaned immediately and maintained in a clean condition (Tr. 101). Photographs taken during the December 10, 1997, inspection clearly show enclosures that were in need of cleaning (CX 10; Tr. 111-12).

g. Failure to provide adequate pest control

Dr. Harlan testified that she observed several large, fresh rodent holes in the lower barn, the upper barn, and the big cat area (CX 1 at 2, CX 11; Tr. 101-02). Dr. Harlan was concerned for the health of Respondents' animals because rodents can transmit diseases to the animals. She told Mr. Stephens that he needed to start filling in the rodent holes so that he could determine if he was eliminating the rodents. (Tr. 101-02.) Mr. Stephens acknowledged that Respondents had difficulty controlling rodents (Tr. 356).

h. Failure to maintain proper records

Dr. Harlan testified that when she examined Respondents' records there was information required to be kept by the Regulations concerning the source of animals that was not recorded in Respondents' records (CX 1 at 2; Tr. 102). In addition, one of the two tiger cubs listed as being born was not at Respondents' facility and its disposition was not recorded in Respondents' records (CX 1 at 2; Tr. 102).

Mr. Stephens acknowledged that Respondents' records did not contain the required information (Tr. 356-57). Mr. Stephens did not address the disposition of the tiger cub.

i. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several problems with veterinary care at Respondents' facility. There was a goat with an abscess on its right jaw (CX 12 at 1; Tr. 104); a yak whose fur was heavily crusted with burrs and mats (CX 12 at 2-3; Tr. 104); a tiger named "Timberland" that was limping and very sensitive on both front paws (Tr. 104); and a reindeer that was very thin and in need of hoof trimming (CX 12 at 3-6; Tr. 104). Dr. Harlan characterized the failure to provide veterinary care to animals in need of care as a serious deficiency and instructed Mr. Stephens to seek veterinary care for the animals and to clip the yak (Tr. 105).

Mr. Stephens testified that the tiger named "Timberland" had been treated by Respondents' veterinarian, Dr. Sheperd (Tr. 369). This self-serving testimony does not overcome Complainant's substantial and credible evidence. Dr. Sheperd did not appear as a witness for Respondents, and Respondents could not produce any records indicating that the tiger had been treated (Tr. 10, 403).

2. <u>The APHIS Inspection on February 9, 1998</u>

On February 9, 1998, Dr. Harlan inspected Respondents' facility and found that the facility did not comply with the Regulations and Standards (CX 13-CX 26; Tr. 116-42).

a. Failure to provide adequate ventilation

Dr. Harlan testified that there were extremely strong ammonia levels in the basement holding area (CX 13 at 1; Tr. 117). She instructed Mr. Stephens that the ventilation needed to be improved to reduce the ammonia levels (CX 13 at 1).

Mr. Stephens acknowledged that Dr. Harlan did find ammonia levels in the basement holding area, but asserted that he has taken steps to prevent the ventilation problem (Tr. 362).[2]

b. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed a young bison in the lower barn that had an excessive number of burrs and knots in its coat (CX 13 at 4, CX 26 at 1-3; Tr. 118). She also observed that the tiger named "Timberland" was still limping and that Mr. Stephens had not conferred with Respondents' veterinarian on the tiger's current condition (CX 13 at 4; Tr. 118-19). Finally, Dr. Harlan observed three reindeer that were thin and in need of hoof trimming (CX 13 at 4, CX 26 at 4-6; Tr. 119).

Mr. Stephens testified that the tiger named "Timberland" was being treated by Respondents' veterinarian, Dr. Sheperd (Tr. 369). However, Dr. Sheperd did not appear at the hearing, and Respondents were unable to produce any records indicating that the tiger had been treated.

c. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed that Respondents were feeding brewer's grain to the hoof stock (CX 13 at 2; Tr. 120). She was concerned because brewer's grain lacks the energy content that animals need (CX 13 at 2; Tr. 120). Dr. Harlan also observed that the quality of the hay in the camel, llama, and calf pens, and one reindeer pen, was extremely poor (CX 13 at 2, CX 19; Tr. 121, 135-36). Dr. Harlan observed several carcasses being fed to the large cats that were black and not fresh (CX 13 at 3, CX 20; Tr. 121, 136-37). Finally, Dr. Harlan observed pigs being fed spoiled, clotted milk (CX 13 at 3, CX 21; Tr. 122, 137).

Mr. Stephens testified that he was mixing brewer's grain with another type of grain (Tr. 359, 368). Respondents did not offer corroborating evidence to support Mr. Stephens' assertion. Mr. Stephens acknowledged that Respondents fed "bad hay" to the animals (Tr. 360). Mr. Stephens did not find anything wrong with the carcasses that Respondents fed to the large cats (Tr. 410-11). The photographs indicate otherwise (CX 20). Finally, Mr. Stephens claimed that he does not feed spoiled, clotted milk to the pigs (Tr. 394). Again, the photographs indicate

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[2] "[T]he subsequent correction of a condition not in compliance with the standards has no bearing on the existence of a violation . . . ." *See In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 809637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

otherwise (CX 21).

d. Failure to remove and dispose of animal and food wastes

Dr. Harlan testified that she observed a very large pile of manure and debris 15 feet from the upper barn (CX 13 at 2, CX 16; Tr. 123, 132-33). Dr. Harlan was concerned because the manure pile is a haven for rodents, which can carry diseases to Respondents' animals at the facility (Tr. 123). Dr. Harlan also observed open barrels of waste in the large cat area (CX 13 at 2, CX 15 at 1; Tr. 124-25, 131-32).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

e. Failure to store food properly

Dr. Harlan testified that she observed carcasses being stored on the ground and exposed to the weather (CX 13 at 2; Tr. 123-24). She also observed meat in freezers that was not protected against spoilage and toxic chemicals stored on a freezer (CX 13 at 2; Tr. 125-26, 131).

Mr. Stephens acknowledged that Respondents had contaminated meat in the freezer (Tr. 367). However, he did not grasp the potential hazards associated with storing food in close proximity to toxic chemicals (Tr. 366-68). Mr. Stephens testified that he does not store carcasses on the ground, but they have to go somewhere (Tr. 393). This testimony illustrates Mr. Stephens inconsistent statements concerning the care and housing of Respondents' animals.

f. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed two camels standing in deep mud (CX 13 at 3, CX 17; Tr. 126, 133-34). She was concerned because camels are desert animals whose feet are not designed for mud (CX 17; Tr. 126, 133-34). Dr. Harlan also observed standing water and mud in several large cat pens (CX 13 at 3, CX 18; Tr. 126-27, 134-35).

Mr. Stephens acknowledged that there were drainage problems at Respondents'

facility (Tr. 345-48, 352).

g. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed several pens that were in need of cleaning (CX 13 at 3, CX 18, CX 20, CX 21, CX 23, CX 24; Tr. 127-29, 134-36, 139). The photographs taken during the February 9, 1998, inspection clearly show a failure to adequately clean animal enclosures (CX 18, CX 20, CX 21, CX 23, CX 24).

h. Failure to provide adequate pest control

Dr. Harlan testified that she observed evidence of rodent activity in the lower barn, the upper barn, and the big cat area (CX 13 at 3, CX 25; Tr. 129, 139-40). Dr. Harlan was concerned because the steps Respondents had taken to control the rodent activity were insufficient for the size of Respondents' facility (Tr. 130).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

3. The APHIS Inspection on March 23, 1998

On March 23, 1998, Dr. Harlan inspected Respondents' facility and found that the facility did not comply with the Animal Welfare Act and the Regulations and Standards (CX 27-CX 41; Tr. 142-65).

a. Failure to maintain proper records

Dr. Harlan testified that the deaths of several of Respondents' animals were not recorded in Respondents' records (CX 27 at 1; Tr. 144). Respondents also had animals in the facility that were not recorded in Respondents' records (Tr. 144-45).

Mr. Stephens did not dispute the recordkeeping deficiencies identified during the March 23, 1998, inspection.

b. Failure to have structurally sound housing facilities

Dr. Harlan testified that she observed broken wires in the liger pen and loose metal sheets and exposed nails in the llama shelter (CX 27 at 1-2, CX 34, CX 35; Tr. 146-47, 161-63).

Mr. Stephens acknowledged that there were broken wires in the liger pen which he repaired (Tr. 377-78). He did not address the loose metal sheets and exposed

nails in the llama shelter.

c. Failure to provide adequate space for animals

Dr. Harlan testified that she observed two tiger cubs in an enclosure that had inadequate space (CX-27 at 2, CX 39; Tr. 147-48, 164, 248-49).

Mr. Stephens acknowledged that the two tiger cubs were in an enclosure that did not provide adequate space (Tr. 396).

Dr. Lewandowski testified that even if the tiger cubs were placed in the enclosure depicted in CX 39 temporarily while their primary enclosures were being cleaned, the enclosure depicted in CX 39 was too small and he would have put the cubs in a larger temporary enclosure (Tr. 303-04).

d. Failure to store food properly

Dr. Harlan observed a bottle of bleach stored with the feed storage containers in the lower barn (CX 27 at 2; Tr. 148). Dr. Harlan also observed problems with three freezers, the most serious of which was the one in the upper garage which had badly decayed and decomposing meat in it (CX-27 at 2, CX 36; Tr. 148-49, 163).

Mr. Stephens acknowledged that Respondents had contaminated meat in the freezer (Tr. 367).

e. Failure to remove and dispose of animal waste

Dr. Harlan testified that the large pile of manure located by the upper barn that was cited during the February 9, 1998, inspection had not been removed (CX 27 at 2, CX 37; Tr. 149-50, 163-64).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

f. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed two Watusi cattle that could not reach

their food or water without wading through deep mud (CX 27 at 2, CX 38; Tr. 150, 164).

Mr. Stephens acknowledged that there were drainage problems at Respondents' facility (Tr. 345-48, 352).

g. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed the feed for the camels and some other hoof stock that was exposed to the weather (CX 27 at 3; Tr. 151). Dr. Harlan was concerned because continued exposure to weather causes the feed to become moldy and contaminated (Tr. 151).

Dr. Lewandowski testified concerning some of Respondents' poor feeding practices and what Respondents could have done to improve them (Tr. 299-300).

h. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed feces on the top of the shelter in one tiger pen (CX 27 at 3, CX 40; Tr. 152, 164-65). She also observed a pig pen that was in need of cleaning (CX 27 at 3, CX 41 at 1; Tr. 152, 165). The photographs taken during the March 23, 1998, inspection clearly show enclosures that were not kept clean (CX 40, CX 41 at 1).

i. Failure to provide adequate pest control

Dr. Harlan testified that she observed several rodent holes in the lower barn feed storage room (CX 27 at 3, CX 41 at 2; Tr. 152-53, 165). She testified further that Respondents' pest control activities were insufficient to keep the rodent population at a minimal level (Tr. 153).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

j. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several goats and a llama that were in need of hoof trimming (CX 27 at 3, CX 33; Tr. 153, 159-61). She also observed that the tiger named "Timberland" was still limping and that Mr. Stephens had no records indicating that the animal was examined or treated by a veterinarian (CX 27 at 3; Tr. 153-54). Two of the three reindeer that were identified on the February 9, 1998, inspection as being very thin had died, and the surviving reindeer was very

thin and in need of immediate veterinary care (CX 27 at 3, CX 28 at 1, CX 32; Tr. 154-56, 159). Finally, Dr. Harlan observed a camel that was extremely thin and in need of immediate veterinary care (CX 27 at 3, CX 28 at 1, CX 31; Tr. 154-56, 158-59). Dr. Harlan was so concerned for the animals' health that she served a Notice of Intent to Confiscate Animals on Respondents (CX 27 at 5-6, CX 28; Tr. 155-57).

Mr. Stephens testified that he did not think anything was wrong with the camel. He thought the animal was in rut. (Tr. 417.) However, he failed to confirm his belief with a veterinarian because he thought that if he called the veterinarian every time something was wrong, the veterinarian would think he was "half nuts" (Tr. 417). Mr. Stephens testified that he sought veterinary care for the reindeer (Tr. 365). However, Respondents' veterinarian did not appear as a witness at the hearing, and Respondents did not produce any records indicating that the reindeer had received care.

Dr. Lewandowski testified that the photographs taken of the camel and reindeer showed the camel to be in a very debilitated condition and the reindeer to be in a critical state requiring intensive care (CX 31, CX 50; Tr. 285-87).

4. The APHIS Inspection on March 25, 1998

On March 25, 1998, Dr. Harlan inspected Respondents' facility and found violations of the Animal Welfare Act and the Regulations and Standards (CX 42-CX 47, CX 51; Tr. 167-74).

a. Failure to remove and dispose of animal waste

Dr. Harlan testified that the large pile of manure located by the upper barn that was cited during the February 9, 1998, and March 23, 1998, inspections had not been removed (CX 42 at 1, CX 45; Tr. 168-69).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

b. Failure to provide adequate pest control

Dr. Harlan testified that she observed fresh rodent holes in the lower barn feed storage room (CX 42 at 1, CX 47; Tr. 169, 174).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

c. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed baler twine mixed with the hay in the reindeer's pen (CX 42 at 1, CX 46; Tr. 170, 173-74). She testified that many animals do eat string, and if the animal had ingested the string, it could cause serious intestinal damage and lead to the animal's death (Tr. 170). Mr. Stephens agreed with Dr. Harlan that the string was in the animal feed and that it should not have been in the animal feed (Tr. 397).

d. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several goats and a llama that were cited as in need of hoof trimming during the March 23, 1998, inspection that were still in need of hoof trimming (CX 42 at 2; Tr. 170). She also observed some sheep that were in need of hoof trimming (Tr. 170). In addition, Dr. Harlan was very concerned about the condition of the one surviving reindeer and the male camel (Tr. 171). Although the animals had been examined, Mr. Stephens was not providing veterinary care to the animals that were in critical condition (CX 42 at 2, CX 44; Tr. 171-73).

Mr. Stephens testified that sometimes he makes mistakes and sometimes he does not get around to trimming Respondents' animals' hooves (Tr. 369-70). He admitted that not trimming Respondents' animals' hooves could cause injury to their health (Tr. 370). He testified further that he thought the camel was eating, but did not think anything was wrong with the camel because he thought the camel was in rut (Tr. 374, 417). Mr. Stephens did not take any steps to confirm that the camel was in rut (Tr. 417).

Dr. Lewandowski testified that he conducted an examination of the camel and reindeer during the March 25, 1998, inspection (CX 43; Tr. 281). He testified that both animals were in extremely poor condition (Tr. 282). The humps on the camel were so severely depleted of fat that both of the camel's humps were flattened laterally against the side of his body (Tr. 283). Dr. Lewandowski stated that the camel "was in very, very poor condition" (CX 31; Tr. 283, 285-86), and the

reindeer was in worse condition than the camel (CX 50; Tr. 283-84, 286-87).

e. Failure to allow APHIS to conduct a complete inspection

Dr. Harlan testified that, during the March 25, 1998, inspection, Mr. Stephens returned home and informed her that she could not complete the inspection (CX 42 at 2, CX 51; Tr. 171-72).

Mr. Stephens testified that he agrees with the regulation that authorizes APHIS officials to inspect an exhibitor's facility, but he believed that Dr. Harlan was harassing him by coming back to view the condition of Respondents' animals (Tr. 421). I disagree. Dr. Harlan specifically denied having any animosity towards Mr. Stephens or engaging in any acts of harassment against him (Tr. 247), and I am unable to conclude that Dr. Harlan was harassing Respondents.

5. The APHIS Inspection on March 30, 1998

On March 30, 1998, Dr. Harlan inspected Respondents' facility and found violations of the Animal Welfare Act and the Regulations (CX 48-CX 50, CX 52, CX 53; Tr. 174-88).

a. Failure to allow APHIS to conduct a complete inspection

Dr. Harlan testified that Mr. Stephens would not permit her to conduct a complete inspection of Respondents' facility (CX 48, CX 52; Tr. 176-77). Mr. Stephens limited Dr. Harlan's inspection to examination of the camel and reindeer (CX 48, CX 52; Tr. 175-77).

Mr. Stephens testified that he agrees with the regulation that authorizes APHIS officials to inspect an exhibitor's facility, but he believed that Dr. Harlan was harassing him by coming back to view the condition of Respondents' animals (Tr. 421). Dr. Harlan specifically denied having any animosity towards Mr. Stephens or engaging in any acts of harassment against him (Tr. 247), and I am unable to conclude that Dr. Harlan was harassing Respondents.

b. Failure to provide adequate veterinary care

Dr. Harlan testified that the camel remained very thin to the point of emaciation (CX 48 at 1, CX 49; Tr. 175, 178-79). The reindeer was very thin with rapid respirations that were very shallow (CX 48 at 1, CX 50; Tr. 176, 179).

III. Sanctions

The record establishes that Respondents were given notice of the deficiencies at their facility and ample opportunity to correct them (CX 1, CX 13, CX 27-CX 30, CX 42, CX 48, CX 51, CX 52). APHIS employees conducted or attempted to conduct five inspections of Respondents' facility during the period December 10, 1997, through March 30, 1998. During each inspection, APHIS employees pointed out deficiencies to Mr. Stephens and made recommendations on corrections (CX 1, CX 13, CX 27-CX 30, CX 42, CX 48, CX 51, CX 52). After each inspection, APHIS employees prepared an inspection report and gave Respondents a copy of the inspection report (Tr. 423). Each inspection report served as a written notice to Respondents that the APHIS employees found that certain items were not in compliance with the Animal Welfare Act and the Regulations and Standards (Tr. 88-89). APHIS employees discussed the Animal Welfare Act with Mr. Stephens and spent time educating him as to the requirements of the Animal Welfare Act and the Regulations and Standards (Tr. 85).

I find that the APHIS employees who testified regarding their inspections of Respondents' facility were credible and did not exaggerate and their testimonies were often supported by photographs.

An act is "willful" under the Administrative Procedure Act (5 U.S.C. § 558(c)) if the violator "(1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). The record establishes that Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful.

Respondents' chronic failure to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months presents an obvious and careless disregard of the statutory and regulatory requirements. When an Animal Welfare Act licensee disregards statutory and regulatory requirements over such a period of time, the licensee's violations are clearly willful.

The 34 willful violations committed by Respondents warrant a substantial sanction. All of Respondents' violations are regarded as serious by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Tr. 321). Many of Respondents' violations exposed their animals to the risk of serious illness and death.

Section 19(b) of the Animal Welfare Act, with respect to the assessment of a civil penalty, provides, as follows:

> 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).

With regard to the size of Respondents' business, the evidence shows that Respondents have a business of significant size (Tr. 53). Mr. Stephens testified that Respondents have between 120 and 150 animals and that Respondents exhibit elephants, camels, reindeer, alpacas, llamas, potbellied pigs, lions, tigers, cougars, and numerous other animals (Tr. 338, 370). In 1997, Mr. Stephens earned $20,000 from his exhibition activities (Tr. 384-86).

The gravity of Respondents' violations is clearly evident. For example, Respondents' failures to provide veterinary care for the animals in need of care are very serious violations (Tr. 321). Respondents chronically failed to comply with the Animal Welfare Act and the Regulations and Standards during the period December 10, 1997, through March 30, 1998 (Tr. 321-22). Moreover, during the March 25, 1998, and March 30, 1998, inspections, Mr. Stephens refused to allow APHIS officials to conduct a complete inspection of Respondents' facility, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Respondents' refusals to allow APHIS officials to complete inspections of their facility are very serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

Respondents' conduct over a period of almost 4 months reveals consistent disregard for, and unwillingness to, abide by the requirements of the Animal Welfare Act and the Regulations and Standards. As Dr. Goldentyer, Eastern Regional Director, Division of Animal Care, APHIS, USDA, testified, "[i]t's also serious because the facility was given opportunities to comply and did not." (Tr. 321.)

An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act. The record in this proceeding establishes that Respondents committed 34 violations of the Animal Welfare Act and the Regulations and Standards.

The administrative officials responsible for administration of the Animal Welfare Act and day-to-day supervision of the Animal Welfare program recommend that I order that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assess Respondents a $32,000 civil penalty, and permanently disqualify Respondents from obtaining an Animal Welfare Act license (Complainant's Brief at 19-22). USDA's current

sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[3]

The administrative officials base their sanction recommendation on the 39 violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint. I reject their recommendation of a $32,000 civil penalty and assess only a $27,800 civil penalty because I find that Complainant failed to prove five of the violations alleged in the Complaint.

The purpose of an administrative sanction is deterrence rather than punishment. This case involves serious violations and chronic noncompliance with the Animal Welfare Act and the Regulations and Standards. APHIS employees made numerous attempts to educate Mr. Stephens to the requirements of the Animal Welfare Act and the Regulations and Standards. Mr. Stephens was recalcitrant and refused to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months. Congress enacted the Animal Welfare Act and

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[3]*In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 91 (Dec. 14, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 67-68 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

charged the Secretary of Agriculture with enforcing it. USDA has limited resources available for enforcement of the Animal Welfare Act and relies heavily on the deterrent effect disciplinary proceedings and sanctions have on regulated individuals (Tr. 319-20, 322). The sanctions recommended by administrative officials, as modified to reflect my finding that Complainant failed to prove five of the violations alleged in the Complaint, are necessary to dissuade Respondents and others from committing the same or similar violations.

Section 19(b) of the Animal Welfare Act authorizes the assessment of a maximum civil penalty of $2,500 per violation (7 U.S.C. § 2149(b)). Therefore, under the Animal Welfare Act, Respondents could be assessed a maximum of $85,000 for Respondents' 34 violations of the Animal Welfare Act and the Regulations and Standards.

I agree with Complainant that, in addition to the assessment of a civil penalty, Respondents should be ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and should be permanently disqualified from obtaining an Animal Welfare Act license.[4]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise four issues in Respondents' Appeal to the Judicial Officer [hereinafter Appeal Petition]. First, Respondents contend that the ALJ's permanent disqualification of Respondents from obtaining an Animal Welfare Act license is unfair and unjust. In support of their contention, Respondents assert that there are no similar cases in which a person was permanently disqualified from obtaining an Animal Welfare Act license, Respondents were cited for violating the veterinary care requirements only with respect to five animals (three reindeer, one camel, and one tiger), APHIS did not confiscate any of Respondents' animals, Respondents attempted to correct all of the violations found by APHIS employees, and none of Respondents' violations rise to willful defiance of USDA. (Appeal Pet. at 1-2.)

I disagree with Respondents' contention that their permanent disqualification from obtaining an Animal Welfare Act license is unfair and unjust. Respondents' assertion that there are no similar cases in which a respondent was permanently disqualified from obtaining an Animal Welfare Act license is incorrect. In the past, USDA has permanently disqualified dealers and exhibitors from obtaining Animal Welfare Act licenses or permanently revoked dealers' and exhibitors' Animal

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[4]See *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-45 (Nov. 18, 1998).

Welfare Act licenses for the kind of violations that I find Respondents committed.[5]

Further, Respondents' assertion that they were cited for failure to provide veterinary care for only five animals is incorrect. Respondents failed to provide veterinary care to the following animals in need of veterinary care, in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40): (1) on December 10, 1997, a yak, a tiger, and a reindeer (CX 1 at 3); (2) on February 9, 1998, a bison, a tiger, and three reindeer (CX 13 at 4); (3) on March 23, 1998, several goats, a llama, a tiger, a reindeer, and a camel (CX 27 at 3); (4) on March 25, 1998, several goats, a llama, several sheep, a camel, and a reindeer (CX 42 at 2); and (5) on March 30, 1998, a camel and a reindeer (CX 48 at 1).

I agree with Respondents' assertion that APHIS did not confiscate their animals. However, the record reveals that during the March 23, 1998, inspection of Respondents' facility, two APHIS veterinary medical officers, Drs. Harlan and Hammel, examined a reindeer and a camel which they found met the requirements in 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.129(a) for confiscation (CX 28 at 1, CX 29 at 1) and that Drs. Harlan and Hammel issued a Notice of Intent to Confiscate Animals (CX 27 at 5-6). Moreover, APHIS' failure to confiscate Respondents' animals is not a basis for finding that permanent disqualification of Respondents from obtaining an Animal Welfare Act license is unfair and unjust.

The record does not establish that Respondents "attempted" to correct all of the violations found by APHIS employees. Even if I found that Respondents had successfully corrected all of the violations immediately after they were identified by APHIS employees, a correction does not eliminate the fact that the violation

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[5]*See, e.g., In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (assessing a $20,000 civil penalty against the respondent and permanently disqualifying the respondent from obtaining an Animal Welfare Act license for 33 violations of the Animal Welfare Act and the Regulations); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (assessing a $200,000 civil penalty against the respondent and revoking the respondent's Animal Welfare Act license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (assessing a $3,000 civil penalty against the respondent and permanently disqualifying the respondent from obtaining an Animal Welfare Act license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (assessing a $26,000 civil penalty against the respondent and revoking the respondent's Animal Welfare Act license for 51 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

occurred.[6]

Finally, while I am uncertain of the meaning of Respondents' assertion that none of their violations "rise to the level of willful defiance of USDA," I find that Respondents' 34 violations of the Animal Welfare Act and the Regulations and Standards were willful.[7]

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[6]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, No. 98-3100 (3d Cir. 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[7]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. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 95 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 32 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or

(continued...)

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[8] While there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151) authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[9] and there are numerous instances

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[7](...continued)
not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations would still be found willful.

[8]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[9]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-41 (Nov. 18, 1998); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); (continued...)

in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[10] Therefore, the ALJ's permanent disqualification of Respondents from obtaining an Animal Welfare Act license was warranted in law.

Moreover, Respondents' permanent disqualification from obtaining an Animal Welfare Act license is not unfair and unjust. This case involves extremely serious, willful violations of the Animal Welfare Act and the Regulations and Standards by Respondents who have not displayed good faith. Respondents have a history of previous violations of the Animal Welfare Act and the Regulations and Standards.[11]

The permanent disqualification of Respondents from obtaining an Animal Welfare Act license was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Complainant's Brief at 21) and is in accord with USDA's sanction policy, which is set forth in *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Second, Respondents contend that the ALJ erroneously allowed Dr. Lewandowski to testify "beyond the bounds of his personal experience and beyond

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[9](...continued)
In re Mary Bradshaw, 50 Agric. Dec. 499, 507 (1991).

[10]See *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed at the time the order imposing the sanction was issued); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying the respondents from obtaining an Animal Welfare Act license for 2 years where the respondents had previously voluntarily terminated their Animal Welfare Act license and were not licensed on the date the disqualification order was issued); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for 1 year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for 1 year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

[11]The ongoing pattern of violations of the Animal Welfare Act and the Regulations and Standards during the period of December 10, 1997, through March 30, 1998, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

the bounds of the testimony referred to on the witness list" (Appeal Pet. at 3). Respondents allege that Dr. Lewandowski's testimony that was beyond the bounds of his personal observations harmed Respondents and contend that the civil penalty assessed against Respondents and the permanent disqualification of Respondents from obtaining an Animal Welfare Act license, should be modified to "reinstatement of license" (Appeal Pet. at 3).

Specifically, Respondents contend that the ALJ's denial of two objections (Tr. 288, 306) are error. First, Respondents objected to a question posed by Complainant's counsel to Dr. Lewandowski regarding CX 2 (pictures of deer carcasses in Respondents' large cat area taken during the December 10, 1997, inspection of Respondents' facility), as follows:

[BY MR. MARTIN:]

Q. Doctor, you have testified here today that you are familiar with the proper methods of caring for and feeding exhibition animals?

[BY DR. LEWANDOWSKI:]

A. Yes.

Q. I was wondering if you could take a look at some photographs, and I would like to ask you for your opinion --

A. Sure.

Q. -- concerning those photographs. Would you please take a look at Complainant's Exhibit CX-2, please?

A. Two?

Q. Two. In particular, I would like you to look at photographs --

MR. HARTLEY: Excuse me. I would like to object to this testimony as it goes outside the scope of his affidavit if this is regarding feeding of tigers and lions. He did not write any affidavit regarding the feeding of tigers and lions and cats.

MR. MARTIN: Your Honor, the witness has testified that he has

extensive experience in the care, handling, feeding, nutrition of exhibition animals, and I think as long as we have this witness here who obviously has a lot of expertise that he could share with the Court, I think we should get his opinion concerning some of the methods that were employed at Mr. Stephens' facility because Mr. Hartley has raised the issue that USDA is taking extreme interpretations of some of these regulations.

JUDGE BERNSTEIN: I do not think this witness is limited to any affidavit that he may have submitted in the scope of his testimony.

MR. HARTLEY: Okay. Then I would like to voir dire him regarding his experience with cats just real quick.

JUDGE BERNSTEIN: All right.

He is going to ask you some questions about your experience.

THE WITNESS: Okay.

VOIR DIRE EXAMINATION

BY MR. HARTLEY:

Q. What education do you have regarding exotic animals, including lions and tigers?

A. As I mentioned before, my training was in zoo and wildlife medicine, exotic animal medicine, at the University of Pennsylvania and the Philadelphia Zoo.

The Philadelphia Zoo at that time maintained approximately 30 cats ranging in size from the small exotic cats, such as ocelot, all the way through jaguar, leopard, lions and tigers.

The zoo in Detroit, we maintained --

Q. I am sorry. So you were involved in maintenance and treatment of those animals?

A. Oh, yes.

MR. HARTLEY: That is all the questions I have.

JUDGE BERNSTEIN: Are you satisfied --

MR. HARTLEY: Yes.

JUDGE BERNSTEIN: -- that he has expertise in this field?

MR. HARTLEY: Yes, I am. Yes.

JUDGE BERNSTEIN: Okay. Continue, Mr. Martin.

DIRECT EXAMINATION RESUMED

Tr. 287-89.

Section 1.141(h)(2)(i) of the Rules of Practice (7 C.F.R. § 1.141(h)(2)(i)) provides that if a party objects to the admission of any evidence and the administrative law judge overrules the objection, an automatic exception will follow. However, based on Respondents' counsel's voir dire examination of Dr. Lewandowski and the colloquy between the ALJ and Respondents' counsel after the voir dire examination (Tr. 289), I find that Respondents withdrew the objection at Tr. 288.

Nonetheless, Respondents again objected to Dr. Lewandowski's testimony regarding some of the photographs taken of Respondents' facility during the December 10, 1997, and March 23, 1998, inspections of Respondents' facility and Dr. Lewandowski's testimony regarding proper animal facility operation,[12] as follows:

> MR. HARTLEY: Again, I would request that his testimony regarding all the photographs and what he feels a farm should be like to be stricken, being that we were not given prior notice of his testimony regarding those

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[12]Complainant's counsel elicited testimony from Dr. Lewandowski regarding the following photographs: CX 2 at 1-2, CX 5, CX 6 at 3-4, CX 7, CX 8, CX 9 at 1, CX 12 at 2-3, CX 37, and CX 39. Dr. Lewandowski testified as to whether the photographs depicted the proper operation of an animal facility and the proper care of animals and the methods by which to improve animal facility operation and animal care. (Tr. 289-304.)

issues.

JUDGE BERNSTEIN: I have considered your application, and it is denied.

MR. HARTLEY: Okay.

JUDGE BERNSTEIN: We are here to make a complete record, and to that end I have accepted his testimony on the issues.

MR. HARTLEY: Okay.

Tr. 306.

The record reveals that Dr. Lewandowski did not participate in the December 10, 1997, and March 23, 1998, inspections of Respondents' facility. Further, Dr. Lewandowski's participation in the March 25, 1998, inspection was limited to an examination of the condition of Respondents' adult male Bactrian camel and adult female reindeer and the feed that Respondents provided to the male Bactrian camel (CX 43; Tr. 281-87, 307-08). However, the record reveals that Dr. Lewandowski is an expert in the field of care, handling, feeding, and nutritional requirements of exhibition animals, such as Respondents' animals (Tr. 279-81). Respondents offered to stipulate that Dr. Lewandowski is a veterinary care expert (Tr. 280) and agreed with the ALJ that Dr. Lewandowski is an expert "regarding exotic animals, including lions and tigers" (Tr. 289) and an expert with respect to the "other matters" at issue in the proceeding (Tr. 294-95).

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).

Dr. Lewandowski's expert testimony regarding the conditions depicted in photographs taken at Respondents' facility during the December 10, 1997, and March 23, 1998, inspections of Respondents' facility is material, relevant, not unduly repetitious, and the type of evidence upon which responsible persons are accustomed to rely. Therefore, I do not find that the ALJ erred by allowing Dr. Lewandowski to testify about conditions at Respondents' facility on December 10, 1997, and March 23, 1998, based upon Dr. Lewandowski's observation of pictures of conditions at Respondents' facility on December 10, 1997, and March 23, 1998.

Third, Respondents contend that the ALJ's findings of fact and conclusions of law are error. Specifically, Respondents contend that the ALJ erroneously found that Respondents failed to provide animals with wholesome and uncontaminated food and that the ALJ erroneously found that Respondents failed to provide veterinary care to animals in need of care on February 9, 1998. (Appeal Pet. at 4.)

The ALJ concluded that Respondents failed to provide animals with wholesome and uncontaminated food on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, in violation of section 3.129(a) of the Standards (9 C.F.R. § 3.129(a)) (Initial Decision and Order at 3-6, 8-11; Findings of Fact Nos. 7E, 9E, 12E, 15E; Conclusions of Law Nos. 5E, 7E, 10E, 13E). Respondents contend that the ALJ based his conclusions that Respondents violated 9 C.F.R. § 3.129(a) on findings that Respondents fed road kill that was not fit for consumption to their animals. Respondents assert that the evidence establishes that Respondents obtained road kill to feed to their animals, but did not feed their animals any road kill that was not fit for consumption.

Respondents are correct that there is some evidence that Respondents examined the road kill that they obtained and disposed of at least some of the road kill that was decomposing and not fit for consumption by their animals (Tr. 339-40). However, the record establishes that on February 9, 1998, Respondents fed their animals carcasses that were decomposing and not wholesome (CX 20 at 3-4; Tr.

121, 136).

In any event, the ALJ did not base his conclusions that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, March 23, 1998, and March 25, 1998, on the state of decomposition of carcasses which Respondents fed to their animals (Initial Decision and Order at 15-16, 23, 25), and the ALJ's conclusion that Respondents violated 9 C.F.R. § 3.129(a) on February 9, 1998, is based only in part on Dr. Harlan's observation that "several carcasses being fed to the large cats . . . were black and not fresh" (Initial Decision and Order at 19). Therefore, I find that Respondents' assignment of error regarding the ALJ's conclusions that on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, Respondents violated 9 C.F.R. § 3.129(a), is misplaced. Complainant proved by a preponderance of the evidence that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998. Even if I found that Respondents examined each road kill carcass and did not feed any decomposing carcass to their animals, that finding would not be a basis for concluding that the ALJ's conclusions that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, were error.

Respondents also contend that the ALJ's conclusion that on February 9, 1998, Respondents failed to provide veterinary care to animals in need of care, in violation of 9 C.F.R. § 2.40, is error. Specifically, Respondents contend that the ALJ ignored the "admission" on CX 13 that the reindeer did receive veterinary care and that the violations either did not occur or were not as severe as stated by the ALJ. (Appeal Pet. at 4.)

While CX 13 does state that Respondents' reindeer had been examined by a veterinarian on December 22, 1997, CX 13 also states that the reindeer, as well as other animals, were in need of veterinary care, as follows:

> **Category IV: Non-compliant item(s) previously identified that have not been corrected.**
>
> . . . .
>
> 2.40(b) Veterinary Care - Lower barn - there was a goat with an abscess on the right jaw. This needs examined and treated by the facility veterinarian. Note: this goat is improved[.]
>
> There was a yak in the lower barn with an excessive number of burrs and mats caught in its coat. It needs clipped to remove this debris. This animal is improved but, there is a young bison in the lower barn who now needs a large mat of burrs and knots removed.
>
> Large cat area - Tiger (Timberland) was tender on his front paws. He

favors the left one more, but is sensitive on both. Needs examined by the veterinarian.
All three reindeer were thin and in need of hoof trimming. The hind feet were especially long. The veterinarian that cares for the hoof stock did not examine the goat or reindeer until 12/22/97 - correction date was 12/11/97. The veterinarian for the big cats did not examine the tiger "Timberland" he prescribed treatment over the phone. Mr. Stephens indicated that he treated the animal for about ten days after our last inspection on 12/10/97. Mr Stephens has not gotten back to his vet to inform him that the cat continues to limp.

CX 13 at 4.

Further, Dr. Harlan testified regarding the veterinary care violations which she observed on February 9, 1998, as follows:

[BY MR. MARTIN:]

Q. Any other veterinary care deficiencies?

[BY DR. HARLAN:]

A. Yes, there were. We noted that -- we examined not only the animals that were -- we examined all the animals present, obviously, for veterinary care, but we made a special note of the animals that had been previously cited, to see how they had been treated and what was going on with them.

As everything was not corrected on this, we listed the items that were improved as part of the non-compliance for category, a repeat non-compliance, so that we could identify the ones that still needed to be taken care of and that were still in non-compliance. So, the items that were, that Water Wheel Exotics was given credit for was the goat with the abscess on the right jaw. There was evidence that this animal was improved and was looking better. The yak in the lower barn had been clipped. There was another animal, though, in exactly the same condition with excessive build up of burrs in his coat, which was a young bison who also now needed to be clipped.

The tiger, Timberland, was tender on his front paws and continued to be tender at this inspection and was favoring the left one, again, more.

We did talk to Mr. Stephens about this and he did indicate that it had been examined, or had not been examined, but Dr. Sheperd had prescribed treatment over the phone on 12/10, but he had not reported back to the veterinarian that the animal was still limping as of that time on February 9.

The three reindeer that we saw that day were all still very thin and still in need of hoof trimming. So, the veterinary care provisions remained unchanged.

Q. Doctor, how would you characterize those deficiencies?

A. Very serious for the animal's sake. The tiger, Timberland, for at least two months at this point, was still limping and very sore on his front feet, and had yet to be examined by a veterinarian. The three reindeer, there was no evidence of any work up or exam by the veterinarian to determine why they were thin and what was going wrong with them. They still had not had their feet trimmed, which would make them more comfortable and able to get around. Obviously, one animal had been clipped, but there was another animal in the exact same condition that now needed to be clipped.

It was an observed pattern of difficulties of the animals, with no real improvement occurring for the benefit of the animal.

The only real improvement was the abscess on the goat.

Q. And, did you express your concerns to Mr. Stephens?

A. Yes, I did.

Q. What did you tell him?

A. I told him again that these animals needed to be promptly examined by a veterinarian, appropriate work up for the reindeer that were thin to find out why and proper treatment needed to be provided to Timberland, the tiger with the sore feet. He needed to be examined, needed to have a determination of what was causing the tenderness and limping on those front feet.

Tr. 118-20.

Further still, pictures taken during the February 9, 1998, inspection of Respondents' facility depict the need for care of the bison's coat (CX 26 at 1-3), a thin reindeer (CX 26 at 4), and reindeer in need of hoof trimming (CX 26 at 4-6).

Mr. Stephens testified that the tiger, "Timberland," was being treated by a veterinarian, Dr. Sheperd (Tr. 369), but Dr. Sheperd did not testify, and Respondents did not produce any records indicating that the tiger had been treated. Moreover, Mr. Stephens agreed with Dr. Harlan's finding that the hoofs of the three reindeer needed trimming (Tr. 369).

I find that Complainant proved by a preponderance of the evidence that on February 9, 1998, Respondents failed to provide veterinary care to animals in need of care, in violation of 9 C.F.R. § 2.40, and the ALJ's conclusion that Respondents violated 9 C.F.R. § 2.40 on February 9, 1998, is not error.

Moreover, except with respect to the ALJ's conclusions that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998, I disagree with Respondents contention that the ALJ's findings of fact and conclusions of law are error. The ALJ bases his conclusion that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998, on Respondents' violation of each of these provisions of the Standards on the immediately preceding inspection, March 23, 1998, and Respondents' refusal to allow APHIS officials to conduct a complete inspection on March 25, 1998, to determine if these violations had been corrected (Initial Decision and Order at 27-28).

Complainant, as 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 in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[13] Complainant introduced no evidence which proves that Respondents' violations of 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 23, 1998, continued on March 25, 1998. Respondents' refusal to allow APHIS employees to complete the inspection of Respondents' facility on March 25, 1998, and the APHIS employees' inability on March 25, 1998, to determine if Respondents' violations of 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 23, 1998, had been corrected, is not proof that on March 25, 1998, Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a).

Fourth, Respondents contend that the civil penalty assessed by the ALJ against Respondents was excessive given the fact that Respondents' violations were not

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[13]See note 1.

severe and the financial state of Respondents. Respondents request that "the Judicial Officer . . . remove the fine." (Appeal Pet. at 4.)

While I have reduced the civil penalty assessed by the ALJ against Respondents, the reduction in the civil penalty is only based on my disagreement with the ALJ's conclusion that Respondents committed at least 39 violations of the Animal Welfare Act and the Regulations and Standards. However, I do not find that the ALJ's assessment of a $32,000 civil penalty against Respondents, based on the ALJ's finding of at least 39 violations, was "excessive," and I find no basis upon which to "remove" the civil penalty.

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[14] The Secretary of Agriculture has authority to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act or the Regulations and Standards (7 U.S.C. § 2149(b)); therefore, the ALJ's assessment of a $32,000 civil penalty against Respondents, based on the ALJ's finding of at least 39 violations of the Animal Welfare Act and the Regulations and Standards, was warranted in law.

Moreover, I disagree with Respondents' contention that the civil penalty assessed by the ALJ is excessive. This case involves extremely serious, willful violations of the Animal Welfare Act and the Regulations and Standards by Respondents who have not displayed good faith. Moreover, Respondents have a history of previous violations of the Animal Welfare Act and the Regulations and Standards.[15]

The civil penalty assessed by the ALJ was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Complainant Brief at 19-22) and is in accord with USDA's sanction policy, which is set forth in *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Moreover, the civil penalty assessed by the ALJ against Respondents is well within the range of civil penalties assessed in these kinds of cases. USDA consistently imposes significant civil penalties for violations of the Animal Welfare Act and the Regulations and Standards.[16] I have reduced the $32,000 civil penalty

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[14]See note 8.

[15]See note 11.

[16]*See, e.g., In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (imposing a $25,000 civil penalty and a revocation of license for 43 violations of the Animal Welfare Act and the Regulations (continued...)

[16](...continued)
and Standards); *In re Judie Hansen*, 57 Agric. Dec. ___ (Dec. 14, 1998) (imposing a $4,300 civil penalty and a 30-day license suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and permanent disqualification from obtaining a license for 33 violations of the Animal Welfare Act and the Regulations); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day license suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty and a revocation of license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day license suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (Modified Order) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (Decision and Order on Remand) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (Order Lifting Stay Order and Decision and Order) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act and the Regulations and Standards); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from obtaining a license for 32 violations of the Animal Welfare Act and the Regulations and Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from obtaining a license 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) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act and the Regulations and Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act and the Regulations and Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for 24
(continued...)

assessed by the ALJ to $27,800 only because I find that Respondents committed 34 violations of the Animal Welfare Act and the Regulations and Standards, rather than at least 39 violations found by the ALJ.

Finally, a respondent's financial state is not a factor that is required by section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) to be considered in determining the amount of the civil penalty to assess against the respondent for violations of the Animal Welfare Act or the Regulations and Standards.[17] Therefore, Respondents' financial state is not relevant to the amount of the civil penalty assessed by the ALJ.

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

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[16](...continued)
violations of the Animal Welfare Act and the Regulations and Standards); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $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) (imposing a $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).

[17]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 94 (Dec. 14, 1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 16 n.1 (Nov. 18, 1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *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 Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the 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 a written program of adequate veterinary care under the supervision of a veterinarian and failing to provide adequate veterinary care to animals in need of care;

(b) Failing to provide a suitable method for the removal and disposal of animal and food wastes from the facility;

(c) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury and contain the animals securely;

(d) Failing to store food so as to adequately protect the food against deterioration, molding, or contamination by vermin;

(e) Failing to clean primary enclosures for animals, as required;

(f) Failing to establish and maintain an effective program for the control of pests;

(g) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(h) Failing to provide a method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to provide sufficient space for animals in enclosures;

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

(k) Failing to provide animals with wholesome and uncontaminated food;

(*l*) Failing to adequately ventilate indoor housing facilities for animals; and

(m)Failing to allow APHIS officials to conduct complete inspections of all animals and facilities.

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

2. Respondents are jointly and severally assessed a civil penalty of $27,800, which is hereby suspended: *Provided, That* Respondents, after notice and opportunity for a hearing, are not found to have violated the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for the period of disqualification from becoming licensed under the Animal Welfare Act and the Regulations imposed in paragraph 3 of this Order.

3. Respondents are permanently disqualified from obtaining a license under

the Animal Welfare Act and the Regulations. The disqualification provision of this Order shall become effective upon service of this Order on Respondents.

4. Notwithstanding paragraph 3 of this Order, in order to facilitate the provision of care to Respondents' animals during the period of disqualification, Respondents may sell any animals which are under their control on the effective date of the disqualification provision of this Order. Respondents shall notify APHIS in writing at least 10 days prior to any sale and shall specify the species and identification number of each animal to be sold, the location of each animal to be sold, the prospective buyer of each animal to be sold, the time that each animal to be sold will be moved, and the method of transportation of each animal to be sold. This information shall be provided to: Dr. Elizabeth Goldentyer, Regional Director, Eastern Region; USDA, APHIS, ANIMAL CARE; 2568 A Riva Road, Suite 302, Annapolis, Maryland 21401-7400 (Telephone number: (410) 571-8692). This paragraph of the Order does not modify the disqualification of Respondents from becoming licensed under the Animal Welfare Act and the Regulations, as provided in paragraph 3 of this Order, in any other manner and shall not be construed as allowing Respondents to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

In re: JAMES E. STEPHENS and WATER WHEEL EXOTICS, INC.
AWA Docket No. 98-0019.
Order Denying Petition for Reconsideration filed June 18, 1999.

Petition for reconsideration — Expert witness testimony — Sanction — License disqualification.

The Judicial Officer denied Respondents' Petition for Reconsideration. The Judicial Officer held that: (1) Dr. Lewandowski's expert testimony regarding the conditions at Respondents' facility on December 10, 1997, solely based upon Dr. Lewandowski's observation of pictures which were taken of conditions at Respondents' facility during the December 10, 1997, inspection was proper; (2) that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is warranted in law (7 U.S.C. § 2151) and justified by the facts in the proceeding; and (3) there was no basis for modifying the Order issued in *In re James E. Stephens*, 58 Agric. Dec. ___ (May 5, 1999).

Robert A. Ertman, for Complainant.
Matthew A. Hartley, Sewickley, Pennsylvania, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 16, 1998.

The Complaint alleges that James E. Stephens and Water Wheel Exotics, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards. On May 11, 1998, Respondents filed Answer to Complaint in which they denied the material allegations of the Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing on October 6 and 7, 1998, in Pittsburgh, Pennsylvania. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Matthew A. Hartley, represented Respondents.

On December 14, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]; on December 22, 1998, Respondents filed Respondents' Post Hearing Written Submissions; on December 29, 1998, Respondents filed Respondents Reply Brief; and on January 4, 1999, Complainant filed Complainant's Reply Brief.

On January 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondents committed at least 39 willful violations of the Animal Welfare Act and the Regulations and Standards; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents a $32,000 civil penalty; and (4) permanently disqualifying Respondents from obtaining an Animal Welfare Act license (Initial Decision and Order at 7-12, 33-35).

On March 10, 1999, Respondents appealed to the Judicial Officer; on May 4, 1999, Complainant filed Complainant's Memorandum in Response to Appeal; and on May 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On May 5, 1999, I issued a Decision and Order: (1) concluding that Respondents committed 34 willful violations of the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents a $27,800 civil penalty; and (4) permanently disqualifying

Respondents from obtaining a license under the Animal Welfare Act and the Regulations. *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 17-22, 67-70 (May 5, 1999).

On May 24, 1999, Respondents filed Respondents' Petition for Reconsideration of the Judicial Officer's Decision [hereinafter Petition for Reconsideration]; on June 4, 1999, Complainant filed Complainant's Memorandum in Response to Petition for Reconsideration; and on June 7, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the May 5, 1999, Decision and Order.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

. . . .

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. § 2151.

Respondents raise four issues in their Petition for Reconsideration. First, Respondents contend my finding that Respondents withdrew their objection to Dr. Lewandowski's testimony is error, and the case should be remanded for hearing (Pet. for Recons. at 1-2).

Respondents objected to a question posed by Complainant's counsel to Dr. Lewandowski regarding Complainant's Exhibit 2 (pictures of deer carcasses in Respondents' large cat area taken during the December 10, 1997, inspection of Respondents' facility), as follows:

[BY MR. MARTIN:]

Q. Doctor, you have testified here today that you are familiar with the proper methods of caring for and feeding exhibition animals?

[BY DR. LEWANDOWSKI:]

A. Yes.

Q. I was wondering if you could take a look at some photographs, and I would like to ask you for your opinion --

A. Sure.

Q. -- concerning those photographs. Would you please take a look at Complainant's Exhibit CX-2, please?

A. Two?

Q. Two. In particular, I would like you to look at photographs --

MR. HARTLEY: Excuse me. I would like to object to this testimony as it goes outside the scope of his affidavit if this is regarding feeding of tigers and lions. He did not write any affidavit regarding the feeding of tigers and lions and cats.

MR. MARTIN: Your Honor, the witness has testified that he has extensive experience in the care, handling, feeding, nutrition of exhibition animals, and I think as long as we have this witness here who obviously has a lot of expertise that he could share with the Court, I think we should get his opinion concerning some of the methods that were employed at Mr. Stephens' facility because Mr. Hartley has raised the issue that USDA is taking extreme interpretations of some of these regulations.

JUDGE BERNSTEIN: I do not think this witness is limited to any affidavit that he may have submitted in the scope of his testimony.

MR. HARTLEY: Okay. Then I would like to voir dire him regarding his experience with cats just real quick.

JUDGE BERNSTEIN: All right.

He is going to ask you some questions about your experience.

THE WITNESS: Okay.

VOIR DIRE EXAMINATION

BY MR. HARTLEY:

Q. What education do you have regarding exotic animals, including lions and tigers?

A. As I mentioned before, my training was in zoo and wildlife medicine, exotic animal medicine, at the University of Pennsylvania and the Philadelphia Zoo.

The Philadelphia Zoo at that time maintained approximately 30 cats ranging in size from the small exotic cats, such as ocelot, all the way through jaguar, leopard, lions and tigers.

The zoo in Detroit, we maintained --

Q. I am sorry. So you were involved in maintenance and treatment of those animals?

A. Oh, yes.

MR. HARTLEY: That is all the questions I have.

JUDGE BERNSTEIN: Are you satisfied --

MR. HARTLEY: Yes.

JUDGE BERNSTEIN: -- that he has expertise in this field?

MR. HARTLEY: Yes, I am. Yes.

JUDGE BERNSTEIN: Okay. Continue, Mr. Martin.

DIRECT EXAMINATION RESUMED

Tr. 287-89.

Section 1.141(h)(2)(i) of the Rules of Practice (7 C.F.R. § 1.141(h)(2)(i)) provides that if a party objects to the admission of any evidence and the administrative law judge overrules the objection, an automatic exception will follow. However, based on Respondents' counsel's voir dire examination of Dr. Lewandowski and the colloquy between the ALJ and Respondents' counsel after the voir dire examination, I found that Respondents withdrew the objection at Tr. 288. *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 55.

Even if my finding that Respondents withdrew their objection at Tr. 288 is error, the error does not prejudice Respondents because, as I stated in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 55-57, the ALJ properly allowed Dr. Lewandowski's expert testimony regarding the conditions at Respondents' facility on December 10, 1997, solely based upon Dr. Lewandowski's observation of pictures which were taken of conditions at Respondents' facility during the December 10, 1997, inspection.

Second, Respondents contend the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is not supported by the facts and law, and Respondents' Animal Welfare Act license can only be suspended (Pet. for Recons. at 2-3).

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[1] While there is no provision in

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[1]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order

(continued...)

the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151) authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[2] and there are numerous instances in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[3] Therefore, the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is warranted in law.

Moreover, as fully explicated in *In re James E. Stephens, supra*, the permanent disqualification of Respondents from obtaining an Animal Welfare license is justified by the facts.

Respondents also assert that they were licensed under the Animal Welfare Act

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[1](...continued)
Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (1998) (Table), 1998 WL 863340 (2d Cir.), *cert. denied*, 119 S.Ct. 1575 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[2]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-41 (Nov. 18, 1998); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

[3]See *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed at the time the order imposing the sanction was issued); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying the respondents from obtaining an Animal Welfare Act license for 2 years where the respondents had previously voluntarily terminated their Animal Welfare Act license and were not licensed on the date the disqualification order was issued), *appeal docketed*, No. 99-1476 (4th Cir. Apr. 13, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for 1 year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for 1 year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

during the inspections that are the subject of this proceeding. Respondents contend that, based on their status as an Animal Welfare Act licensee at the time the alleged violations occurred, permanent disqualification from becoming licensed under the Animal Welfare Act is not an appropriate sanction. (Pet. for Recons. at 2.)

I disagree with Respondents' contention that permanent disqualification from obtaining an Animal Welfare Act license is not appropriate because Respondents were licensed under the Animal Welfare Act during the inspections that are the subject of this proceeding. The Secretary of Agriculture's authority, under section 21 of the Animal Welfare Act (7 U.S.C. § 2151), to disqualify a violator from obtaining an Animal Welfare Act license is not affected by the violator's status as an Animal Welfare Act licensee at the time of an inspection or at the time the violator commits violations of the Animal Welfare Act.[4]

Third, Respondents request that I modify the Decision and Order to allow Respondents to notify the United States Department of Agriculture after the sale of their animals. Respondents contend that, without such a modification, Respondents will not be able to sell their animals to exhibitors and that the United States Department of Agriculture will not be harmed by receiving notice of a sale after the sale. (Pet. for Recons. at 3.)

Paragraph 4 of the Order in *In re James E. Stephens, supra*, provides that, notwithstanding Respondents' permanent disqualification from obtaining an Animal Welfare Act license, Respondents may sell any animals which are under their control on the date they are disqualified from obtaining an Animal Welfare Act license, but Respondents must notify the Animal and Plant Health Inspection Service in writing at least 10 days prior to any sale. *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 69-70.

The record establishes that Respondents committed serious, willful violations of the Animal Welfare Act and the Regulations and Standards over a period of 4 months. Many of Respondents' violations exposed Respondents' animals to the risk of serious illness and death. Respondents' sale of their animals may facilitate the proper care of Respondents' animals, and I do not want to impede Respondents' sale of their animals which are regulated under the Animal Welfare Act. Nonetheless, in order to ensure that any regulated animals which Respondents sell are handled in accordance with the Animal Welfare Act and the Regulations and Standards, I

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[4]Respondents make inconsistent statements regarding their status as an Animal Welfare Act licensee at the time I issued the May 5, 1999, Decision and Order (Pet. for Recons. at 2). However, the record establishes that Respondents did not renew their Animal Welfare Act license in 1998, and Respondents' Animal Welfare Act license expired on July 15, 1998 (Complainant's Exhibit 59, Complainant's Exhibit 60, and Tr. 323-26).

find that the Animal and Plant Health Inspection Service must be notified prior to the sale. Further, I find that Respondents' assertion that the required 10-day notice will prevent Respondents from selling their animals to exhibitors is speculative, and I find no basis for modifying paragraph 4 of the Order issued in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. 69-70.

Fourth, Respondents state that they make all arguments previously raised in Respondents' Appeal to the Judicial Officer, filed March 10, 1999, and request that "the fines be removed and that the Judicial Officer sign[] an order allowing . . . Respondents to obtain an [Animal Welfare Act] license" (Pet. for Recons. at 3). For the reasons set forth in *In re James E. Stephens, supra*, and except as explained in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 62-63, 65-66, Respondents' arguments in Respondents' Appeal to the Judicial Officer are rejected, and I find no basis for the modification of the Order in *In re James E. Stephens, supra.*

For the foregoing reasons and the reasons set forth in *In re James E. Stephens, 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.[5]

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[5]*In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 9 (May 25, 1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 7 (May 6, 1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re*

(continued...)

Respondents' Petition for Reconsideration was timely filed and automatically stayed the May 5, 1999, Decision and Order. Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed May 5, 1999, is reinstated, with allowance for time passed.

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

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the 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 a written program of adequate veterinary care under the supervision of a veterinarian and failing to provide adequate veterinary care to animals in need of care;

(b) Failing to provide a suitable method for the removal and disposal of animal and food wastes from the facility;

(c) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury and contain the animals securely;

(d) Failing to store food so as to adequately protect the food against deterioration, molding, or contamination by vermin;

(e) Failing to clean primary enclosures for animals, as required;

(f) Failing to establish and maintain an effective program for the control of pests;

(g) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(h) Failing to provide a method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to provide sufficient space for animals in enclosures;

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

(k) Failing to provide animals with wholesome and uncontaminated food;

(*l*) Failing to adequately ventilate indoor housing facilities for animals; and

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[5](...continued)
Andershock Fruitland, Inc., 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

(m)Failing to allow Animal and Plant Health Inspection Service officials to conduct complete inspections of all animals and facilities.

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

2. Respondents are jointly and severally assessed a civil penalty of $27,800, which is hereby suspended: *Provided, That* Respondents, after notice and opportunity for a hearing, are not found to have violated the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for the period of disqualification from becoming licensed under the Animal Welfare Act and the Regulations imposed in paragraph 3 of this Order.

3. Respondents are permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations. The disqualification provision of this Order shall become effective upon service of this Order on Respondents.

4. Notwithstanding paragraph 3 of this Order, in order to facilitate the provision of care to Respondents' animals during the period of disqualification, Respondents may sell any animals which are under their control on the effective date of the disqualification provision of this Order. Respondents shall notify the Animal and Plant Health Inspection Service, in writing, at least 10 days prior to any sale and shall specify the species and identification number of each animal to be sold, the location of each animal to be sold, the prospective buyer of each animal to be sold, the time that each animal to be sold will be moved, and the method of transportation of each animal to be sold. This information shall be provided to: Dr. Elizabeth Goldentyer, Regional Director, Eastern Region; USDA, APHIS, ANIMAL CARE; 2568 A Riva Road, Suite 302, Annapolis, Maryland 21401-7400 (Telephone number: (410) 571-8692). This paragraph of the Order does not modify the disqualification of Respondents from becoming licensed under the Animal Welfare Act and the Regulations, as provided in paragraph 3 of this Order, in any other manner and shall not be construed as allowing Respondents to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: SWECK'S, INC.
EAJA-FSA Docket No. 99-0003.
Decision and Order filed March 22, 1999.

EAJA application — Statutory time limits — Prevailing party — Filing.

The Judicial Officer affirmed Hearing Officer James R. Holman's denial of an award of fees and other expenses sought by Applicant under the Equal Access to Justice Act (EAJA). The Judicial Officer held that the National Appeals Division's Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, which was not issued within the time limits provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2), was, nonetheless, the final National Appeals Division determination in *In re Sweck's, Inc.*, Case No. 98000135E, and effective. See generally *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). Based on the Director Review Determination, the Judicial Officer concluded that Applicant did not succeed on any significant issue or achieve any benefit which Applicant sought in *In re Sweck's, Inc.*, Case No. 98000135E; therefore, Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, and Applicant's request for fees and other expenses allegedly incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, must be denied.

Robert L. Purcell, for Respondent.
Gregory A. Andrews, Johnston, Iowa, for Applicant.
Initial decision issued by James R. Holman, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Sweck's, Inc. [hereinafter Applicant], instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Eastern Regional Office, on July 28, 1998. The National Appeals Division assigned Applicant's EAJA Application to James R. Holman, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], for his consideration (Letter from Norman G. Cooper to Guy R. Swecker, dated August 14, 1998).

Applicant alleges in its EAJA Application that: (1) it was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, an adversary adjudication in which Applicant appealed an adverse decision by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding Applicant's eligibility for 1996 AMTA program payments; (2) Respondent's position in *In re*

Sweck's, Inc., Case No. 98000135E, was not substantially justified; and (3) Applicant incurred fees and other expenses of $34,190 in connection with its appeal of Respondent's adverse decision.

Respondent filed Farm Service Agency's Opposition to Request for EAJA Fees and Other Expenses, which states: (1) Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified; (3) Applicant did not claim any "fees and other expenses" as that term is used in the Equal Access to Justice Act; and (4) Applicant did not file a statement of net worth or an itemized statement of the time expended in *In re Sweck's, Inc.*, Case No. 98000135E, and the rate at which fees and other expenses were computed.

On or about November 12, 1998, Applicant filed a document entitled "In Support of the Request of Sweck's Inc. for Fees and Other Expenses Under the Equal Access to Justice Act [EAJA]"; on or about December 2, 1998, Respondent filed a document entitled "Answer to Application for EAJA Fees and Expenses"; and on or about December 3, 1998, Applicant filed a document entitled "Response to Farm Service Agency's Opposition to Sweck's Inc. Request for Equal Access to Justice Act Fees and other Expenses".

On December 30, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; and (2) denied Applicant's request for fees and other expenses under the Equal Access to Justice Act (Initial Decision and Order at 4).

On February 2, 1999, Applicant appealed to the Judicial Officer.[1] On March 3, 1999, Respondent filed Farm Service Agency's Response to Petition for Review, and on March 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful review of the record in this proceeding, I agree with the Hearing Officer's Initial Decision and Order. Therefore, while I restate the Initial

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[1]I note that the Hearing Officer states that appeal petitions must be filed with the Office of the Judicial Officer (Initial Decision and Order at 6). However, as provided in section 1.145(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.145(a)), appeal petitions must be filed with the Hearing Clerk. See generally, *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk).

Decision and Order, I adopt the Hearing Officer's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Hearing Officer's Initial Decision and Order, as restated.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees

and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated. . . .;

(C) "adversary adjudication" means (i) an adjudication under

section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. III 1997).

HEARING OFFICER'S INITIAL DECISION AND ORDER (AS RESTATED)

HISTORICAL INFORMATION

On November 12, 1997, Respondent issued an adverse decision in which Respondent determined that Applicant had not provided sufficient documentation to substantiate that Applicant was actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program. Applicant requested a record review of Respondent's adverse decision, pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14). On March 11, 1998, the Hearing Officer issued an Appeal Determination in which he found that Respondent's determinations that Applicant was not actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program, were error. *In re Sweck's, Inc.*, Case No. 98000135E (Appeal Determination).

On April 7, 1998, the Acting Administrator, Farm Service Agency, United States Department of Agriculture [hereinafter Acting Administrator], requested that the Director, National Appeals Division, United States Department of Agriculture [hereinafter Director], review the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. On June 25, 1998, the Director reversed the Hearing Officer, holding that Applicant failed to meet its burden of showing by a preponderance of the evidence that Respondent's November 12, 1997, decision was erroneous. *In re Sweck's, Inc.*, Case No. 98000135E (Director Review Determination).

On July 28, 1998, Applicant filed an EAJA Application for fees and expenses allegedly incurred in connection with its appeal of Respondent's November 12, 1997, adverse decision, and Respondent filed a timely response opposing Applicant's EAJA Application. During a teleconference conducted on October 22, 1998, Applicant declined the opportunity for a hearing and requested a determination on Applicant's EAJA Application, based on a review of the record.

STATEMENT OF THE CASE

The Equal Access to Justice Act and the EAJA Rules of Practice provide that a decision concerning an applicant's eligibility for an award of fees and other expenses incurred by that party in connection with an adversary adjudication must be based on the record of the adversary adjudication. Therefore, this Decision and Order is based on the record in *In re Sweck's, Inc.*, Case No. 98000135E, and Applicant's and Respondent's filings in this proceeding.

Three issues are relevant to this proceeding: (1) was Applicant the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) if Applicant was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, was Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, substantially justified; and (3) if Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was not substantially justified, may the fees and expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, be awarded to Applicant under the Equal Access to Justice Act.

Respondent argues, based on the June 25, 1998, Director Review Determination, that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E. Respondent contends that, under 7 U.S.C. § 6999, the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, is the final National Appeals Division determination and reviewable only by a United States district court of competent jurisdiction and that the Hearing Officer has no authority to review or reverse the Director Review Determination.

Applicant contends that it is the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, in that the Hearing Officer's March 11, 1998, Appeal Determination was in Applicant's favor and the Appeal Determination became final because the Director Review Determination was issued more than 10 days after receipt of the request for review by the Acting Administrator, in violation of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002).

Section 278(b) of the Department of Agriculture Reorganization Act of 1994 provides that the Director's determination on review of a hearing officer's determination is the final National Appeals Division determination and provides

time limits within which the Director shall issue the final National Appeals Division determination, as follows:

§ 6998. Director review of determinations of hearing officers

. . . .

(b) Determination of Director

The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director shall issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. However, if the Director determines that the hearing record is inadequate, the Director may remand all or a portion of the determination for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. The Director shall complete the review and either issue a final determination or remand the determination not later than—

(1) 10 business days after receipt of the request for review, in the case of a request by the head of an agency for review; or

(2) 30 business days after receipt of the request for review, in the case of a request by an appellant for review.

7 U.S.C. § 6998(b).

Similarly, section 11.9(d)(1) of the National Appeals Division Rules of Procedure provides that the Director's determination is the final National Appeals Division determination and provides time limits within which the Director will issue the final National Appeals Division determination, as follows:

§ 11.9 Director review of determinations of Hearing Officers.

. . . .

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as

> may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.
>
> (2) The Director will complete the review and either issue a final determination or remand the determination not later than—
>
> (i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or
>
> (ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

7 C.F.R. § 11.9(d)(1)-(2).

On April 7, 1998, the Director received the Acting Administrator's request for review of the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. The Director did not issue a final determination in *In re Sweck's, Inc.*, Case No. 98000135E, until June 25, 1998. Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides any consequence for the Director's issuance of a final determination more than 10 business days after receipt of an agency head's request for review. Moreover, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a hearing officer's determination becomes the final National Appeals Division determination, if the Director issues a final determination more than 10 business days after receipt of an agency head's request for review.

Therefore, the June 25, 1998, Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, which is adverse to Applicant, was the final National Appeals Division determination, and Respondent, not Applicant, was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.

The finding that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, is dispositive of Applicant's EAJA Application because a prerequisite to an award of fees and other expenses incurred in connection with an adversary adjudication is that the party seeking the award must have been the

prevailing party in the adversary adjudication (5 U.S.C. § 504(a)(1)). Thus, the issues of whether Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified and whether the fees and expenses, which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, may be awarded under the Equal Access to Justice Act, are moot.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Respondent was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.

2. Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.

3. Applicant is not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504), to fees and other expenses that it alleges it incurred in connection with *In re Sweck's, Inc.*, 98000135E.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Applicant raises one issue in its Request for Review by the Office of the Judicial Officer [hereinafter Appeal Petition].

Applicant contends that the Director is required by 7 U.S.C. § 6998(b)(1) to issue a final determination not later than 10 business days after receipt of an agency head's request for review and that the Director Review Determination, issued in *In re Sweck's, Inc.*, Case No. 98000135E, is ineffective because it was not issued timely.

I agree with Applicant that the Director failed to issue the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, within the time provided in 7 U.S.C. § 6998(b)(1). The record establishes that the Director received the Acting Administrator's request for review of the Hearing Officer's Appeal Determination on April 7, 1998. Pursuant to 7 U.S.C. § 6998(b)(1), the Director was required to issue a final determination or remand the determination not later than 10 business days after receipt of the Acting Administrator's request for review; viz., not later than April 21, 1998. The Director did not issue the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, until June 25, 1998.

However, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a final determination by the Director more than 10 business days after receipt of an agency head's request for review, is ineffective. Moreover, neither the Department of

Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a hearing officer's determination becomes the final National Appeals Division determination, if the Director issues a final determination more than 10 business days after receipt of an agency head's request for review.

Unless a statute specifies that the consequence of a failure by a government official to meet a deadline for issuance of a decision is that the decision is ineffective, noncompliance with the timing provision does not render the decision ineffective.[2] Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure specifies a consequence for noncompliance with the time limit for issuance of the Director's final determination. Therefore, I find that the Director's noncompliance with the time limit had no effect on the June 25, 1998, Director Review Determination issued in *In re Sweck's, Inc.*, Case No. 98000135E.

Moreover, based on the June 25, 1998, Director Review Determination, I find that Applicant did not succeed on any significant issue or achieve any benefit which Applicant sought in *In re Sweck's, Inc.*, Case No. 98000135E. Therefore, Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E,[3]

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[2]See generally *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (stating that Supreme Court has long recognized that many statutory requisitions intended for the guide of officers in the conduct of business devolved on them do not limit their power or render its exercise in disregard of the requisitions ineffectual; the Supreme Court has held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not ordinarily impose their own sanctions); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (rejecting the contention that there must be a punitive sanction for the government's deviation from statutory time limits); *Brock v. Pierce County*, 476 U.S. 253, 261-62 (1986) (holding that the Secretary of Labor does not lose power to recover misused Comprehensive Employment Training Act funds after the 120-day statutory period for issuing a final determination has expired); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489-90 (1997) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 164-65 (1995) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision).

[3]See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that plaintiffs may be considered *prevailing parties* for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit); *SEC v. Comserv Corp.*, 908

(continued...)

and Applicant's request for fees and other expenses allegedly incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, should be denied.

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

Order

Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's Inc.*, Case No. 98000135E, is denied.

In re: SWECK'S, INC.
EAJA-FSA Docket No. 99-0003.
Order Denying Petition for Reconsideration filed May 6, 1999.

Petition for reconsideration — EAJA application — Statutory time limits — Jurisdiction.

The Judicial Officer denied Applicant's Petition for Reconsideration. The Judicial Officer held that the Director of the National Appeals Division had jurisdiction to issue a Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, even though the Director did not issue the Director Review Determination within the time limit provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2)(i).

Robert L. Purcell, for Respondent.
Gregory A. Andrews, Johnston, Iowa, for Applicant.
Initial decision issued by James R. Holman, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Sweck's, Inc. [hereinafter Applicant], instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the

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[3](...continued)
F.2d 1407, 1413 n.6 (8th Cir. 1990) (stating that whether a party is a *prevailing party* for the purposes of award of fees and expenses under the Equal Access to Justice Act turns on whether the party achieved some of the benefit sought by the party and whether the action was a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief); *Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir. 1987) (stating that for purposes of the Equal Access to Justice Act, a *prevailing party* is one who ultimately succeeds on the merits); *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218, 1220-21 (8th Cir. 1984) (stating that to be a *prevailing party* for purposes of the Equal Access to Justice Act, it is enough if a party succeeds on any significant issue which achieves some of the benefit the party sought in bringing the suit).

Department (7 C.F.R. §§ 1.180-.203) by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Eastern Regional Office, on July 28, 1998. The National Appeals Division assigned Applicant's EAJA Application to James R. Holman, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], for his consideration (Letter from Norman G. Cooper to Guy R. Swecker, dated August 14, 1998).

Applicant alleges in its EAJA Application that: (1) it was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, an adversary adjudication in which Applicant appealed an adverse decision by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding Applicant's eligibility for 1996 AMTA program payments; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was not substantially justified; and (3) Applicant incurred fees and other expenses of $34,190 in connection with its appeal of Respondent's adverse decision.

Respondent filed Farm Service Agency's Opposition to Request for EAJA Fees and Other Expenses, which states: (1) Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified; (3) Applicant did not claim any "fees and other expenses" as that term is used in the Equal Access to Justice Act; and (4) Applicant did not file a statement of net worth or an itemized statement of the time expended in *In re Sweck's, Inc.*, Case No. 98000135E, and the rate at which fees and other expenses were computed.

On or about November 12, 1998, Applicant filed a document entitled "In Support of the Request of Sweck's Inc. for Fees and Other Expenses Under the Equal Access to Justice Act [EAJA]"; on or about December 2, 1998, Respondent filed a document entitled "Answer to Application for EAJA Fees and Expenses"; and on or about December 3, 1998, Applicant filed a document entitled "Response to Farm Service Agency's Opposition to Sweck's Inc. Request for Equal Access to Justice Act Fees and other Expenses."

On December 30, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; and (2) denied Applicant's request for fees and other expenses under the Equal Access to Justice Act (Initial Decision and Order at 4).

On February 2, 1999, Applicant appealed to the Judicial Officer. On March 3, 1999, Respondent filed Farm Service Agency's Response to Petition for Review, and on March 4, 1999, the Hearing Clerk transmitted the record of the proceeding

to the Judicial Officer for decision.

On March 22, 1999, I issued a Decision and Order: (1) finding that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) concluding that Applicant is not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504), to fees and other expenses that it alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E; and (3) denying Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E. *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 11, 14 (Mar. 22, 1999).

On April 8, 1999, Applicant filed Petition for Reconsideration of the Judicial Officer [hereinafter Petition for Reconsideration]; on May 4, 1999, Respondent filed a response to Applicant's Petition for Reconsideration; and on May 6, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the March 22, 1999, Decision and Order.

Applicant raises one issue in its Petition for Reconsideration. Applicant contends that the Director, National Appeals Division, United States Department of Agriculture [hereinafter Director], had no jurisdiction to issue the June 25, 1998, Director Review Determination, in *In re Sweck's, Inc.*, Case No. 98000135E, because the Director Review Determination was issued more than 10 business days after receipt of a request for review by the Acting Administrator, Farm Service Agency, United States Department of Agriculture [hereinafter Acting Administrator].

On November 12, 1997, Respondent issued an adverse decision in which Respondent determined that Applicant had not provided sufficient documentation to substantiate that Applicant was actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program. Applicant requested a record review of Respondent's adverse decision, pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14). On March 11, 1998, the Hearing Officer issued an Appeal Determination in which he found that Respondent's determinations that Applicant was not actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program, were error. *In re Sweck's, Inc.*, Case No. 98000135E (Appeal Determination).

On April 7, 1998, the Acting Administrator requested that the Director review the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. On June 25, 1998, the Director reversed the Hearing Officer, holding that Applicant failed to meet its burden of showing by a preponderance of the evidence that Respondent's November 12, 1997, decision was

erroneous. *In re Sweck's, Inc.*, Case No. 98000135E (Director Review Determination).

Section 278(b) of the Department of Agriculture Reorganization Act of 1994 provides that the Director's determination on review of a hearing officer's determination is the final National Appeals Division determination and provides time limits within which the Director shall issue the final National Appeals Division determination, as follows:

> **§ 6998. Director review of determinations of hearing officers**
>
> . . . .
>
> **(b) Determination of Director**
>
> The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director shall issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. However, if the Director determines that the hearing record is inadequate, the Director may remand all or a portion of the determination for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. The Director shall complete the review and either issue a final determination or remand the determination not later than—
>
> (1) 10 business days after receipt of the request for review, in the case of a request by the head of an agency for review; or
>
> (2) 30 business days after receipt of the request for review, in the case of a request by an appellant for review.

7 U.S.C. § 6998(b).

Similarly, section 11.9(d) of the National Appeals Division Rules of Procedure provides that the Director's determination is the final National Appeals Division determination and provides time limits within which the Director will issue the final National Appeals Division determination, as follows:

§ 11.9 Director review of determinations of Hearing Officers.

. . . .

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

7 C.F.R. § 11.9(d)(1)-(2).

Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure specifies a consequence for the Director's failure to comply with the time limit for issuance of a final determination. Moreover, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that the Director lacks jurisdiction to issue a final determination more than 10 business days after receipt of an agency head's request for review.

A statutory timing provision merely intended as a guide for a government official's conduct of business neither limits that government official's power nor renders ineffectual that government official's exercise of power in disregard of the

statutory timing provision.[1] Therefore, I find that the Director's failure to comply with the time limit in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2)(i) had no effect on the Director's jurisdiction to issue a final decision in *In re Sweck's, Inc.*, Case No. 98000135E.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 22, 1999, *In re Sweck's, Inc.*, 58 Agric. Dec. ___ (Mar. 22, 1999), Applicant'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]

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[1]*See generally United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (stating that Supreme Court has long recognized that many statutory requisitions intended for the guide of officers in the conduct of business devolved on them do not limit their power or render its exercise in disregard of the requisitions ineffectual; the Supreme Court has held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not ordinarily impose their own sanctions); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (rejecting the contention that there must be a punitive sanction for the government's deviation from statutory time limits); *Brock v. Pierce County*, 476 U.S. 253, 261-62 (1986) (holding that the Secretary of Labor does not lose power to recover misused Comprehensive Employment Training Act funds after the 120-day statutory period for issuing a final determination has expired); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489-90 (1997) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 164-65 (1995) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision).

[2]*In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric.

(continued...)

Applicant's Petition for Reconsideration was timely filed and automatically stayed the March 22, 1999, Decision and Order. Therefore, since Applicant's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed March 22, 1999, is reinstated, with allowance for time passed.

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

Order

Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, is denied.

In re: PAUL W. THOMAS and LEONA THOMAS.
EAJA-FSA Docket No. 99-0004.
Decision and Order filed June 15, 1999.

EAJA application — Substantially justified — Complete and timely application — Fees and expenses.

The Judicial Officer reversed Hearing Officer Byron Bennes' award of $2,392.50 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were prevailing parties in an adversary adjudication captioned *In re Paul W. Thomas*, Case No. 98000848W. The Judicial Officer held that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified, but that Applicants failed to file a complete and timely Equal Access to Justice Act application. Further, the Judicial Officer found that Applicants failed to adequately document fees that they allegedly incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, and that no award could be made under the Equal Access to Justice Act for interest payments, lost spring wheat, lost income from calves, and the loss of a down payment for, and discount on, a drill.

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[2](...continued)
Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Margit Halvorson Williams, for Respondent.
Applicants, Pro se.
Initial decision issued by Byron Bennes, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a $76,000 emergency loan and Applicants' $175,515 subordination request [hereinafter loan application]; (2) Applicants incurred fees and expenses of $83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of $83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or in the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer [hereinafter Applicants' Response], in which Applicants: (1) contend that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified should not be an issue in this proceeding; (2) contend that if any part of Applicants' request for relief is denied because the relief is not available under the Equal Access to Justice Act, the denial should not result in denial of those aspects of Applicants' request for relief that may be awarded under the Equal Access to Justice Act; and (3) admit that their EAJA Application did not include a written verification, as required by section 1.190(e) of the EAJA Rules of Practice (7 C.F.R. § 1.190(e)). Attached to Applicants' Response are documents which

Applicants contend support their EAJA Application and the following statement signed by Paul W. Thomas and dated December 29, 1998:

> This is a written affirmation under penalty of perjury that all the information provided in the application and all accompanying material is true and complete to the best of my belief.

On January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants $2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal [hereinafter Applicant's Appeal Response]; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful review of the record in this proceeding, I disagree with the Hearing Officer's finding that Applicants filed a complete and timely EAJA Application and with the Hearing Officer's award of $2,392.50 to Applicants. Therefore, I reverse the Hearing Officer's Initial Decision and Order and deny Applicants' request, under the Equal Access to Justice Act, for fees and other expenses which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Applicable Statutory Provision

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law

judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. . . .

. . . .

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E), (c)(1) (1994 & Supp. III 1997).

THE ADVERSARY ADJUDICATION THAT IS THE BASIS FOR APPLICANTS' EAJA APPLICATION

On January 23, 1998, Applicants filed a loan application pursuant to 7 C.F.R. pt. 1945, subpart D. On May 13, 1998, Respondent issued an adverse decision in which Respondent denied Applicants' loan application. Respondent's denial was based upon Respondent's determination that Applicants failed to submit a feasible farm and home plan, as required. Subsequently, Applicants submitted a revised farm and home plan to Respondent, and on June 3, 1998, Respondent found that Applicants' revised farm and home plan was not feasible and denied Applicants' loan application. (Letter dated June 3, 1998, from Respondent to Applicants.)

On June 5, 1998, Applicants appealed Respondent's June 3, 1998, adverse decision pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14) (Letter dated June 5, 1998, from Paul Thomas to Mr. Jordon). On July 14, 1998, the Hearing Officer conducted a hearing in Bismarck, North Dakota, regarding Applicants' appeal of Respondent's adverse decision. At the close of the hearing, the Hearing Officer closed the hearing record; however, Applicants subsequently submitted additional documents to the National Appeals Division, Western Regional Office, and on August 11, 1998, the Hearing Officer re-opened the hearing record to receive the additional documents and allow the parties to provide additional information to, and answer questions posed by, the Hearing Officer. On August 25, 1998, the Hearing Officer closed the hearing record. (Notice of Re-opening the Hearing Record and Request for Information.)

On September 15, 1998, the Hearing Officer issued an Appeal Determination

in which he found that one of the two revised farm and home plans which Applicants filed after the July 14, 1998, hearing "would be considered a feasible plan as required by the regulations" and that Respondent's denial of Applicants' loan application was error (Appeal Determination at 9). Neither Applicants nor Respondent requested that the Director, National Appeals Division, United States Department of Agriculture, review the Hearing Officer's Appeal Determination, and the Hearing Officer's Appeal Determination became final (Notice of Conclusion of Appeal).

APPLICANTS' EAJA APPLICATION

Applicants contend that: (1) they were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) their EAJA Application was complete and timely filed; and (4) they are entitled to an award of $83,469 for fees and other expenses which they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) contends that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) contends that Applicants' EAJA Application was not timely filed and not complete; and (4) contends that the fees and expenses, which Applicants allege that they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, cannot be awarded to Applicants under the Equal Access to Justice Act.

APPLICANTS WERE THE PREVAILING PARTIES IN *IN RE PAUL W. THOMAS*, CASE NO. 98000848W

The Hearing Officer found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8), and Applicants and Respondent agree that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Applicants' EAJA Application; Respondent's Answer at 1). I agree with the Hearing Officer, Applicants, and Respondent that the record in *In re Paul W. Thomas*, Case No. 98000848W, establishes that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W.

RESPONDENT'S POSITION IN *IN RE PAUL W. THOMAS*, CASE NO. 98000848W, WAS NOT SUBSTANTIALLY JUSTIFIED

Applicants contend that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified should not be an issue in this proceeding because Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Applicants' Response; Applicants' Appeal Response). Applicants cite no authority for their contention.

The Equal Access to Justice Act provides that an agency that conducts an adversary adjudication shall award to the prevailing party, fees and other expenses incurred by that party in connection with the adversary proceeding, "unless the adjudicative officer . . . finds that the position of the agency was substantially justified. . . . " (5 U.S.C. § 504(a)(1).) Legislative history applicable to the Equal Access to Justice Act specifically states that there is no presumption that an agency's position was not substantially justified, simply because the agency lost the adversary proceeding, as follows:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953,

4989-90.[1]

Therefore, I conclude that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified, is an issue in this Equal Access to Justice Act proceeding.

A decision regarding whether an agency's position in an adversary adjudication is substantially justified must be based upon the record of the adversary adjudication for which fees and other expenses are sought (5 U.S.C. § 504(a)(1)).[2] The test of whether an agency's position is substantially justified is one of reasonableness in law and in fact, and the agency bears the burden of showing the substantial justification of its position.[3]

Applicants applied for an emergency loan in accordance with 7 C.F.R. §§ 1945.151-.200 and were required to file a "feasible plan." Title 7, Code of Federal Regulations, § 1945.154, provides that "[a] feasible plan is one which meets the requirements of subpart B of part 1924 of this chapter." Title 7, Code of Federal Regulations, pt. 1924, subpart B, addresses the requirements for a feasible plan, as follows:

> **§ 1924.56 Farm business planning.**
>
> The automated Farm and Home Plan system is the primary tool used by the Agency to evaluate loan feasibility and prospects for achieving financial viability. Other manual or automated business planning systems may be used with the consent of the Agency.
>
> . . . .

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[1]*See also Cornella v. Schweiker*, 728 F.2d 978, 982 (8th Cir. 1984) (stating that the fact that the government lost the case does not raise a presumption that its position was not substantially justified).

[2]*See also Smith v. NTSB*, 992 F.2d 849, 851-52 (8th Cir. 1993); *In re Ronald L. Wieczorek*, 57 Agric. Dec. ___, slip op. at 8 (Dec. 17, 1998).

[3]*See, e.g., Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Smith v. NTSB*, 992 F.2d 849, 852 (8th Cir. 1993); *Koss v. Sullivan*, 982 F.2d 1226, 1229 (8th Cir. 1993); *SEC v. Comserv Corp.*, 908 F.2d 1407, 1411-12 (8th Cir. 1990); *Derickson Company, Inc. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985); *Wheat v. Heckler*, 763 F.2d 1025, 1028-29 (8th Cir. 1985); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984); *Cornella v. Schweiker*, 728 F.2d 978, 982 (8th Cir. 1984); *Foley Const. Co. v. United States Army Corps of Engineers*, 716 F.2d 1202, 1204 (8th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

(b) *Documentation and revision of plans.* Individuals must submit a farm business plan to the Agency, upon request, for loan approval and servicing purposes. An individual may request the assistance of the Agency official, as needed, in completing the plan. Farm business plans will be based only on accurate, verifiable information. If the Agency official and the individual cannot reach agreement, on the farm business plan, then the Agency will make loan approval and servicing determinations based on the Agency's separate, revised farm business plan. The individual will have the right to appeal any resulting adverse decision.

(1) Historical information will be used as a guide to evaluate the feasibility of projected farm business plans. Individuals must provide the Agency with their previous 5-year production history, if available. Positive and negative trends, mutually agreed upon changes and improvements, and current input prices, will be taken into consideration when arriving at reasonable projections.

. . . .

(iii) This paragraph applies when an accurate projection cannot be made because the individual's production history in any or all of the previous 5 years has been substantially affected by a disaster that has been declared by the President or designated by the Secretary of Agriculture. This paragraph also applies to those individuals who would have had a qualifying physical or production loss, as defined in § 1945.154(a), from such a disaster, but who were not located in a designated or declared disaster area.

(A) If the individual's disaster years yields are less than the county average yields, county average yields will be used for those years. If county average yields are not available, State average yields will be used.

(B) In calculating a baseline average yield, the individual may exclude the production year with the lowest actual or county average yield, providing the individual's yields were affected by disasters at least 2 of the 5 years.

7 C.F.R. § 1924.56(b)(1).

The Hearing Officer found that Applicants' farm is located in Sioux County, North Dakota, which was included in the disaster declarations for the years 1993 through 1997, and Applicants were eligible to use county average yields and exclude the year with the lowest actual yield or county average yield in accordance with 7 C.F.R. § 1924.56(b)(1)(iii)(A)-(B) (Appeal Determination at 3, 5-6).

Respondent used Applicants' "past record of production and financial management" to determine whether Applicants' farm and home plan was feasible.

Respondent did not use county average yields or exclude the year with the lowest actual yield or county average, as provided in 7 C.F.R. § 1924.56(b)(1)(iii)(A)-(B). (Letter dated June 3, 1998, from Respondent to Applicants.) Therefore, Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified.

APPLICANTS DID NOT FILE A TIMELY OR COMPLETE EAJA APPLICATION

Applicants are required to file their EAJA Application in accordance with 5 U.S.C. § 504 and the EAJA Rules of Practice. The Equal Access to Justice Act requires that a party seeking an award of fees and other expenses shall, within 30 days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under 5 U.S.C. § 504, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party seeking an award must also allege that the position of the agency was not substantially justified. (5 U.S.C. § 504(a)(2).)

The Equal Access to Justice Act requires each agency to establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses (5 U.S.C. § 504(c)(1)). The EAJA Rules of Practice are the uniform procedures for the submission and consideration of the award of fees and other expenses under the Equal Access to Justice Act established by the United States Department of Agriculture.

Section 1.193(a) of the EAJA Rules of Practice (7 C.F.R. § 1.193(a)) provides that an Equal Access to Justice Act application may be filed no later than 30 days after the final disposition of the adversary adjudication. The final disposition of *In re Paul W. Thomas*, Case No. 98000848W, occurred not later than October 26, 1998 (Notice of Conclusion of Appeal). Applicants filed an incomplete EAJA Application on October 19, 1998, and as of the date of the issuance of this Decision and Order, have not filed a complete Equal Access to Justice Act application.

Section 1.190(e) of the EAJA Rules of Practice requires that each Equal Access to Justice Act application must be accompanied by a verification, as follows:

§ 1.190 Contents of application.

. . . .

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It also shall contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

7 C.F.R. § 1.190(e).

Applicants' EAJA Application, filed October 19, 1998, neither contained a written verification nor was accompanied by a written verification. Applicants admit that the verification under oath or affirmation required by 7 C.F.R. § 1.190(e) "may have been overlook [sic]" and state that the National Appeals Division "did not inform [Applicants] that this part of the application was missed" (Applicants' Response).

The National Appeals Division has no obligation to inform Applicants that section 1.190(e) of the EAJA Rules of Practice (7 C.F.R. § 1.190(e)) requires Applicants to include a written verification with their EAJA Application. Moreover, the EAJA Rules of Practice are published in the *Federal Register*; thereby constructively notifying Applicants of the requirement for a written verification.[4]

Applicants attached a written verification to Applicants' Response, which was filed on January 11, 1999, after the 30-day deadline for filing their EAJA Application.

Section 1.192(a)-(c) of the EAJA Rules of Practice requires that each Equal Access to Justice Act application must be accompanied by documentation of fees and expenses for which an Equal Access to Justice Act award is sought and an affidavit, as follows:

§ 1.192 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party,

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[4] *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).

stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c).

Applicants' EAJA Application was not accompanied by an affidavit from their agent, Ms. Patsy Otto. Moreover, the copies of monthly billing statements from Applicants' agent's employer, the North Dakota Agricultural Mediation Service, which accompanied Applicants' EAJA Application, do not include the monthly amounts Applicants were billed for their agent's services.

On January 11, 1999, after the 30-day deadline for filing their EAJA Application, Applicants filed a written statement by Ms. Otto, and copies of monthly billing statements from the North Dakota Agricultural Mediation Service, which include monthly amounts Applicants were billed for services. Ms. Otto's written statement reads in its entirety, as follows:

December 31, 1998

Paul Thomas
Box 31
Cannon Ball, ND 58528

Dear Mr. Thomas;

Enclosed are signed copies of the billings from October 1997 to current November 1998. North Dakota Agriculture Mediation Services charges at a rate of $15 per hour.

It is required by our office to document all calls, office visits, and paper work, which I completed for you on an ongoing basis.

If you need any additional information please let me know.

Sincerely,
/s/
Patsy Otto
AMS:Negotiator

Each copy of the billing statements referenced by Ms. Otto and filed by Applicants on January 11, 1999, states "I hereby certify that the above accurately reflects the hours and expenses incurred on behalf of the Ag. Mediation Service" and the certification is signed by Ms. Otto.

An affidavit is a sworn statement in writing made under oath or on affirmation before a person having authority to administer the oath or affirmation.[5] Neither

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[5]*See generally, e.g.*, Merriam Webster's Collegiate Dictionary 20 (10th ed. 1997):

affidavit . . . *n* . . . a sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer.

The Oxford English Dictionary, vol. I, 216 (2d ed. 1991):

affidavit. . . . A statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof.

Black's Law Dictionary 58 (6th ed. 1990):

Affidavit. . . . A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Bouvier's Law Dictionary 158 (3d ed. 1914):

AFFIDAVIT. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.

See also, e.g., *Egger v. Phillips*, 710 F.2d 292, 311 n.19 (7th Cir.) (stating that a declaration that is not sworn before an officer authorized to administer oaths is, by definition, not an affidavit; the fact that a declarant recites that the statements are made under penalty of perjury does not transform an unsworn statement into an affidavit), *cert. denied*, 464 U.S. 918 (1983); *Amtorg Trading Corp. v.*

(continued...)

Ms. Otto's unsworn written statement nor Ms. Otto's certification on copies of North Dakota Agricultural Mediation Service's monthly billings is an affidavit.[6]

Applicants state that they were unaware of the requirement that their EAJA Application must include an affidavit from their agent, as follows:

> 1. Ms. Halvorson states that I did not submit an Affidavit with my application. I am not an attorney and I tried my best to complete the application with all the appropriate documents. I had my attorney Mr. Arlen Ruff review the application I submitted. Being this was the first application Mr. Ruff or I was submitting I thought we had submitted all the documents necessary for a complete application. I also thought all of the documents I was submitting were truthful. I was unaware that I needed an affidavit for anyone submitting

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[5](...continued)
United States, 71 F.2d 524, 530 (C.C.P.A. 1934) (citing with approval the definition of *affidavit* in Black's Law Dictionary (3d ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 658 (N.D. Ca. 1994) (stating that an affidavit must be confirmed by oath or affirmation); *Adkins v. Mid-America Growers*, 141 F.R.D. 466, 469 (N.D. Ill. 1992) (stating that what separates affidavits from simple statements is the certification; the requirement is not trivial for it subjects the affiant to perjury penalties if falsely made); *In re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, 332 (E.D. Mich. 1948) (citing with approval the definition of *affidavit* in Bouvier's Law Dictionary: a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath or affirmation); *In re Johnston*, 220 F. 218, 220 (S.D. Cal. 1915) (stating that the general definition of the term *affidavit* is a written declaration under oath; therefore, it has been held that, in order for an affidavit to be valid for any purpose, it must be sworn to); *Mitchell v. National Surety Co.*, 206 F. 807, 811 (D. N.M. 1913) (stating that it is a matter inherent in the affidavit that it must be under oath); *Crenshaw v. Miller*, 111 F. 450, 451 (M.D. Ala. 1901) (stating that an affidavit is a voluntary, ex parte statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it); *United States* v. *Glasener*, 81 F. 566, 568 (S.D. Cal. 1897) (stating that the word *affidavit* is defined by Webster to be "a sworn statement in writing"); *Baldin v. Calumet National Bank (In re Baldin)*, 135 B.R. 586, 600 (Bankr. N.D. Ind. 1991) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath or affirmation).

[6]*Cf. Robbins v. United States*, 345 F.2d 930, 932 (9th Cir. 1965) (stating that a statement that is not notarized, but contains a recital that it is made under penalty of perjury is not an affidavit); *Williams v. Pierce County Bd. of Comm'rs*, 267 F.2d 866, 867 (9th Cir. 1959) (per curiam) (stating that a document is not an affidavit if there is no certificate that the affiant took any oath or swore to his statement); *Brady v. Blue Cross and Blue Shield of Texas, Inc.*, 767 F. Supp. 131, 135 (N.D. Tex. 1991) (stating that an acknowledgment is not an affidavit because it contains no jurat).

> information that it was truthful and correct. When I received notice that my application was complete, I felt all of the necessary information was provided which was necessary for the application.

Applicants' Appeal Response.

The EAJA Rules of Practice are published in the *Federal Register*; thereby constructively notifying Applicants of the requirement for an affidavit from their agent.[7] Applicants must comply with the EAJA Rules of Practice. Applicants' contention that they are exempt from the requirements in the EAJA Rules of Practice because they are not attorneys and because the EAJA Application which they filed on October 19, 1998, was the first Equal Access to Justice Act application that Applicants and Applicants' attorney had ever filed, is without merit.

The Hearing Officer found that Applicants' EAJA Application did not include written verification, as required by 7 C.F.R. § 1.190(e), and did not include an affidavit from Applicants' agent, as required by 7 C.F.R. § 1.192(b). Further, the Hearing Officer found that the copies of the billing statements submitted with Applicants' EAJA Application were unsigned, did not reflect who provided the services, and did not show the amounts Applicants were billed for services. (Initial Decision and Order at 3.) Nonetheless, the Hearing Officer concluded "the Applicants [sic] application for fees and expenses are [sic] deemed complete" (Initial Decision and Order at 4).

The Hearing Officer cites two bases for his conclusion that Applicants' EAJA Application is complete. First, the Hearing Officer found that on January 11, 1999, Applicants filed a written verification, as required by 7 C.F.R. § 1.190(e), and signed billing statements indicating the monthly amounts billed to Applicants. I agree with the Hearing Officer that on January 11, 1999, Applicants filed a written verification and signed billing statements showing monthly amounts billed to Applicants by the North Dakota Agricultural Mediation Service. However, I find that Applicants' January 11, 1999, filings do not comply with the requirement in the Equal Access to Justice Act and the EAJA Rules of Practice that an Equal Access to Justice Act application must be filed within 30 days of a final disposition in the adversary adjudication (5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a)).

Some courts allow applicants for awards under the Equal Access to Justice Act

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[7]See note 4.

to supplement timely-filed applications after the 30-day deadline.[8] These courts consider Equal Access to Justice Act applications that are completed by supplementation after the time for filing the application. While Applicants in this proceeding filed an incomplete EAJA Application before the 30-day deadline, Applicants' EAJA application is still incomplete because Applicants have not filed an affidavit from their agent, as required by 7 C.F.R. § 1.192(b). Thus, Applicants' EAJA Application, even as supplemented by their January 11, 1999, filing, remains incomplete and cannot be considered.

Second, the Hearing Officer found that Applicants may have been confused and misled by the EAJA Rules of Practice and the National Appeals Division Rules of Procedure, as follows:

> A review of all applicable regulations pertaining to Equal Access To Justice Applications reveals a lack of clarity and misleading information. Departmental regulations found at 7 CFR 1.180 et seq, advise that the regulations relating to EAJA applications are limited to the listed organizations. The National Appeals Division is not a listed organization. This matter is further confused by the fact that the NAD regulations advise that EAJA is not applicable or available to appellants within the National Appeals Division. The Eighth Circuit Court of Appeals in LANE vs. USDA, 120 F.3d 106 (1997), ruled that EAJA at 5 U.S.C. § 504 was applicable; however, Departmental regulations have not been modified or updated to reflect the current status of the law. This lack of action may have led to confusion concerning what is required in filing an EAJA application.
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> The Agency urges the NAD to take form over substance, overlook confusion caused by inconsistent regulations and take a very restrictive view of what constitutes a timely and complete application. This Division has chosen to follow an approach that recognizes the potential for confusion, takes substance over form and a procedure that provides

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[8]*See, e.g., Bazalo v. West*, 150 F.3d 1380, 1383 (Fed. Cir. 1998) (stating that a party, who alleged in a timely Equal Access to Justice Act application that he was a prevailing party, could supplement his filing after the 30-day time limitation to set forth an explicit statement of his net worth and thereby complete his Equal Access to Justice Act application); *Dunn v. United States*, 775 F.2d 99, 104 (3d Cir. 1985) (stating that so long as a fee-petition is filed within the 30-day period, the court may consider the petition and may, absent prejudice to the government or noncompliance with court orders for timely completion of the fee determination, permit supplementation).

fundamental fairness and due process. Therefore, the Applicants application for fees and expenses are deemed complete.

Initial Decision and Order at 3-4.

Applicants did not conform their EAJA Application to the requirements of the EAJA Rules of Practice, but the record is clear that Applicants were neither confused nor misled, either by the EAJA Rules of Practice or by the National Appeals Division Rules of Procedure. Applicants knew, at least by the date of their first filing in this proceeding, that the EAJA Rules of Practice are applicable to this proceeding.[9]

THE FEES AND EXPENSES CLAIMED BY APPLICANTS ARE NOT ALLOWABLE UNDER THE EQUAL ACCESS TO JUSTICE ACT

Fees and expenses, which may be awarded under the Equal Access to Justice Act, include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (5 U.S.C. § 504(b)(1)(A)).

Applicants requested an award of $83,469 for fees and expenses which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (EAJA Application). Specifically, Applicants contend that they are entitled to an award for five categories of fees and other expenses which they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. First, Applicants contend that they are entitled to an award of $5,130 for professional fees billed by the North Dakota Agricultural Mediation Service (EAJA Application). However, Applicants also allege that the North Dakota Agricultural Mediation Service provided 114 hours of services to Applicants "at the rate of $15 per hour for a total charge of $1,710" (EAJA Application) and admit that the $5,130 listed as professional fees on their EAJA Application is error (Applicants' Response).

The monthly billing statements filed by Applicants on January 11, 1999, establish that the North Dakota Agricultural Mediation Service billed Applicants for 173 hours of professional services at a rate of $15 per hour for a total of $2,595. However, the Hearing Officer found that the adversary proceeding commenced

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[9]*See, e.g.*, Applicants' contention in their EAJA Application that they are eligible for award for expenses based on the criteria in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

when Applicants' loan application was denied by the County Committee, and the Hearing Officer denied Applicants' request for an award of $202.50 billed by the North Dakota Agricultural Mediation Service for professional services rendered in October 1997, prior to the denial of Applicants' loan application by the County Committee. Hence, the Hearing Officer awarded Applicants $2,392.50 based on the monthly billing statements sent to Applicants by the North Dakota Agricultural Mediation Service for 159.5 hours of professional services provided to Applicants during the period November 1997 through November 1998. (Initial Decision and Order at 7.)

Even if I had found that Applicants filed a timely and complete EAJA Application, I would not have awarded Applicants $2,392.50 based on the monthly billing statements filed by Applicants. As an initial matter, the adversary adjudication for which Applicants seek an award began no earlier than June 3, 1998, when Respondent issued the adverse determination which became the subject of the adversary adjudication in question, *In re Paul W. Thomas*, Case No. 98000848W. Therefore, I would have denied Applicants' request for an award of fees billed by the North Dakota Agricultural Mediation Service for services prior to June 3, 1998. Moreover, the North Dakota Agricultural Mediation Service billing statements and Ms. Otto's December 31, 1998, written statement, filed January 11, 1999, do not establish that all of the services rendered by the North Dakota Agricultural Mediation Service during the period June 3, 1998, through November 20, 1998, were provided in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Second, Applicants request an award of $20,614 for the additional interest they contend they will be required to pay to their creditors and suppliers. Third, Applicants request an award of $35,100 because they lost at least 12 bushels of spring wheat per acre because they were unable to fertilize or spray. Fourth, Applicants request an award of $17,625 for lost income on 150 calves that they had planned to purchase and sell. Fifth, Applicants request an award of $5,000 for a forfeited down payment for, and a lost discount on, a drill. Applicants assert that the additional interest payments, the lost spring wheat, the lost income on 150 calves, and the lost down payment for, and discount on, a drill resulted from Respondent's denial of Applicants' loan application. (EAJA Application.)

The Hearing Officer denied Applicants' request for an award for additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill, based on the Hearing Officer's conclusion that an award for these alleged additional interest payments and losses is not permitted under the Equal Access to Justice Act or the EAJA Rules of Practice (Initial Decision and Order at 6-7).

I agree with the Hearing Officer's denial of Applicants' request for an award for alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill. The Equal Access to Justice Act provides that an agency that conducts an adversary adjudication shall award to the prevailing party fees and other expenses incurred in connection with that adversary adjudication, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust (5 U.S.C. § 504(a)(1)). Legislative history applicable to the Equal Access to Justice Act makes clear that the fees and other expenses for which an award may be made under the Equal Access to Justice Act relate only to certain costs of litigation, as follows:

PURPOSE OF THE BILL

> The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. . . .
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> STATEMENT
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> Under present law in the United States, each party is responsible for the payment of his own attorney fees and other expenses incurred during litigation. The "American rule," however, has both common law and statutory exceptions.
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> . . . .

> The bill makes a second significant change in the existing law regarding attorney fees by establishing a general statutory exception for an award of fees against the Government. Under this exception certain parties who prevail in adversary adjudications or civil actions brought by or against the United States will be entitled to attorney fees and related expenses unless the Government action was substantially justified or special circumstances would make an award unjust. . . .
>
> . . . .
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> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

H.R. Rep. No. 96-1418, at 5-6, 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4984, 4988.

The Equal Access to Justice Act does not authorize an award to an applicant for interest expenses, crop losses, lost down payments, and the value of lost opportunities that an applicant may have incurred as a result of an agency's adverse decision that gave rise to an adversary adjudication. Applicants' alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill are not fees and other expenses incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, and cannot be awarded under the Equal Access to Justice Act. Therefore, even if Applicants had filed a timely and complete EAJA Application, I would have denied Applicants' request for an award for their alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W.

2. Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified.

3. Applicants failed to file a timely and complete Equal Access to Justice Act application.

4. Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and lost down payment for, and lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W.

5. Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

6. Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

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

Order

Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, is denied.

In re: PAUL W. THOMAS and LEONA THOMAS.
EAJA-FSA Docket No. 99-0004.
Order Denying Petition for Reconsideration filed August 4, 1999.

Failure to file timely petition for reconsideration.

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

Margit Halvorson Williams, for Respondent.
Applicants, Pro se.
Initial decision issued by Byron Bennes, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a $76,000 emergency loan and Applicants' $175,515 subordination request; (2) Applicants incurred fees and expenses of $83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of $83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer, and on January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture, issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial

Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants $2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On June 15, 1999, I issued a Decision and Order: (1) finding that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) finding that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) finding that Applicants failed to file a timely and complete Equal Access to Justice Act application; (4) finding that Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and forfeited down payment for, and a lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W; (5) finding that Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W; (6) concluding that Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, 98000848W; and (7) denying Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. *In re Paul W. Thomas*, 58 Agric. Dec. ___, slip op. at 26-27 (June 15, 1999).

On June 19, 1999, the Hearing Clerk served Applicants with the Decision and Order.[1] On July 8, 1999, 19 days after the Hearing Clerk served Applicants with the Decision and Order, Applicants filed a letter addressed to the Hearing Clerk requesting reconsideration of the Decision and Order [hereinafter Petition for Reconsideration]. On August 3, 1999, Respondent filed Response to Applicants' Request for Reconsideration, and on August 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the

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[1]See Domestic Return Receipt for Article Number PO93175073 and Domestic Return Receipt for Article Number PO93175074.

June 15, 1999, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Applicants' Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date the Hearing Clerk served the Decision and Order on Applicants, was filed too late, and, accordingly, Applicants' Petition for Reconsideration must be denied.[2]

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[2]*See In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, (continued...)

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

Order

Applicants' Petition for Reconsideration is denied.

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

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: STEPHEN DOUGLAS BOLTON and JANET T. BOLTON.
HPA Docket No. 99-0010.
Decision and Order as to Stephen Douglas Bolton filed June 18, 1999.

Default — Failure to file timely answer — Entering — Ownership — Civil penalty — Disqualification.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing Respondent a $2,000 civil penalty and disqualifying Respondent for 1 year because he entered, for the purpose of showing or exhibiting in a horse show, a horse which was sore. The Judicial Officer held that prohibition on entering in 15 U.S.C. § 1824(2)(B) applies to all persons, including any person who does not own the horse which he or she enters. 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. Application of the default provisions of the Rules of Practice does not deny Respondent due process.

Colleen A. Carroll, 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, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on March 4, 1999.

The Complaint alleges, *inter alia*, that on or about July 2 or 3, 1998, Stephen Douglas Bolton [hereinafter Respondent] entered, for the purpose of showing or exhibiting, a horse known as "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶¶ 3-4).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of

the Rules of Practice, and a service letter on March 13, 1999.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On April 22, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Stephen Douglas Bolton Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. On May 6, 1999, Respondent filed an objection to Complainant's Motion for Default Decision and Proposed Default Decision.

On May 13, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Decision and Order as to Stephen Douglas Bolton Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that on or about July 2 or 3, 1998, Respondent entered, for the purpose of showing or exhibiting, a horse known as "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 2).

On June 3, 1999, Respondent appealed to the Judicial Officer; on June 14, 1999, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order; and on June 16, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

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

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[1]See Domestic Return Receipt for Article Number P 093 141 420.

Applicable Statutory Provisions

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

(a) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse

exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c).

ALJ'S INITIAL DECISION AND ORDER (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file a timely answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact and Conclusion of Law

1. Respondent Stephen Douglas Bolton is an individual whose mailing address is 1940 Clearwater Trail, Carrollton, Texas 75010, and at all times material to this proceeding, was an owner of a horse known as "Extra News Flash."

2. On or about July 2 or 3, 1998, Respondent Stephen Douglas Bolton entered, for the purpose of showing or exhibiting, "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas.

3. On or about July 2 or 3, 1998, Respondent Stephen Douglas Bolton entered "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, for the purpose of showing or exhibiting the horse in the horse show, 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 states in his letter to Joyce A. Dawson, dated June 1, 1999, and filed June 3, 1999 [hereinafter Appeal Petition], that he disagrees with only one aspect of the ALJ's Initial Decision and Order, as follows:

This letter is my appeal to the Department's Judicial Officer in the above referenced proceeding.

I am objecting to the evidence in accordance with Section 1.145 of the Uniform Rules of Practice. I have one (1) objection to the evidence. As required by Section 1.145, this objection was made before the Administrative Law Judge in my Response to the Proposed Decision, dated April 29, 1999.

My objection to the evidence is presented below.

1) I have never been an owner of the horse known as Extra News Flash. I have enclosed a copy of the horse's Certificate of Registration with the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA) to document this fact.

Appeal Pet. (emphasis in original).

The Complaint alleges that:

1. Respondents Stephen Douglas Bolton and Janet T. Bolton . . . at all times mentioned herein, were the owners of the horse known as "Extra News Flash."

Compl. ¶ 1.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on March 13, 1999.[2] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

. . . .

(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

[2]See note 1.

proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent on March 13, 1999, informs Respondent of the consequences of failing to file a timely answer, as follows:

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

Compl. at 2.

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

CERTIFIED RECEIPT REQUESTED

March 5, 1999

Mr. Stephen Douglas Bolton
Ms. Janet T. Bolton
1940 Clearwater Trail
Carrollton, Texas 75010

Dear Sir/Madam:

Subject: In re: Stephen Douglas Bolton and Janet T. Bolton, Respondents
HPA Docket No. 99-0010

Enclosed is a copy of a Complaint, which has been filed with this office under the Horse Protection Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

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

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

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated March 5, 1999, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Stephen Douglas Bolton and Janet T. Bolton (emphasis in original).

Respondent's Answer was required to be filed no later than April 2, 1999. Respondent's first filing in this proceeding is dated April 29, 1999, and was filed on May 6, 1999, 54 days after the Complaint was served on Respondent and 34 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint, including the allegation that at all times mentioned in the Complaint, he was one of the owners of the horse known as "Extra News Flash." Respondent's denial that he was an owner of a horse known as "Extra News Flash" is filed too late to be considered.

Moreover, even if I found that Respondent was never the owner of the horse known as "Extra News Flash," that finding would not constitute a basis for setting aside the ALJ's conclusion that on or about July 2 or 3, 1998, Respondent entered "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) prohibits the entering, for the purposes of showing or exhibiting in any horse show or horse exhibition, of any horse which is sore. The prohibition in section 5(2)(B) of the Horse Protection Act on entering applies to all persons, including persons who do not own the horse that is entered. Thus, even if I found that Respondent was never the owner of the horse known as "Extra News Flash," that finding would not operate as a defense to the allegation that Respondent violated 15 U.S.C. § 1824(2)(B).

Although on rare occasions default decisions have been set aside for good cause

shown or where the complainant did not object,[3] Respondent has shown no basis for setting aside the Initial Decision and Order.[4] The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the complaint

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

[4]*See generally In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding the default decision was properly issued where the respondent failed to file an answer and the respondent is deemed, by his failure to file an answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. §§ 1824(1) and 1824(2)(B)); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision was properly issued where the response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1825(c)), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default decision was properly issued where the 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 and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Jerry Seal*, 39 Agric. Dec. 370 (1980) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824 and section 11.2 of the Horse Protection Regulations (9 C.F.R. § 11.2)).

(7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 54 days after the Hearing Clerk served Respondent with the Complaint and 34 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Initial Decision and Order 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.[5]

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

Order

1. Respondent Stephen Douglas Bolton is assessed a civil penalty of $2,000. The civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

Respondent Stephen Douglas Bolton's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 65 days after service of this

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

Order on Respondent Stephen Douglas Bolton. Respondent Stephen Douglas Bolton shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0010.

2. Respondent Stephen Douglas Bolton is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating[6] in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Stephen Douglas Bolton shall become effective on the 65th day after service of this Order on Respondent Stephen Douglas Bolton.

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[6]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas, or in any area where spectators are not allowed; and (4) financing the participation of others in equine events.

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISIONS

In re: RANDY L. STEPHENS.
DNS Docket No. RD-99-0001.
Decision and Order filed March 29, 1999.

Debarment affirmed – Failure of engineer to fulfill contractual obligations.

Judge Bernstein affirmed Decision to debar Respondent for three years because Respondent, who had contracted to perform engineering services for the Town of Boligee, financed by RUS, a USDA agency formerly known as "FmHA," failed to notify RUS of cost overruns in a timely manner, failed to obtain necessary permits which delayed the project and caused cost overruns, and advised a contractor to submit false claims for payment, all in violation of his contract.

Wally B. Beyer, Debarring Official.
David Oblich, for RD.
William J. Donald III, Tuscaloosa, AL, for Respondent.
Decision and Order issued by Edwin S. Bernstein, 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 which implement a government wide system for nonprocurement debarment and suspension ("Regulations"). The Regulations at 7 C.F.R. § 3017.100(a), state "Executive Order ("E.O.") 12549 provides that to the extent permitted by law, Executive departments and agencies shall participate in a government wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have government wide effect."

On November 18, 1998, Respondent, Randy L. Stephens, filed a timely appeal ("Appeal") of the October 23, 1998, decision of the debarring official, Wally B. Beyer, acting on behalf of Rural Utilities Service ("RUS"), United States Department of Agriculture ("USDA"), which debarred Respondent from participation in government programs for a period of three years ("Debarment Decision"). The bases of the debarment were that Respondent, as an engineer contractor for RUS, failed to notify RUS of cost overruns in a timely manner; failed to obtain required permits; and advised the construction contractor to file false claims.

On December 4, 1998, I entered a ruling respecting procedural requirements

governing this proceeding. Pursuant to that ruling, on December 21, 1998, RUS filed the record of the agency proceeding ("Record"), and on January 5, 1999, RUS filed its Opposition to Respondent's Appeal of Debarment. In a telephone conference on January 13, 1999, both parties agreed, pursuant to Procedural Requirement 10(c), to waive the requirement that the appeal be decided within 90 days of its filing date and agreed that the appeal may be decided on or before April 1, 1999. On January 29, 1999, Respondent filed its Response to Opposition to Respondent's Appeal of Debarment.

Findings of Fact

By Agreement for Engineering Services dated November 15, 1994 ("Agreement") (Record Tab L, Exhibit B) Respondent contracted to perform engineering services for the Town of Boligee, Alabama, in connection with the construction of a sanitary sewer system financed by RUS.[1]

In paragraph 2 of a letter dated April 25, 1997, (Record Tab L, Exhibit D) RUS instructed Respondent to submit a contract change order for increased quantities of items in which there had been overruns and that such change order must also cover the anticipated quantities necessary to finish the project. Paragraph 3 of the letter stated that questions had been raised "whether certain roads can be open cut or if they will have to be bored under." It was not until August 1, 1997, that Respondent submitted a Contract Change Order ("Contract Change Order No. 02") indicating that 30 road bores would be required at a cost in excess of $119,000.00 (Record Tab M).

In a June 19, 1998, letter to the Debarring Official, Respondent admitted that he was advised in February 1997 by the Greene County Engineer that a required permit had not been obtained and that open cutting on any county road, therefore, would not be allowed (Record Tab I).

In a meeting on February 10, 1998, Respondent admitted that he advised the construction contractor to submit a written payment estimate to RUS claiming a greater quantity of one item (sand) than was actually used to cover the cost of another item (pipe). When Respondent was asked at that meeting if he "had knowingly certified to an incorrect payment estimate and had sent it in requesting payment," Respondent nodded his head and said "yes" (Record Tab L, Exhibit P, p. 2).

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[1]RUS is an agency of the United States Department of Agriculture. The water and waste program, administered by Rural Development, a part of RUS, was formerly administered by Farmers Home Administration ("FmHA"). FmHA is in many of the relevant documents.

Paragraph 14 of the Agreement required Respondent to provide for resident construction inspection (Record Tab L, Exhibit B). During an inspection of the project on April 25, 1997, a RUS employee observed that sewer lines were being installed with no resident inspection on the job site. The RUS official was told that the resident inspector refused to continue inspecting the project because he had not been paid (Record Tab L, Exhibit D).

During an inspection of the project on July 29, 1997, the Mayor of the Town of Boligee advised that her signature had been forged on two invoices dated July 3, 1997, and July 24, 1997, for payments to Respondent. The Mayor also stated that her signature was forged on the application for a permit from Greene County (Record Tab L, Exhibit A, p. 2 and Exhibit H).

Conclusion

The decision of the debarring official, debarring Respondent, Randy L. Stephens, for three years is affirmed. The decision was supported by a preponderance of the evidence in the record.

Discussion

In debarment proceedings, the burden of proof is on the agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). "Debarment must be established by a preponderance of the evidence." 7 C.F.R. § 3017.314(c)(1). "Preponderance of the evidence" is defined as "[p]roof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not." 7 C.F.R. § 3017.105(a). The decision of the debarring official may be vacated by the Administrative Law Judge if the judge determines that the decision was: "(1) Not in accordance with the law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion." 7 C.F.R. § 3017.515(a).

Respondent, Randy L. Stephens and Associates, Inc., contracted to perform engineering services for the Town of Boligee as described in their Agreement dated November 15, 1994. These services involved the design and monitoring of construction in connection with the installation of a sanitary sewer system for the town financed by the RUS, an USDA agency formerly known as Farmers Home Administration, or "FmHA."

RUS based its debarment of Respondent upon three grounds:

1. That Respondent failed to notify RUS officials of cost overruns in a timely

manner. The cost overruns occurred for three months before Respondent notified RUS and the overruns placed the project at 20 percent over budget.

2. That Respondent failed to obtain required permits from Greene County. Respondent ordered the contractor to discontinue work until the permits were obtained. This caused $119,080. in cost overruns.

3. That Respondent advised the construction contractor to submit false claims for payment for quantities of material that had not been used on the project.

Respondent's arguments in response to these alleged grounds are contained in its Appeal and in its Response to Opposition to Respondent's Appeal of Debarment, filed January 29, 1999 ("Response"). These arguments can be summarized as follows:

1. With respect to the contention that Respondent did not notify RUS officials of change orders over a three-month period which resulted in cost overruns that placed the project at 20 percent over budget, Respondent did not deny that he failed to notify RUS officials of these cost overruns during this three-month, period and that the overruns placed the project at 20 percent over budget. However, Respondent contended that he did not "willfully or significantly fail to notify RUS officials in a timely manner given the unusually heavy rains encountered during the project, the fact that the 20% increase did not occur over a three-month period as alleged but was extended out for the life of the project and other circumstances" (Response, p. 2).

2. With respect to the contention that Respondent's failure to obtain the necessary permits caused the project to be shut down and caused cost overruns of $119,080., Respondent did not deny that he failed to obtain the necessary permits but argued that RUS also was to blame for this. He stated, "It was overlooked by all concerned that the County permit had not been received. . . . It was overlooked by RECD officials and by me." He contended that it was the lending agency's responsibility to ascertain that permits were in hand (Appeal, p. 3). Further, Respondent denied that this effectively shut the contractor down. However, in the same section of its argument, Respondent acknowledged that, although its contract was dated November 15, 1994, and it allegedly furnished the Greene County Engineer's office with plans on the project in April 1995 and permits were obtained for all agencies except Greene County by October 1995, construction did not begin until September 1996 (Appeal, p. 3).

3. With respect to the contention that Respondent advised the construction contractor to submit false claims for material that had not been used on the project, Respondent stated that "it is common practice in the engineering and construction industry that when there is an underrun on one particular item and an overrun on

another particular item to substitute the item with the surplus quantities for the item with the shortage. The dollar amount of the work performed does not change by on (sic) cent" (Appeal, p. 4). He reiterated this argument in his Response as follows: "Additionally, Respondent never advised the contractor to substitute items. Respondent was asked by the contractor if he could do so since there was an 'underrun' in one item and an 'overrun' in another item." Respondent, thus, admitted authorizing this false invoicing; however, he argued that this is a common practice in the engineering and construction industry and that the total price was not affected (Response, p. 3; Appeal, p. 4)..

In RUS' Opposition to Respondent's Appeal of Debarment ("Opposition"), it raised two additional arguments that were not included in the Debarment Decision: (1) That Respondent failed to provide for inspection because Respondent failed to notify RUS that the resident inspector refused to inspect because he had not been paid and (2) that the Mayor of Boligee advised that her signature had been forged on two invoices that Respondent had submitted for payment as well as on an application for a permit from Greene County. Since these were not set forth as grounds for debarment in the Debarment Decision, I agree with Respondent that it would be improper to consider these charges at this time. Furthermore, there is no evidence in the record that Respondent forged the Mayor's signature.

However, with respect to the three grounds set forth in the Debarment Decision, I find that Respondent committed the acts alleged and that they violate the parties' Agreement. Paragraph 15 of the Agreement states, "The ENGINEER will cooperate and work closely with FmHA representatives." In failing to notify RUS officials of changes ordered over a three-month period that resulted in cost overruns which placed the project at 20 percent over budget, Respondent failed to comply with this express contractual duty. Paragraph 17 of the Agreement states, "The ENGINEER will prepare necessary Contract change orders for approval of the OWNER, FmHA, and others on a timely basis." Respondent also clearly failed to comply with this express requirement of the Agreement.

Respondent also violated his obligations under the Agreement with respect to the failure to obtain permits from Greene County. It is not clear that this was Respondent's obligation. RUS has not cited any authority for that contention. However, Respondent has admitted that he was aware of delays in obtaining such permits for a substantial period of time during which Respondent violated Paragraph 15 of the Agreement by failing to communicate this information to RUS.

Finally, with respect to the allegation that Respondent advised the construction contractor to submit false claims, Respondent has not denied that he advised the contractor to submit false claims but argues in his defense that "overruns" were offset by "underruns" and that doing this was a common practice in the engineering

and construction industry. Respondent has submitted no evidence that this was a common practice and, in any event, if he wished to authorize such offsetting, he had an obligation to inform RUS of this practice. Thus, in advising the construction contractor to submit false claims without so informing RUS, Respondent violated his contractual obligation to RUS.

Respondent also argued:

> The stated reasons for debarment do not rise to the level of "willful failure to perform in accordance with the terms of a public agreement" required under 7 C.F.R. § 3017.305(b)(1), or "any other cause so serious or compelling a nature that it affects the present responsibility of a person" required under 7 C.F.R. § 3017.305(d). At most, the conduct charged to Respondent represents simple inadvertence, mistake, negligence or nonperformance of contractual duties for which extenuating or mitigating circumstances exist.

(Response, pp. 1-2)

I disagree. Respondent's actions clearly were willful. Willfulness in USDA and Administrative Procedure Act proceedings has long been defined as doing an act which is prohibited and doing it intentionally irrespective of evil motive or reliance on erroneous advice or acting with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-188 (1973); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); and *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

Thus, Respondent's acts, which it concedes may constitute "inadvertence," "negligence," or "nonperformance of contractual duties" do constitute willful failures to perform and, in the case of advising the construction contractor to submit false claims, rise to intentional acts with intent to falsify claims.

In addition, Respondent's actions, which show careless disregard of his responsibilities, at best, also constitute actions so serious and compelling as to effect Respondent's present responsibility to perform as an engineering contractor for the United States Government.

Order

1. The three-year debarment of Respondent, Randy L. Stephens, is affirmed.
2. This Order shall take effect immediately. This Decision and Order is final and not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

[This Decision and Order became final March 29, 1999.--Editor]

In re: BALBO CONSTRUCTION, INC., and GERARD CASTOR, PRESIDENT.
DNS RHS Docket No. 99-0001.
Decision and Order filed April 29, 1999.

Nonprocurement debarment--False contract quote--Failure to follow the terms of the construction contract--Debarment affirmed.

Administrative Law Judge Dorothea A. Baker, affirmed the decision of the debarring official that the Corporation (Balbo Construction, Inc.) of which Mr. Castor was the President had willfully committed irregularities which seriously reflected on the propriety of further dealings between it and the Federal Government, for failure to follow Agency's regulations, including but not limited to, failure to fulfill the terms of a construction contract on rural housing financed by the Rural Housing Service.

Jan E. Shadburn, Debarring Official.
Donald M. McAmis, for RD.
James M. Derr, St, Thomas, Virgin Islands, for Appellants-Respondents.
Decision and Order issued by Dorothea A. Baker, 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. Part 3017, being the regulations which implement a government-wide system for nonprocurement debarment and suspension.

The regulations at 7 C.F.R. § 3017.100(a), implement Executive Order No. 12549, which requires, to the extent permitted by law, Executive Department and Agencies to participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one Agency shall have government-wide effect.

By letter dated June 25, 1998, Mr. Gerard Castor, President of Balbo

Construction, Inc. was advised, among other things, that the Rural Housing Service (RHS) was proposing that he as an individual be debarred for a period of three years. Such action was indicated to be based on evidence that the Corporation (Balbo Construction, Inc.) of which Mr. Castor was the President, had committed irregularities which seriously reflected on the propriety of further dealings between it and the Federal Government. More specifically, debarment was proposed as a result of its failure to follow Agency's regulations, including but not limited to, failure to fulfill the terms of a construction contract on rural housing financed by the Rural Housing Service. A copy of the referenced contract was enclosed. The effected property belonged to a Miss Jerain Fleming. As President, the Corporation's actions were imputed to Mr. Castor. 7 C.F.R. § 3017.325.

Debarment was based on the following grounds: violations of the terms of a public agreement or transaction so serious as to affect the integrity of an Agency program, such as (1) willful failure to perform in accordance with the terms of one or more public agreements or transactions; (2) willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction; and (3) any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

More specifically, it was indicated that noncompliance was evidenced by the Corporation's failure to follow Agency's regulations under the construction contract for rural housing financed by Rural Housing Service. The Corporation entered into a construction contract on April 3, 1996, to build a home for Miss Jerain Fleming, to be completed in 180 days at a cost of $75,000.00. The Corporation and Mr. Castor were notified in writing on August 6, 1996, to proceed in accordance with the terms of that letter, and the construction contract. Pursuant to the general conditions paragraph III., Completion of Work, the Corporation refused and failed to complete the work within the time specified in the contract and as of the date of the letter, June 25, 1998, had yet to complete the work. The Appellants-Respondents were notified that they had the opportunity to contest the proposed debarment within thirty days of receipt of the Notice of Proposed Debarment. No response was received from the Appellants-Respondents until after August 13, 1998, more than thirteen days after the period for response had expired.

The Appellants-Respondents were given several additional opportunities to meet with officials of Complainant, but never took advantage of these opportunities. For instance, they were offered an opportunity to present additional information and to meet with officials of the Rural Housing Service on September 4, 1998. The Appellants-Respondents were given until November 30, 1998 to contact officials to set up such a meeting in response to Appellants'-Respondents' request for an informal meeting. No responses from Appellants-

Respondents were ever received. On January 13, 1999, the Rural Housing Service debarred Appellant-Respondent-Castor, as an individual, and so notified him. The reasons of the debarment were the same as set forth in the Notice of Proposed Debarment. Appellant-Respondent-Castor was debarred for a period of three years, effective June 25, 1998, through June 25, 2001. It is the appeal from that debarment notice which is at issue in this proceeding.

Appellants'-Respondents' appeal was filed with the Hearing Clerk on February 12, 1999. Briefly summarized, the grounds set forth by the Appellants-Respondents in their Appeal Petition are that the suspending and debarring officials decision is not supported by the facts and, therefore, failed to comply with substantive and procedural due process requirements. Also, it is contended that the contract at issue herein contained adequate sanction for nonperformance and debarment should not be considered an appropriate sanction for any alleged failure to perform thereunder.

A review of the administrative file indicates that the debarment decision was in accordance with law; was based on the applicable standards of evidence and, was not arbitrary, capricious or an abuse of discretion.

Findings of Fact

1. Appellant-Respondent-Gerard Castor is President of Balbo Construction, Inc. Jurisdiction over this matter is conferred by 7 C.F.R. § 3017.515.

2. The contract entered into by Appellant-Respondent with Fleming was dated April 3, 1996.

3. The contract in question specifically provided in Clause A that all work was to comply with the FmHA and Virgin Islands' adopted building codes and cited specifically FmHA Instruction 1924, Exhibit D.

4. The Virgin Islands and FmHA's Building Codes were incorporated by reference and attached to the contract signed by Appellant-Respondent.

5. The contract specified in Clause A that construction would be completed at the agreed upon price.

6. The contract specified in Clause B that construction would be completed within 180 days of notification to begin construction.

7. Appellant-Respondent was given notice to begin construction on August 6, 1996.

8. Construction of the dwelling was still not complete on July 16, 1997, when Appellant-Respondent was so notified.

9. The construction-contract period for construction was extended beyond the 180-day period for 90-additional days on July 30, 1997.

10. The construction-contract period for construction was extended a second time on September 29, 1997 for an additional twenty-one days to October 30, 1997, the scheduled completion date of the dwelling.

11. A letter from Fleming to Appellant-Respondent, dated October 2, 1997, indicated that during a September 21, 1997 meeting Appellant-Respondent indicated to Fleming that an additional $15,680.00 (or an additional 21% above the contract price) would be necessary before Appellant-Respondent would agree to complete the dwelling.

12. On November 24, 1997, the dwelling was still only ninety percent complete.

13. On December 30, 1997, Appellant-Respondent filed a lien notice against the dwelling property in the amount of $33,398.48.

14. On June 25, 1998, debarring official Jan E. Shadburn, (Complainant) sent Appellant-Respondent a Notice of Proposed Debarment.

15. No response was received from Appellant-Respondent until after August 13, 1998, more than thirteen days after the period for response had expired.

16. Complainant offered Appellant-Respondent an opportunity to present additional information and to meet with officials of Complainant on September 4, 1998.

17. Appellant-Respondent was given until November 30, 1998 to contact officials of Complainant, to set up a meeting in response to Appellant's-Respondent's request for an informal meeting.

18. No response was ever received.

19. On January 13, 1999, Complainant debarred Appellant-Respondent-Gerard Castor, and so notified him.

20. On February 12, 1999, the Appellants-Respondents filed an appeal.

21. The Appellant's-Respondent's contention that a change in the status of Virgin Islands' Building Code led directly to the issuance of the debarment order from which an appeal was taken is without merit.

Discussion and Conclusions

In the discussion which follows Balbo Construction, Inc., and Gerard Castor will be referred to as Respondent[s], although this is an appeal procedure and the afore-named are Appellants.

The Respondent sets forth several grounds on appeal for overturning the debarment, among which was that the debarment lacked substantive due process. Respondent alleges, among other things, that failure to disclose all the grounds for a debarment presents a paradigm case of denial of both procedural and substantive

due process. Respondent further argues that debarment is not suppose to follow automatically from the proof of a cause for debarment. These contentions lack merit. Both the Notice of Proposed Debarment dated June 25, 1998, and the Notice of Debarment dated January 13, 1999, clearly set forth the basis of the debarment, namely, "violation of the terms of a public agreement or transaction so serious as to affect the integrity of an Agency program, such as: [1] wilful failure to perform in accordance with the terms of one or more public agreements or transactions, 7 C.F.R. § 3017.305(b)(1); [2] willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, 7 C.F.R. § 3017.305(b)(3); and [3] any other cause of so serious or compelling a nature that it affect the present responsibility of a person, 7 C.F.R. § 3017.305(d)." Clearly, Respondent was notified in writing of the proposed debarment and the three proposed causes of debarment are clearly set out in the notice, as required by 7 C.F.R. § 3017.312(c). Specific actions and inactions by Respondent are clearly identified with sufficient specificity as to leave no doubt as to the conduct or transactions upon which the debarment is based. In addition, pursuant to the requirement of 7 C.F.R. § 3017.313, Respondent was given an opportunity to submit opposition to the proposed debarment, as well as several additional opportunities to meet with officials of Complainant. Respondent never took advantage of these opportunities.

Appellant was afforded procedural due process as specified under the debarment regulations found at 7 C.F.R. Part 3017.

The additional contention of Respondent, that the procedure was defective because no written Findings of Fact were made, is without merit. Sufficient information was included in the final debarment to constitute Findings of Fact. There is no requirement that the Findings of Fact be separate from the debarment notice. Nor is there any requirement that they be specifically labeled "Findings of Fact."

In debarment proceedings, the burden of proof is on the Agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). Debarment must be established by a preponderance of the evidence. 7 C.F.R. § 3017.314(c)(1). Preponderance of the evidence is defined as proof by information that compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. 7 C.F.R. § 3017.105(a). In the subject case, Complainant's decision to debar Respondent is established by a preponderance of the evidence as required by the regulations.

Respondent alleges that the reason for the price increase in the construction of Fleming's dwelling was due to changes in wind-loading requirements, which took place during and after formation of the contract and construction startup, in the

Virgin Islands' Building Code. However, Respondent has furnished no reliable evidence that such a situation had occurred even though Respondent was given several opportunities to do so, to the Complainant, prior to the issuance of the debarment notice.

The construction contract incorporates by reference the Virgin Islands' Building Code. Two sections of the Virgin Islands' Building Code are pertinent to Respondent's allegations: "Paragraph (h) of section 292; and paragraph (h) of section 311, both of which incorporate certain sections of the Council of American Building Officials One and Two Family Dwelling Code, and subsequent amendments thereto."

A review thereof reveals no changes to the 110 mph wind-load requirement either before the date of the construction contract, nor at any time during construction, nor thereafter. Furthermore, the 1994 Uniform Building Code, in effect prior to the last amendment to the Virgin Islands' Building Code also shows a wind-load requirement of 110 mph.

A change in building code requirements for construction would have required a new set of plans, drawings and specifications for the dwelling in question. In order to assure that the changes conformed to applicable standards, some type of competent, license professional must have reviewed and certified to the plans and modifications conformity with the applicable development standard.

Section 1924.5(f) of FmHA Instruction 1924-A recognizes the necessity of such an approach and requires it. The administrative record demonstrates that no change in the plans, drawings or specifications had ever been requested nor submitted by the Respondent.

Respondent relies upon a document, Construction Information for a Stronger Home, which was for guidance only and did not purport to be an official version of the Virgin Islands' Building Code. It does not show officially any changes to building requirements. It simply states that it is what amounts to a guide which has no official effect. The document is dated "Feb. 1996" which is prior to the formation of the construction contract signed by Respondent. As pointed out by Complainant, the requirement to build to 110 mph wind-load requirements has been in effect since the 1994 Uniform Building Code. Respondent has not shown any change to the Virgin Islands' Building Code in anything it has submitted.

Since the Uniform Building Code had the 110 mph wind-load requirements as early as 1994, Respondent had to be or, as a professional builder, should have been aware of the 110 mph wind-load requirements well prior to entering into the construction contract; and even if the document supplied by Respondent were a part of the official Virgin Island's Code, Respondent had ample opportunity to be aware of its contents prior to signing the construction contract. Respondent agreed

to build the dwelling for the sum specified in the contract. It waited for six months after it signed the contract before it even made mention about not being able to build the house for the sum that it agreed to. Respondent should bear the responsibility for its own actions or inaction.

Even applying the principles that debarment is discretionary and that mitigating factors should be considered, the Appellant had not shown that there is any basis in such principles to alter the determination of debarment.

The administrative record indicates that the construction contract was not completed within the specified terms and extensions granted. On November 24, 1997, the end date of the final extension, the dwelling was still only ninety percent complete. No certificate of occupancy was issued until June 11, 1998, six months after the final extension. There has been no demonstration of a code change which would have required an increase in the contract price. There was no amendment nor change order to the contract in this regard.

Rather than build a dwelling for the agreed upon contract price, Respondent admits in its August 13, 1998 contest of proposed debarment and in its appeal of the debarment, that it procured an arrangement on the side, without notification to the Complainant, with the father of the prospective dwelling owner to provide sweat equity. There is no reliable indication that the Complainant had knowledge of this part of the arrangement. The administrative record shows that checks were issued to the Respondent, not Fleming's father, for work produced. While Complainant did some inspections, there is nothing inherent in an inspection which would give rise to knowledge on the part of Complainant of the arrangements between Respondent and Fleming's father. Even with such an arrangement, the administrative record shows that Fleming had to absorb costs in excess of $11,800.00 over and above the contract cost and forego the completion of the driveway.

Complainant has a valid interest in assuring the elimination of a serious housing shortage, including substandard and inadequate housing, and assuring the realization of a decent home and suitable living environment for every American family. See 42 U.S.C. § 1441. This goal is achieved through the rural housing programs of the Rural Housing Service, formally the FmHA as provided in 42 U.S.C. § 1471 *et seq.*, including its single family rural housing loan programs. In order to run a successful loan program, loans must be able to be repaid. Respondent's ratios are setup based upon the loan amount, which is based on the construction contract price. Significant variations in the construction contract, such as those borne out by the administrative record herein, strike at the heart of a successful nation-wide loan program. In the subject case, the increased cost was not justified based upon any evidence submitted by Respondent. It was the

experience of officials of Complainant that a house of this type built by Respondent in the Virgin Islands during that period of time could have been built for $75,000.00. The additional cost which have to be borne by Fleming affects significantly her repayment ability. Respondent's failure to follow the terms of the construction contract and failure to secure Complainant's concurrence on any of these contract variations, as required by the regulations, show a cavalier attitude towards both Fleming and the Agency, as well as the terms of the construction contract which incorporated 7 C.F.R. Part 1924 by reference.

As provided in 7 C.F.R. § 3017.115(b) debarment is used in the public interest and for the Government's protection. Respondent clearly violated the terms of the construction contract. The violation was willful. Willfulness in the United States Department of Agriculture and Administrative Procedure Act's proceedings has long been defined as doing an Act which is prohibited and doing it intentionally irrespective of evil motive or reliance on erroneous advice or acting with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182 (1973); *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

The failure of the Respondent to properly perform his contractual obligations indicates a lack of present responsibility and his failure to live up to the terms of the contract, at the very least, shows incompetence. The debarring official found that the Respondent was irresponsible and in order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons.

Respondent mistakenly uses the term sanction in his argument as a penalty for noncompliance with a requirement of the law and argues that the contracts themselves contain adequate sanctions for nonperformance. The Respondent is mistaken in this regard. The debarment imposed is to protect the Government loan program from having to do business with building contractors such as Respondent who fail to follow regulations and fail to honor their contractual obligations. What Respondent has done is to refuse to complete a public contract for no good cause. Respondent has obtained additional monies for the dwelling it contracted to build at a certain price by waiting until the house was almost completed, by negotiating a different construction contract on the side, and then profiting beyond the amount agreed upon by refusing to finish the project without additional reimbursement.

Based upon the administrative record and after considering all of the contentions put forth by the Respondent in its appeal, the debarment imposed upon the Respondent is supported by the evidence, is reasonable and is warranted. As set forth in the Notice of Debarment, dated January 13, 1999, the debarment is

"* * * effective June 25, 1998 through June 25, 2001."

Order

The three-year debarment of Respondent Gerard Castor, is affirmed.

This Order shall take effect immediately.

This Decision and Order are final and are not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

[This Decision and Order are final and not appealable within this Department.-Editor]

[This Decision and Order became final April 29, 1999.-Editor]

In re: AVTAR S. GILL.
DNS-RMA Docket No. 99-0001.
Decision and Order filed June 4, 1999.

Nonprocurement debarment and suspension--False statements--Filing false crop insurance claims--Mail fraud--Suspension affirmed.

Administrative Law Judge Dorothea A. Baker affirmed the decision of the suspending official that Respondent be suspended for a period of twelve months from participating in the Federal Crop Insurance Program and all other governmental programs. He was advised that the suspension may be shorten or extended in accordance with 7 C.F.R. Part 3017. The decision was based on facts including those that Respondent had been indicted for making false statements, filing false crop insurance claims and engaging in mail fraud. Specifically, the indictment indicated that Respondent together with two other individuals, committed conspiracy and wire fraud by submitting false claims under the Federal Crop Insurance Program for the 1994 Raisin Crop Year and was charged with seven counts of making false statements to the Federal Crop Insurance Corporation.

Kenneth D. Ackerman, Suspension Official.
Donald M. McAmis, for RD.
Anthony P. Capozzi, Fresno, California, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This Decision and Order are issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. Part 3017,

being the regulations which implement a government-wide system for nonprocurement debarment and suspension.

The regulations at 7 C.F.R. § 3017.100(a), implement Executive Order No. 12549, which requires, to the extent permitted by law, Executive Department and Agencies to participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one Agency shall have government-wide effect.

By letter dated October 26, 1998, Mr. Gill ("Respondent") was informed that pursuant to 7 C.F.R. Part 3017, the Federal Crop Insurance Corporation (FCIC) was initiating proceedings to suspend him for a period of twelve months beginning with the date of the letter [October 26, 1998] from participating in the Federal Crop Insurance Program and all other government programs. He was further advised "This suspension may be shorten or extended in accordance with 7 C.F.R. Part 3017. Suspension is being imposed to protect the interest of the Government."

The Agency indicated that it had "adequate evidence" for making this suspension because the Respondent had been indicted for making false statements, filing false crop insurance claims and engaging in mail fraud. Specifically, it was pointed out, that together with two other individuals it was alleged in the indictment that he committed conspiracy and wire fraud by submitting false claims under the Federal Crop Insurance Program for the 1994 Raisin Crop Year. Further it was noted that the Respondent was charged with seven counts of making false statements to the Federal Crop Insurance Corporation.

These actions were indicated to be cause for suspension under 7 C.F.R. § 3017.405 because they furnished adequate evidence that a case for debarment might exist under 7 C.F.R. § 3017.305 and furnished a reason to suspect commission of an offense under 7 C.F.R. § 3017.305(a). The suspension was immediate and was indicated to be necessary to protect a public interest.

The same letter, dated October 26, 1998, advised the Respondent, among other things:

> Within 30 days after receipt of this notice of suspension, you have a right to submit in person, in writing, or through a representative, information and argument in opposition to this proposed action including any additional specific information that raises a genuine dispute over the facts material to your suspension.

Respondent was further advised that within forty-five days after receipt of any

information and arguments submitted by him, the suspending official would make a decision concerning the suspension and that the suspension would remain in effect pending the completion of the FCIC's consideration of any evidence submitted by Respondent.

By letter dated December 2, 1998, Respondent, through counsel, indicated, among other things:

> "Additional time is requested in which to submit information and argument in opposition to said suspension.
>
> Would you please contact this office so that we may discuss the process involved herein."

Said letter was directed to Kenneth D. Ackerman, suspending official.

By letter of January 19, 1999, accompanied by a declaration of Respondent, the Respondent objected to the notice of suspension and submitted detailed reasons controverting the charges of the indictment as well as indication he had entered a not guilty plea to any and all charges alleged in the indictment in Case No. CRF-98-5339. Respondent contended that the mere allegations set out in the indictment are not proof of any fact, and that to base a suspension merely on an indictment returned in a Federal criminal case is arbitrary and capricious in that it did not allow Respondent to present any evidence prior to the suspension. Accordingly, it was concluded by Respondent that the action of the Agency in suspending Respondent was arbitrary and capricious and a violation of his constitutional rights. In addition, it was requested that the Department of Agriculture Risk Management Agency, be required to present evidence as a basis for the indictment or present evidence as a basis for the suspension of Respondent's participation in the Federal Crop Insurance Program. The declaration accompanying said letter sets forth in considerable detail the basis of Respondent's denials.

It was in response thereto that the suspending official addressed a letter dated March 4, 1999, to Respondent wherein it was indicated:

> "We receive your letter dated January 19, 1999, in opposition to the suspension action initiated against Mr. Avtar S. Gill (Mr. Gill) by the Federal Crop Insurance Corporation (FCIC) dated October 26, 1998. We have determined that did not raise a genuine dispute as to the facts material to Mr. Gill's suspension, nor did you present any information which would warrant reversing our suspension action. Therefore, your request that the suspension action initiated against Mr. Gill be terminated immediately

is denied.

Pursuant to 7 C.F.R. § 3017.405(b), indictments shall constitute adequate evidence for purposes of suspension actions. Adequate evidence of a debarrable offense requires immediate action to protect the public interest.

Respondent was given thirty days from the receipt of the March 4, 1999 letter to appeal that decision, which he did by "Notice of Appeal" filed with the Hearing Clerk on March 31, 1999.

By letter dated April 15, 1999, addressed to the Respondent, it was indicated that the debarring official would have ten days from the date of that letter to file a response in opposition to the appeal.

On April 16, 1999, there was filed "Complainant's Response in Opposition to Respondent's Appeal Petition" wherein the Complainant indicated that it believed the suspending official's determination should be affirmed premised upon the administrative record and the fact that Complainant followed the government-wide debarment and suspension regulations found at 7 C.F.R. Part 3017. It was set forth therein, among other things, that: "The Administrative Record shows conclusively that Complainant has afforded Respondent prompt opportunity to convince Complainant that its decision was in error and afforded Respondent additional requested time to make such arguments without any corresponding response from Respondent which delineate any cogent reason not to have imposed the suspension."

The correctness of the suspension must take into consideration whether or not the decision of the debarring official was not in accordance with law, not based on the applicable standard of evidence, or was arbitrary and capricious and an abuse of discretion. We have found no such infirmities with respect to the subject suspension.

It is provided in 7 C.F.R. § 3017.405 that suspension may be imposed upon adequate evidence that a cause for debarment exists and "indictment shall constitute adequate evidence for the purposes of suspension actions." (Emphasis added). Complainant maintains that suspension was premised upon the indictment and that the decision was neither arbitrary nor capricious nor an abuse of discretion.

Respondent was granted an extension of time within which to respond to Complainant's contentions which he did by document (Respondent's Reply) field May 14, 1999. Therein, Respondent submits that he has been denied due process of law by refusing to provide him with an evidentiary hearing pertaining to his suspension; that Respondent was never told what specific facts he should attempt to dispute; and that the Respondent "put in issue" the facts relating to and

supporting the indictment. More specifically, Respondent states that the Department of Agriculture, when it suspended Respondent on the basis of the subject indictment, engaged in a permissible action. However, the Respondent indicates, among other things: "* * *what is not permissible and a violation of Respondent's due process rights is to continue this suspension without affording the Respondent the opportunity to refute the bare allegations of the indictment. The indictment is simply the description of the charges made by the Government against the Respondent; it is not evidence of anything * * *." By document filed May 10, 1999, Complainant filed a Motion for Extension of Time in which to file a reply. Complainant requested an extension of time to June 4, 1999 within which to file any response necessary to Respondent's reply. This request was granted.

The Complainant filed its Reply to Respondent's Reply on May 25, 1999.

Findings of Fact

1. Respondent, along with others was indicted in the United States District Court for the Eastern District of California in Case No. CRF-98-5339 on or about October 1, 1998 (The document attached as part of the administrative record does not show a clear date stamp. for violations of 18 U.S.C. §§ 2, 371, 1014 and 1343 for conspiracy to make false statements and to commit wire fraud and for aiding and abetting wire fraud.

2. By letter dated October 26, 1998, Complainant suspended Respondent pursuant to the United States Department of Agriculture's nonprocurement suspension regulations at 7 C.F.R. Part 3017.

3. By letter dated January 19, 1999, Respondent opposed the suspension.

4. By letter dated March 4, 1999, Complainant notified Respondent that it had determined that Respondent did not raise a genuine issue as to the facts material to Mr. Gill's suspension nor did "... [Respondent] present any information which would warrant reversing our suspension action. Therefore, your request that the suspension action initiated * * * be terminated immediately is denied."

5. By letter dated March 16, 1999, Respondent appealed the suspension.

6. Among other things, the suspension prohibits Respondent from obtaining Federal Crop Insurance on crops in which he has an interest, and from selling, servicing, adjusting, or acting in any capacity relating to any crop insurance policy, insured or reinsured by the Federal Crop Insurance Corporation.

7. The sole basis for the suspension was the fact that Respondent was indicted.

8. The indictment of an individual constitutes a finding by a Grand Jury that probable cause exists to believe that the indicted individual committed a

felony.

9. The regulations provided that indictment shall constitute adequate evidence for purposes of suspension actions.

10. The suspension is a temporary suspension and pursuant to government-wide debarment and suspension regulations (7 C.F.R.§ 3017.415) must be revisited within one year of the suspension, if not sooner.

Conclusions

In debarment proceedings, the burden of proof is on the Agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). Debarment must be established by a preponderance of the evidence. 7 C.F.R. § 3017.314(c)(1). Preponderance of the evidence is defined as proof by information that compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. In the subject case, Complainant's decision to debar Respondent is established by a preponderance of the evidence as required by the regulations.

There was articulated a rational connection between the fact of indictment and the choice made namely, suspension in the public interest. The standard for the subject suspension is enunciated in 7 C.F.R. § 3017.410 in that the suspension must not be groundless and adequate evidence is required. An indictment constitutes adequate evidence. It would be inappropriate in this proceeding to "second guess" a Grand Jury and to try to determine whether there was probable cause for the indictment. Only the Grand Jury and the Assistant U.S. Attorney know what evidence the Grand Jury had before it. Complainant took prompt action which balanced the threat to the individual verses the threat to the public as set forth by the Supreme Court in *Federal Deposit Insurance Corporation v. Mallen et al.*, 486 U.S. 230, 243 (1988).

The suspension in the subject case is for a specific, temporary period of time only. Within the one-year period, the suspension must either be revisited and renewed or terminated. 7 C.F.R. § 3017.415(b).

Order

Based upon the record as a whole, the suspension of Respondent Avtar S. Gill is affirmed.

This Order shall take effect immediately.

This Decision and Order are final and are not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

The Hearing Clerk shall serve copies of this Decision and Order upon the

parties.

[This Decision and Order became final June 4, 1999.-Editor]

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: MERALDA MILLER.
P.Q. Docket No. 98-0013.
Decision and Order filed February 24, 1999.

Bringing fresh untreated Mangoes into United States from Jamaica prohibited - Civil penalty imposed.

Judge Bernstein imposed a civil penalty of $1,000, upon Respondent for importing fresh Mangoes into the United States from Jamaica which had not been treated in accordance with the applicable regulations.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This administrative proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) ("the Act"), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") on April 1, 1998. The Complaint alleges that Respondent violated these acts and the regulations promulgated under the acts (7 C.F.R. § 319.56 *et seq.*). Respondent filed a timely Answer to the Complaint on May 19, 1998. On November 6, 1998, I presided over a hearing in this matter. James D. Holt, Office of the General Counsel, United States Department of Agriculture ("USDA") appeared for Complainant. Respondent appeared *pro se*.

Complainant filed post-hearing proposed findings of fact, proposed conclusions of law, a proposed order and a brief on December 18, 1998. Respondent filed no post-hearing submission. The proposed findings of fact, conclusions of law, and both parties' arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the Record. Complainant's exhibits are referred to as "CX" and the hearing transcript is referred to as "Tr."

Findings of Fact

1. Respondent, Meralda Miller, resides at 3485 Fenton Avenue, Bronx, New York 10469.

2. On May 29, 1997, at John F. Kennedy International Airport, New York, Respondent imported mangoes from Jamaica into the United States without a permit.

3. On May 29, 1997, at John F. Kennedy International Airport, New York, Respondent imported mangoes from Jamaica into the United States that were fresh and had not been treated to destroy insects.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. Respondent violated the Plant Quarantine Act (7 U.S.C. §§ 151-167); and the regulations promulgated (7 C.F.R. §§ 319.56-2(e), 319.56-2i; Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables, The Plant Protection and Quarantine Treatment Manual) and the standards issued pursuant to the Act.

Discussion

The Plant Quarantine Act provides that the Secretary of Agriculture ("the Secretary") may forbid the importation of a fruit into the United States in order to prevent the introduction of any injurious insect into the United States. 7 U.S.C. § 160. The Act also provides that the Secretary may promulgate regulations which prohibit such importation regardless of the use for which the fruit is intended. 7 U.S.C. § 160. The Act further provides that no person shall import, or offer for entry into the United States, fruit which has been prohibited by such regulations. 7 U.S.C. § 160. The Secretary may assess a civil penalty not exceeding $1,000 for each violation of the Act. 7 U.S.C. § 163.

Fresh fruit is defined as "the edible, more or less, succulent, portions of food plants in the raw or unprocessed state, such as bananas, oranges, grapefruit, pineapples, ..." 7 C.F.R. § 319.56-1. The Fruits and Vegetables subpart of Part 319 (Foreign Quarantine Notices), Chapter III, Title 7, Code of Federal Regulations, prohibits the importation of fruit into the United States unless the importation is explicitly allowed by an administrative instruction. 7 C.F.R. § 319.56. The Fruits and Vegetable subpart provides that fruit from the West Indies may only be imported under permit if it is treated to kill all injurious insects. 7 C.F.R. § 319.56-2(e). The administrative instructions for the importation of fruit from the West Indies identifies the treatments listed in the Plant Protection and Quarantine Treatment Manual as those treatments which meet the requirements of 7 C.F.R. § 319.56-2(e) for the importation of fruit into the United States from the West Indies. 7 C.F.R. § 319.56-2i. The Plant Protection and Quarantine Treatment

Manual is incorporated by reference into Part 319 (Foreign Quarantine Notices), Chapter III, Title 7, Code of Federal Regulations. 7 C.F.R. § 300.1. Mango is a fruit. 7 C.F.R. § 319.56-1. The treatment identified as T102-a (Mango) in the Plant Protection and Quarantine Treatment Manual requires that mango must be treated by a hot water dip, in the country of origin at a certified facility and under the supervision of APHIS personnel, to protect from the introduction of the Mediterranean fruit fly (Ceratitis capitata). Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables.

Fresh mangoes from Jamaica are not allowed entry into the United States (CX 6; Tr. 53-54). This is to prevent the introduction of the Mediterranean fruit fly into the United States. 7 U.S.C. § 160, 7 C.F.R. § 319.56. The regulations prohibit importation of mangoes from Jamaica regardless of the use for which the fruit is intended. 7 U.S.C. § 160, 7 C.F.R. §§ 319.56-2(e), 7 C.F.R. § 319.56-2i, Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables, The Plant Protection and Quarantine Treatment Manual.

On May 29, 1997, Respondent flew from Jamaica to the United States on Jamaica Airlines, landing at John F. Kennedy International Airport, New York (CX 4-5; Tr. 20-21, 70). When Respondent was questioned about her Customs Declaration, she stated that she was bringing cooked mangoes and cooked yams into the United States (CX 4; Tr. 48-49). When Respondent's baggage was inspected by Plant Protection and Quarantine Officers, they discovered cooked yams and fresh, untreated mangoes. The mangoes had been provided to Respondent in Jamaica by a relative and had not been treated as required by the treatment manual (CX 1, 3-4; Tr. 28, 51-54, 58-60, 70, 73, 75). Respondent did not present a permit allowing her to import mangoes.

Therefore, on May 29, 1997, Respondent imported into the United States fresh, untreated mangoes from Jamaica, West Indies, without a permit in violation of the Act and the regulations promulgated under the Act. 7 U.S.C. §§ 151-167, 7 C.F.R. § 319.56).

A civil penalty of $1,000.00 is an appropriate sanction. The Secretary may assess a civil penalty not exceeding $1,000.00 for each violation of the Act. 7 U.S.C. § 163. Fresh mangoes from Jamaica are prohibited from entering the United States because they might harbor the larva of the Mediterranean fruit fly (CX 6; Tr. 26, 41, 64). The Mediterranean fruit fly is one of the world's most destructive insect pests. It attacks more than 250 different kinds of fruits, nuts, and vegetables, many of which grow in home gardens and orchards. If the Mediterranean fruit fly became established in the continental United States, they would devastate commercial agriculture. United States consumers would pay more for fruits and vegetables because of higher production costs and reduced yields.

The Mediterranean fruit fly would cost consumers an additional $821 million per year. *See, Mediterranean Fruit Fly, Impact on You*, United States Department of Agriculture, Animal and Plant Health Inspection Service, Agriculture Information Bulletin No. 636.

It is well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility of achieving the congressional purpose." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as Respondent. Without the adherence of these individuals to federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. Sanctions are very important to prevent people from spreading plant pests. The sanctions need to be substantial enough to deter a wrongdoer from committing such a violation in the future as well as to deter others in similar situations.

Therefore, the civil penalty of $1,000.00, which was requested by USDA, is appropriate. It is also consistent with civil penalties assessed in similar circumstances. *See In re Ana Maria Rosales*, 56 Agric. Dec. 1689 (1997)(Default Decision); *In re Rigaud Pierre*, 56 Agric. Dec. 1688 (1997)(Default Decision); *In re Arturo Caneles*, 56 Agric. Dec. 1691 (1997)(Default Decision); *In re Fermin Rivera-Torres and Miguel Pallens*, 56 Agric. Dec. 1693 (1997)(Default Decision).

Order

1. Respondent is assessed a civil penalty of $1,000.00. Respondent shall send a certified check or money order for $1,000.00, payable to "Treasurer of the United States," to USDA, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

2. This Decision will become final and effective without further proceedings 35 days after service upon Respondent unless appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to § 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final May 6, 1999.--Editor]

In re: NKIAMBI JEAN LEMA.
P.Q. Docket No. 99-0002.
Decision and Order filed March 15, 1999.

Failure to deny allegations — Due process — Importation from Zaire — Limes — Passion fruit — Civil penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $500 civil penalty because he imported 12 limes and 6 passion fruit into the United States from Zaire, in violation of 7 C.F.R. § 319.56. Respondent's failure to deny the material allegations of the Complaint 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 Judicial Officer stated that agencies may dispense with a hearing in a proceeding in which there is no material issue of fact on which a meaningful hearing may be held. Accordingly, the Default Decision did not violate Respondent's right to due process. The Judicial Officer also stated that a sanction imposed by an agency will be overturned only if it is unwarranted in law or without justification in fact. The Judicial Officer held the civil penalty assessed against Respondent was authorized by the Federal Plant Pest Act (7 U.S.C. §§ 150gg) and the Plant Quarantine Act (7 U.S.C. § 163) and therefore, warranted in law. Moreover, the Judicial Officer found that, while there is no requirement that sanctions imposed by an agency be uniform, the civil penalty assessed against Respondent was consistent with sanctions imposed for similar violations of 7 C.F.R. § 319.56 and that the facts in the proceeding justify assessment of a $500 civil penalty against Respondent. The Judicial Officer also rejected Respondent's contention that the Commodities Exchange Act (7 U.S.C. §§ 1-25) was applicable to the proceeding.

Rick D. Herndon, 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, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act] and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 16, 1998.

The Complaint alleges that, on or about January 14, 1998, Nkiambi Jean Lema [hereinafter Respondent] imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56 (Compl. ¶ II).

On November 16, 1998, Respondent filed a Motion to Dismiss or in the Alternative Answer to Complaint [hereinafter Answer]. Respondent did not deny

the material allegations of the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

On November 27, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On December 11, 1998, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On January 4, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Default Decision and Order in which the ALJ: (1) found that Respondent imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56, as alleged in the Complaint; and (2) assessed Respondent a $500 civil penalty (Default Decision and Order at 2).

On February 16, 1999, Respondent appealed to, and requested oral argument before, the Judicial Officer. On March 8, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on March 11, 1999, the Hearing Clerk transmitted the record of this proceeding 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 Complainant and Respondent have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

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

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

Respondent filed an Answer on November 16, 1998, but failed to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that a failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for the purposes of the proceeding, an admission of the allegation. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that the admission of all the material allegations of fact contained in the complaint shall constitute a waiver

of hearing. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision and Order as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Nkiambi Jean Lema is an individual whose mailing address is 3605 Blair Avenue, Randallstown, Maryland 21133.

2. On or about January 14, 1998, at Dulles International Airport, Herndon, Virginia, Respondent imported 12 limes and 6 passion fruit from Zaire into the United States.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56, which prohibit the importation of limes and passion fruit into the United States from Zaire.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in his February 16, 1999, Appeal Petition. First, Respondent contends that he was not afforded an opportunity for a hearing on the record (Appeal Pet. ¶¶ 1-2).

Respondent is entitled to due process of law in this proceeding, and the fundamental elements of due process of law are notice and an opportunity to be heard.[1] Moreover, section 108 of the Federal Plant Pest Act (7 U.S.C. § 150gg)

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[1]*See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (stating that our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991) (stating that notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988) (stating that a fundamental requirement of due process is notice reasonably calculated to apprise the parties of the pendency of an action and afford them the opportunity to present their objections); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (stating that the due process clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case); *Baldwin v. Hale*, 1 Wall. 223, 233 (1864) (stating that

(continued...)

provides that the Secretary of Agriculture may issue an order assessing a civil penalty for violation of the regulations issued under the Federal Plant Pest Act only after notice and an opportunity for an agency hearing on the record and section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that the Secretary of Agriculture may issue an order assessing a civil penalty for violation of the regulations issued under the Plant Quarantine Act only after notice and an opportunity for an agency hearing on the record. However, a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing in a proceeding in which there is no material issue of fact on which a meaningful hearing can be held.[2] Therefore, a decision without hearing, based upon a respondent's admission of the material allegations of fact in a complaint, by the respondent's failure to deny or otherwise respond to a complaint, generally is not set aside.

The record reveals that Respondent was given an opportunity for a hearing on

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[1](...continued)
"[c]ommon justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence"); *Boswell's Lessee v. Otis*, 9 How. 336, 350 (1850) (stating that "no principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence").

[2]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating that the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) (rejecting petitioner's contention that the Federal Energy Regulatory Commission's failure to hold an evidentiary hearing denied petitioner procedural due process and stating that since no material factual dispute exists, the Federal Energy Regulatory Commission was not required to hold a hearing); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986); *United States v. Cheramie Bo-Truc # 5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976) (stating that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the Administrative Procedure Act requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed); *Independent Bankers Ass'n of Georgia v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (stating that the case law in this circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating that it is settled law that when no fact question is involved or the facts are agreed, an agency hearing is not required); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (stating that no agency hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law).

the record and was informed that a failure to deny or otherwise respond to the allegations in the Complaint would be deemed an admission of the allegations and a waiver of hearing.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on October 21, 1998.[3] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to deny or otherwise respond to a complaint, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (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.
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> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Office of the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that failure to answer any allegation in the Complaint would constitute an admission of that allegation and a waiver of the right to a hearing, as follows:

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[3]Domestic Return Receipt for Article Number P093143480.

CERTIFIED RECEIPT REQUESTED

October 16, 1998

Mr. Nkiambi Jean Lema
3605 Blair Avenue
Randallstown, Maryland 21133

Dear Mr. Lema:

Subject: In re: Nkiambi Jean Lema, Respondent -
P.Q. Docket No. 99-0002

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine 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 three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

You must notify us of any future address changes. Failure to do so may

result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

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

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

Sincerely,
/s/
Regina Paris
Legal Technician

Letter dated October 16, 1998, from Regina Paris, Legal Technician, Office of the Hearing Clerk, Office of Administrative Law Judges, USDA, to Mr. Nkiambi Jean Lema (emphasis in original).

Despite being informed of the consequences of failure to deny the allegations of the Complaint in his answer, Respondent failed to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States. Therefore, I find that there are no issues of fact on which a meaningful hearing could be held in this proceeding. Consequently, the Default Decision and Order, issued without hearing, based on Respondent's failure to deny the material allegations of fact in the Complaint, does not violate Respondent's right, under the due process clause of the Fifth Amendment to the United States Constitution, the Federal Plant Pest Act, or the Plant Quarantine Act, to an opportunity for a hearing.

Second, Respondent contends that the $500 civil penalty assessed against him by the ALJ is "extremely excessive and arbitrar[y]" (Appeal Pet. ¶ 2).

I disagree with Respondent's contention that the $500 civil penalty assessed against him is excessive and arbitrary. A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[4] The

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[4]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States* (continued...)

Secretary of Agriculture has authority to assess a civil penalty not exceeding $1,000 for each violation of the Regulations (7 U.S.C. §§ 150gg, 163); therefore, the assessment of a $500 civil penalty against Respondent for a violation of 7 C.F.R. § 319.56 is warranted in law.

Moreover, while there is no requirement that sanctions imposed by an administrative agency must be uniform,[5] the $500 civil penalty assessed against Respondent is consistent with sanctions imposed for similar violations of the Regulations,[6] and I find that the facts in this proceeding justify the assessment of

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[4](...continued)
Dep't of Agric., 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[5]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-88 (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.), *cert. denied*, 502 U.S. 860 (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).

[6]See, e.g., *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (assessing the respondent a $250 civil penalty for the importation of approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States, in violation of 7 C.F.R. § 319.56); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (assessing the respondent a $375 civil penalty for the importation of a fresh mango into the United States from Jamaica, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c)); *In re Christian King*, 52 Agric. Dec. 1333 (1993) (assessing the respondent a $750 civil penalty for the importation of approximately 5 to 8 pounds of fresh okra
(continued...)

a $500 civil penalty against Respondent.

Third, Respondent states that he "disclosed to the authority the content of his luggage through form 6055" (Appeal Pet. ¶ 4).

Respondent is deemed by his failure to deny or otherwise respond to the allegations in the Complaint that on or about January 14, 1998, he imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56. Even if I found that Respondent disclosed the contents of his luggage to an authority on a form, Respondent's reporting the contents of his luggage would not operate as a defense to his violation of 7 C.F.R. § 319.56, which he is deemed to have admitted by his failure to deny or otherwise respond to the allegations of the Complaint.

Fourth, Respondent contends that the requirements regarding the assessment of civil penalties under the Commodities Exchange Act, as amended (7 U.S.C. §§ 1-25) [hereinafter the Commodities Exchange Act], are applicable to this proceeding (Appeal Pet. ¶¶ 5-6).

I disagree with Respondent's contention that the requirements regarding the

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[6](...continued)
into the United States from Sierra Leone, in violation of 7 C.F.R. § 319.56); *In re Carol F. Hines*, 52 Agric. Dec. 336 (1993) (assessing the respondent $375 civil penalty for the importation of mangoes and pomegranates into the United States from Guyana, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56); *In re Alicia Piedad Valero*, 52 Agric. Dec. 328 (1993) (assessing the respondent a $375 civil penalty for the importation of fresh mango fruits into the United States from Ecuador, in violation of 7 C.F.R. § 319.56); *In re Vanessa Hopkins*, 51 Agric. Dec. 1212 (1992) (assessing the respondent a $375 civil penalty for the importation of approximately 2 mangoes into the United States from Trinidad, in violation of 7 C.F.R. § 319.56); *In re Rousseline Claude*, 51 Agric. Dec. 1209 (1992) (assessing the respondent a $375 civil penalty for the importation of mangoes into the United States from Haiti, in violation of 7 C.F.R. § 319.56); *In re Maurice Duani*, 47 Agric. Dec. 973 (1988) (assessing the respondent a $375 civil penalty for the importation of approximately 2 pounds of fresh dates into the United States from Israel without a permit, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56(c)); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (assessing the respondent a $250 civil penalty for the importation of approximately 4 peaches and approximately 5 plums into the United States from Israel, in violation of 7 C.F.R. § 319.56(c)); *In re Sotirios Foundas*, 47 Agric. Dec. 611 (1988) (assessing the respondent a $125 civil penalty for the importation of 10 pounds of chestnuts into the United States from Greece, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Lawrence Craig*, 47 Agric. Dec. 606 (1988) (assessing the respondent a $375 civil penalty for the importation of approximately 3 avocados into the United States from Mexico, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196 (1986) (assessing the respondent a $250 civil penalty for the importation of plantains into the United States from the Philippines, in violation of 7 C.F.R. § 319.56(c)); *In re Rene Vallalta*, 45 Agric. Dec. 1421 (1986) (assessing the respondent a $250 civil penalty for the importation of approximately 1 cacao seed pod into the United States from El Salvador, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56).

assessment of civil penalties under the Commodities Exchange Act are applicable to this proceeding. Complainant instituted this proceeding under the Plant Quarantine Act, the Federal Plant Pest Act, and the Regulations. The Commodities Exchange Act is not applicable to this proceeding.

Although, on rare occasions, default decisions have been set aside for good cause shown or where Complainant did not object,[7] generally there is no basis for setting aside a default decision issued in those situations in which a respondent files an answer and fails to deny the material allegations of the complaint.[8]

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

[8]See generally *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733 (1992) (stating that since the respondent failed to deny the allegation of interstate commerce in its answer, the allegation as to interstate commerce in the complaint is deemed admitted); *In re Rex Kneeland*, 50 Agric. Dec. 1571 (1991) (holding the default order proper where the answer, filed late, does not deny the material allegations of the complaint); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (stating that the respondent's answer was filed late and fails to deny the material allegations of the complaint; either reason warrants a default decision); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (ruling that a default decision should be issued because respondent's answer does not deny the material allegations of the complaint); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations of the complaint); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations of the complaint); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny

(continued...)

Respondent was given notice of the proceeding and an opportunity for a hearing. The Rules of Practice clearly provide that a failure to deny or otherwise respond to the allegations of the complaint shall be deemed, for the purposes of the proceeding, to be an admission of the allegations of the complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139). Respondent failed, in his Answer, to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States. In accordance with the Rules of Practice, Respondent's failure to deny or otherwise respond to the allegations of the Complaint is deemed an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139).

Accordingly, the Default Decision and Order was properly issued. 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.[9]

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

Order

Nkiambi Jean Lema is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

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[8](...continued)
material allegations of the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations of the complaint); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations of the complaint); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations of the complaint); *In re Michael A. Lucas*, 43 Agric. Dec. 1721 (1984) (stating that since the respondent's answer fails to deny the allegations of the complaint, the administrative law judge's default decision was properly issued).

[9]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations).

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0002.

In re: NKIAMBI JEAN LEMA.
P.Q. Docket No. 99-0002.
Order Denying Petition for Reconsideration and Motion to Transfer Venue filed May 14, 1999.

Failure to file timely petition for reconsideration — Judicial Officer's power to transfer case — Venue — Jurisdiction.

The Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Decision and Order on Respondent, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also denied Respondent's Motion to Transfer Venue to the United States District Court for the District of Maryland, holding that the Judicial Officer has no authority under the Rules of Practice to transfer the proceeding to a United States district court.

Rick D. Herndon, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act] and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7

C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 16, 1998.

The Complaint alleges that, on or about January 14, 1998, Nkiambi Jean Lema [hereinafter Respondent] imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56 (Compl. ¶ II).

On November 16, 1998, Respondent filed a Motion to Dismiss or in the Alternative Answer to Complaint. Respondent did not deny the material allegations of the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

On November 27, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On December 11, 1998, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On January 4, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Default Decision and Order: (1) finding that Respondent imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56, as alleged in the Complaint; and (2) assessing Respondent a $500 civil penalty (Default Decision and Order at 2).

On February 16, 1999, Respondent appealed to the Judicial Officer. On March 8, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on March 11, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On March 15, 1999, I issued a Decision and Order: (1) finding that on or about January 14, 1998, at Dulles International Airport, Herndon, Virginia, Respondent imported 12 limes and 6 passion fruit from Zaire into the United States; (2) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56, which prohibit the importation of limes and passion fruit into the United States from Zaire; and (3) assessing Respondent a $500 civil penalty. *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 3-4, 15 (Mar. 15, 1999).

On March 17, 1999, the Hearing Clerk served Respondent with the Decision and Order.[1] On April 21, 1999, 35 days after the Hearing Clerk served Respondent with the Decision and Order, Respondent filed Appeal Petition [hereinafter Petition

[1]See Domestic Return Receipt for Article Number PO93174998.

for Reconsideration] and Motion to Transfer Venue. On May 14, 1999, Complainant filed Complainant's Response to Respondent's Motion to Transfer Venue and Appeal Petition, and on May 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the March 15, 1999, Decision and Order and a ruling on Respondent's Motion to Transfer Venue.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[2]

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[2]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for (continued...)

Respondent's Motion to Transfer Venue of this proceeding to the United States District Court for the District of Maryland is also denied. The Judicial Officer has no authority under the Rules of Practice to transfer a case to a district court of the United States.[3] Further, the United States District Court for the District of Maryland has no jurisdiction to review the final order, *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (Mar. 15, 1999), assessing Respondent a $500 civil penalty under the Plant Quarantine Act and the Federal Plant Pest Act. Rather, section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that an order by the Secretary of Agriculture, assessing a civil penalty under the Plant Quarantine Act, is reviewable in a United States court of appeals (other than the United States Court of Appeals for the Federal Circuit) under 28 U.S.C. §§ 2341-2351, and section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)) provides that an order by the Secretary of Agriculture, assessing a civil penalty under the Federal Plant Pest Act, is reviewable in a United States court of appeals (other than the United States Court of Appeals for the Federal Circuit) under 28 U.S.C. §§ 2341-2351. Should Respondent file a petition for review of *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (Mar. 15, 1999), in accordance with 28 U.S.C. §§ 2341-2351, venue is provided by statute, as follows:

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

[3]*Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating that the Chief Administrative Law Judge does not have authority to transfer a case to a district court of the United States under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2343.

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

Order

Respondent's Petition for Reconsideration and Respondent's Motion to Transfer Venue are denied.

In re: ROBERT HOURIET, d/b/a HARDWICK ORGANIC PRODUCE.
P.Q. Docket No. 98-0016.
Decision and Order filed May 6, 1999.

Failure to file timely answer — Default — Selective prosecution — Due process — Civil Penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt, assessing Respondent a $1,000 civil penalty because he imported peppers and tomatoes into the United States from Mexico and onions into the United States from the Netherlands, without the required permit, in violation of 7 C.F.R. § 319.56-2. 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. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Judicial Officer held that agency officials have broad discretion in deciding against whom to institute disciplinary proceedings and found nothing in the record to indicate that Complainant's filing of the Complaint was an abuse of administrative discretion.

James D. Holt, 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, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Plant Quarantine Acts];

regulations issued under the Plant Quarantine Acts (7 C.F.R. §§ 319.56-.56-8); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 28, 1998.

The Complaint alleges that on or about March 3, 1998, Robert Houriet, d/b/a Hardwick Organic Produce [hereinafter Respondent], imported red peppers, green peppers, red tomatoes, and cherry tomatoes from Mexico into the United States without a permit and imported onions from the Netherlands into the United States without a permit, in violation of 7 C.F.R. § 319.56-2 (Compl. ¶¶ II-VI).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on September 16, 1998.[1] 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)).

On October 8, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a proposed Decision and Order.

On October 16, 1998, Respondent filed an Answer denying the material allegations in the Complaint and a Motion requesting a 30-day period in which to prepare a defense. On November 5, 1998, Complainant filed Complainant's Views on Document filed by Respondent on October 16, 1998, an Amended Motion for Adoption of Proposed Decision and Order [hereinafter Amended Motion for Default Decision], and an amended proposed Decision and Order [hereinafter Amended Proposed Default Decision]. On December 7, 1998, Respondent filed objections to Complainant's Amended Motion for Default Decision and Amended Proposed Default Decision.

On December 7, 1998, pursuant to 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 [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated 7 C.F.R. § 319.56-2, as alleged in the Complaint; and (2) assessed Respondent a $1,000 civil penalty (Default Decision at 2-3).

On January 19, 1999, Respondent appealed to the Judicial Officer. On May 5,

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[1]The Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter to Respondent by certified mail (Domestic Return Receipt for Article Number P093143416). The United States Postal Service returned the Complaint, Rules of Practice, and service letter to the Hearing Clerk in an envelope marked "unclaimed." On September 16, 1998, in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint, Rules of Practice, and service letter to Respondent by ordinary mail (Memorandum to File, dated September 16, 1998, by Regina A. Paris).

1999, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer, and on May 6, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

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

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, on November 5, 1998, Complainant filed Amended Motion for Default Decision. On December 7, 1998, Respondent filed objections to Complainant's Amended Motion for Default Decision. Respondent's objections are not meritorious.

The allegations in the Complaint having been admitted and there being no valid reason for not entering a default decision, the allegations in the Complaint are adopted and set forth in this Decision and Order as the Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of Robert Houriet, d/b/a Hardwick Organic Produce, is RD 1, Box 934, Hardwick, Vermont 05843.

2. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported red peppers from Mexico into the United States without the required permit.

3. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported green peppers from Mexico into the United States without the required permit.

4. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported red tomatoes from Mexico into the United States without the required permit.

5. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported cherry tomatoes from Mexico into the United States without the required permit.

6. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported onions from the Netherlands into the United States without the required permit.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Plant Quarantine Acts and 7 C.F.R. § 319.56-2.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in his January 19, 1999, filing [hereinafter Appeal Petition]. First, Respondent contends that he filed a timely Answer and denies the allegations of fact in the Complaint (Appeal Pet. at first unnumbered page).

I disagree with Respondent's contention that he filed a timely Answer, and I find that he is deemed, for the purposes of this proceeding, to have admitted the facts in the Complaint based on his failure to file a timely Answer.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on September 16, 1998.[2] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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[2]See note 1.

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

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

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint clearly informs Respondent of the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-1400, in accordance with the applicable rules of practice (7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of all the allegations in this complaint and a waiver of hearing.

Compl. at 3-4.

Likewise, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and 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, as follows:

CERTIFIED RECEIPT REQUESTED

July 29, 1998

Mr. Robert Houriet
dba Hardwick Organic Produce
RD 1, Box 934
Hardwick, Vermont 05843

Dear Mr. Houriet:

Subject: In re: Robert Houriet, d/b/a Hardwick Organic Produce, Respondent - P.Q. Docket No. 98-0016

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine 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 three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law

Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated July 29, 1998, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Mr. Robert Houriet (emphasis in original).

Respondent filed his Answer to the Complaint on October 16, 1998, 30 days after he was served with the Complaint and 10 days after his Answer was due. Respondent's answer, which was due no later than October 6, 1998, is filed too late. Respondent is deemed, for purposes of this proceeding, by his failure to file a timely Answer, to have admitted the allegations in the Complaint.

Second, Respondent asserts that "the USDA inspector who filed the complaint abused her administrative discretion in violation of sections 6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44 of . . . Title 7 of the Administrative Procedures [sic] Act" (Appeal Pet. at second unnumbered page).

As an initial matter, Respondent's citation to "sections 6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44 of . . . Title 7 of the Administrative Procedures [sic] Act" appears to be error. The Administrative Procedure Act, which is applicable to this proceeding, is in Title 5 of the United States Code and does not contain sections "6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44." Moreover, the Complaint in this proceeding was not filed by an inspector, as Respondent contends, but rather, the

Complaint was filed by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture.

I infer that Respondent asserts that filing the Complaint was an abuse of "administrative discretion." However, Respondent does not state any basis for his belief that filing the Complaint was an abuse of "administrative discretion."

Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings. Even if Respondent could show that he was singled out for a disciplinary action, such selection would be lawful so long as the administrative determination to selectively enforce the Plant Quarantine Acts was not arbitrary.[3] Respondent has no right to have the Plant Quarantine Acts go unenforced against him, even if he is the first individual against whom the Plant Quarantine Acts are enforced and even if Respondent can demonstrate that he is not as culpable as some others that have not had disciplinary proceedings instituted against them. The Plant Quarantine Acts do not need to be enforced everywhere to be enforced somewhere.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.[4]

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.[5] Respondent bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was

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[3]*See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (per curiam); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 278-79 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1908 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

[4]*Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[5]*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

motivated by a discriminatory purpose.[6] In order to prove a selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[7] Respondent has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) he exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.[8] Respondent has not shown, or even alleged, any of these circumstances, and I find nothing in the record to indicate that Complainant's filing of the Complaint was an abuse of "administrative discretion."

Third, Respondent asserts that:

> [T]he discretionary exemption to the inspector's actions or her failure to act does not apply when the the [sic] inspector or the agency have not grounded their actions in rational justification or not inconsistent with public policy as expressed in Congressional intent of the North American Free Trade Agreement. [(*Berkovitz v. United States*, 486 U.S. 531; 108 S. Ct. 1954; 100 L.Ed.2d 531 (1988))].

Appeal Pet. at second unnumbered page.

While I am uncertain of the meaning of Respondent's assertion, there is nothing in the record that indicates that the United States Department of Agriculture violated the North American Free Trade Agreement. Moreover, I find that *Berkovitz v. United States*, 486 U.S. 531 (1988), is inapposite.

Fourth, Respondent states that the "[a]gency has not provided the [R]espondent with any justification at all of the inspector's actions as discretionary" (Appeal Pet.

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[6]*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

[7]*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[8]*Id.*

at second unnumbered page). Again, I am uncertain of the meaning of Respondent's statement. However, the record does not reveal any United States Department of Agriculture obligation to justify an action of an inspector to Respondent.

Although, on rare occasions, default decisions have been set aside for good cause shown or where Complainant did not object,[9] Respondent has shown no basis for setting aside the Default Decision.[10] Respondent was given notice of the

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

[10]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of a regulation (7 C.F.R. § 319.56) promulgated under the Act of August 20, 1912, as amended, as alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and a regulation (7 C.F.R. § 319.56(c)) promulgated under the Act of August 12, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding that the default decision was properly issued where the respondent filed an answer over a month late and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 318.13-10, .13-12(a)) promulgated under the Act of August

(continued...)

proceeding and an opportunity for a hearing. The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's Answer was filed 30 days after Respondent was served with the Complaint and 10 days after Respondent's Answer was due. Respondent's failure to file a timely answer constitutes, for the purposes of this proceeding, an admission of the allegations in the Complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Default Decision was properly issued. 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.[11]

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

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[10](...continued)
20, 1912, as amended, and Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed 66 days after service of the complaint on the respondent, does not deny material allegations and that the respondent is deemed, by its failure to file a timely answer and its failure to deny the allegations in the complaint, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, the Act of February 2, 1903, as amended, and regulations (7 C.F.R. § 330.400(b)(1); 9 C.F.R. § 94.5(b)(1)) promulgated under the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and the Act of February 2, 1903, as amended, as alleged in the complaint); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding that the default order was properly issued where a timely answer was not filed and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 319.74, 330.110) promulgated under the Act of August 20, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint).

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

Order

Robert Houriet, d/b/a Hardwick Organic Produce, is assessed a civil penalty of $1,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 98-0016.

In re: LEADERMAR (USA) CORPORATION.
P.Q. Docket No. 99-0004.
Decision and Order filed May 19, 1999.

Failure to file timely answer — Due process — Failure to give advance notification — Failure to give notification of time of arrival — Civil penalty.

The Judicial Officer affirmed the Default Decision by Acting Chief Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $3,750 civil penalty because Respondent violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, and violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the changed estimated time of arrival of vessels to the Plant Protection and Quarantine office at the port of Jacksonville, Florida. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed its Answer within 20 days after Respondent was served with the Complaint, Respondent's Answer would not be timely because Respondent's Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent. The Judicial Officer held that 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. Application of the default provisions of the Rules of Practice does not deny Respondent due process under the Fifth Amendment to the United States Constitution.

James A. Booth, for Complainant.
Jerold H. Tabbott, Jacksonville, FL, for Respondent.
Initial decision issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Acts]; regulations issued under the Acts (7 C.F.R. pt. 330) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 23, 1998.

The Complaint alleges that: (1) on or about February 3, 1998, Leadermar (USA) Corporation [hereinafter Respondent] violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Akademikis Zavarickis proceeding from Quayaquil, Ecuador (Compl. ¶ II); (2) on or about March 16, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Gloria Elena proceeding from Pertigalete, Venezuela (Compl. ¶ III); (3) on or about June 3, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Rodin proceeding from London, England (Compl. ¶ IV); (4) on or about July 13, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Candor proceeding from Cristobal, Panama (Compl. ¶ V); and (5) on or about August 11, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Marsha Chuykov proceeding from Navarasik, Russia (Compl. ¶ VI).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of

the Rules of Practice, and a service letter on December 17, 1998.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on January 14, 1999, the Hearing Clerk sent Respondent a letter informing Respondent that its answer had not been received within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 29, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On February 23, 1999, Respondent filed an Answer, 68 days after Respondent was served with the Complaint and 48 days after Respondent's Answer was due. On March 11, 1999, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On March 11, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Acting Chief Administrative Law Judge Edwin S. Bernstein [hereinafter the Acting Chief ALJ] issued a Default Decision and Order: (1) finding that on or about February 3, 1998, Respondent failed to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, in violation of 7 C.F.R. § 330.111(a); (2) finding that on or about March 16, 1998, June 3, 1998, July 13, 1998, and August 11, 1998, Respondent failed to give immediate notification of the changed estimated time of arrival of vessels to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, in violation of 7 C.F.R. § 330.111(d); and (3) assessing Respondent a $3,750 civil penalty (Default Decision and Order at 5-6).

On April 19, 1999, Respondent appealed to the Judicial Officer. On May 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer, and on May 18, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

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

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[1]See Domestic Return Receipt for Article Number P093143567.

ACTING CHIEF ALJ'S DEFAULT DECISION AND ORDER (AS RESTATED)

Respondent failed to file its Answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Leadermar (USA) Corporation, is a business whose mailing address is 6054 Arlington Expressway, Suite 1, Jacksonville, Florida 32211.

2. On or about February 3, 1998, Respondent violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Akademikis Zavarickis proceeding from Quayaquil, Ecuador.

3. On or about March 16, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Gloria Elena proceeding from Pertigalete, Venezuela.

4. On or about June 3, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Rodin proceeding from London, England.

5. On or about July 13, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Candor proceeding from Cristobal, Panama.

6. On or about August 11, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Marsha Chuykov proceeding from

Navarasik, Russia.

Conclusion

By reason of the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Acts and the Regulations issued under the Acts (7 C.F.R. § 330.111(a), (d)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends in its letter to Joyce A. Dawson, dated April 14, 1999, and filed April 19, 1999 [hereinafter Appeal Petition], that it timely mailed Respondent's Answer, but that Respondent's Answer may have been misplaced or lost after delivery, and requests that its Answer, filed February 23, 1999, be accepted as timely, as follows:

> First, we wish to point out that an assumption has been made that our letter of the 29th of December was undelivered by the U.S. Postal Service. We consider it equally likely - and more plausible - that it was misplaced or lost after delivery. This has been our opinion from the start, but it seemed friendlier to ascribe error to the post office.
>
> In our experience dealing with other government agencies, we can document instances where we received penalties for failing to file documents for which we had signed receipts in hand. We therefore have a different perspective when viewing a letter from a government agency stating that they haven't received some document we know we've filed. These mostly go away, as this one should have. From this perspective, the USDA letter of January 14th was not viewed with particular alarm, and was set aside with the intention of timely dealing with it later.
>
> Typical working hours in our office exceed 65 hours per week per person (easily), and we operate with a staff of four. I personally handle most questions of this nature, and my hours are usually even longer. During the last part of January I took the first serious (more than three days) vacation that I have taken in 14 years. I didn't get to replying to the January 14th letter before I left, and it was overlooked on my return until seeing the copy re-sent on the 29th of January.

> The bottom line is that the delay in response to the January 14th letter was error. But it is a clerical error much the same as losing the original letter of December 29th may have been. We considered and still consider the Hearing Clerk's letter of January 14th to be incorrect. Had the December 29th letter not gone astray or been found, their letter of January 14th would have been moot.
>
> The default order stipulates a willingness to accept Leadermar's letter of December 29th, 1998. It then argues that it will still find Leadermar in default for not responding timely to the hearing officer's letter of January 14th, 1999. This is contradictory, and also clearly contrary to the bests [sic] interests of justice, which can only be served by examining the actual penalties in question.
>
> We point out that in all other cases where we have dealt with government agencies over penalties or fines, there has always been consideration given for `clerical error'. In this matter, the only downside to responsibly allowing such consideration, is that the penalty issues will be permitted to be judged upon their own merits. Default is based on the concept that if the respondant [sic] fails to answer within a given time, there is an assumption of guilt. This has already been disputed in our letter of December 29th, 199[8]. The USDA has already made too many assumptions, and this, like others, is clearly inaccurate.

Appeal Pet. at 1-2.

I find that Respondent failed to file a timely answer to the Complaint and that the Acting Chief ALJ's Default Decision and Order was not error.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on December 17, 1998.[2] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under §

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[2]See note 1.

1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent on December 17, 1998, informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, 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.*, 380.1, and 70.1 *et seq.*). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this complaint and a waiver of hearing.

Compl. at 3-4.

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

CERTIFIED RECEIPT REQUESTED

October 23, 1998

Leadermar (USA) Corporation
Arlington Expressway, Suite 1
Jacksonville, Florida 32211

Dear Gentlemen:

Subject: In re: Leadermar (USA) Corporation, Respondent -
P.Q. Docket No. 99-0004

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine 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 three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

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

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated October 23, 1998, from Joyce A Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Leadermar (USA) Corporation (emphasis in original).

Respondent's Answer was required to be filed no later than January 6, 1999. Respondent filed its Answer on February 23, 1999, 68 days after the Complaint was served on Respondent and 48 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)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Acting Chief ALJ's Default Decision and Order was properly issued.

Respondent contends that it mailed its Answer, dated December 29, 1998, prior to the time that its Answer was due. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed with the Hearing Clerk, and section 1.147(g) of the Rules of Practice provides that a document required or authorized to be filed under the Rules of Practice shall be deemed to be filed at the time it reaches the Hearing Clerk, as follows:

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

. . . .

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Respondent's mailing its Answer does not constitute filing the Answer with the Hearing Clerk,[3] and even if I found that Respondent mailed its Answer prior to the date its Answer was due, that finding would not cause me to conclude that Respondent's Answer was timely. The record establishes that Respondent did not file its Answer until February 23, 1999, 48 days after Respondent's Answer was due.

Although on rare occasions default decisions have been set aside for good cause

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[3]See *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7 (Mar. 8, 1999) (Order Denying Pet. for Recons.) (stating that the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (Order Denying Late Appeal) (stating that neither the applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk). *Cf. In re Harold P. Kafka*, 58 Agric. Dec. ___, slip op. at 8-9 (Apr. 5, 1999) (Order Denying Late Appeal) (stating that the respondent's continued unsuccessful efforts to file his appeal petition do not constitute filing an appeal petition with the Hearing Clerk); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 3 n.1 (Mar. 22, 1999) (stating that appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

shown or where the complainant did not object,[4] Respondent has shown no basis for setting aside the Default Decision and Order and accepting Respondent's late-filed Answer.[5] The Rules of Practice clearly provide that an answer must be filed

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

[5]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of a regulation (7 C.F.R. § 319.56) promulgated under the Act of August 20, 1912, as amended, as alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and a regulation (7 C.F.R. § 319.56(c)) promulgated under the Act of August 12, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding that the default decision was properly issued where the respondent filed an answer over a month late and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 318.13-10, .13-12(a)) promulgated under the Act of August 20, 1912, as amended, and Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed 66 days after service of the complaint on the respondent, does not deny material allegations and that the respondent is deemed, by its failure to file a timely answer and its failure to

(continued...)

within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's Answer was filed 68 days after the Hearing Clerk served Respondent with the Complaint. Respondent's failure to file a timely answer constitutes, for the purposes of this proceeding, an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Default Decision and Order 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.[6]

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

Order

Leadermar (USA) Corporation is assessed a civil penalty of $3,750. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

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[5](...continued)
deny the allegations in the complaint, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, the Act of February 2, 1903, as amended, and regulations (7 C.F.R. § 330.400(b)(1); 9 C.F.R. § 94.5(b)(1)) promulgated under the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and the Act of February 2, 1903, as amended, as alleged in the complaint); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding that the default order was properly issued where a timely answer was not filed and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 319.74, 330.110) promulgated under the Act of August 20, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint).

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

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0004.

AGRICULTURE DECISIONS

Volume 58

January - June 1999
Part Two (P&S)
Pages 451 - 473

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 statues 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.

MISCELLANEOUS ORDERS

In re: SIERRA KIWI, INC., A CALIFORNIA CORPORATION.
98 AMA Docket No. F&V 920-1.
Ruling on Petitioner's Motion to Withdraw Petition; Dismissal of Respondent's Appeal; and Ruling on Respondent's Motion for Expedited Decision on Respondent's Appeal filed June 23, 1999.

Motion to withdraw petition — With prejudice — Without prejudice.

The Judicial Officer granted Petitioner's motion to withdraw its petition without prejudice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a petition, generally, a petitioner's motion to withdraw a petition in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the petitioner moves to withdraw the petition with prejudice; (2) error is apparent on the face of the petition such that the petitioner should be precluded from refiling essentially the same flawed petition; (3) allowing the petitioner to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the petitioner has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same petition. The Judicial Officer concluded that, because the petition was dismissed, Respondent's appeal and motion for expedited decision on Respondent's appeal were moot, and the Judicial Officer dismissed Respondent's appeal and denied Respondent's motion for expedited decision on Respondent's appeal.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits issued by James W. Hunt, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

SIERRA KIWI, INC., a California corporation [hereinafter Petitioner], instituted this proceeding on April 8, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the marketing order regulating Kiwifruit Grown in California (7 C.F.R. pt. 920) [hereinafter the Kiwi Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner requests modification of, or exemption from, the Kiwi Order; declaratory relief; an order requiring the United States Department of Agriculture [hereinafter USDA] to implement procedures that enable USDA to modify the Kiwi Order expeditiously; and fees authorized by the Equal Access to Justice Act (Pet.).

On June 8, 1998, the Administrator, Agricultural Marketing Service, USDA

[hereinafter Respondent], filed Motion to Dismiss Petition; on July 6, 1998, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss; and on August 7, 1998, Administrative Law Judge James W. Hunt [hereinafter the ALJ] filed Order Denying Motion to Dismiss.

On August 24, 1998, Respondent filed Answer to Petition: (1) denying the material allegations in the Petition; (2) asserting three affirmative defenses; and (3) requesting denial of the relief sought by Petitioner and dismissal of the Petition with prejudice. The ALJ scheduled a hearing to be held in Sacramento, California, on January 27, 1999 (Summary of Telephone Conference; Notice of Hearing).

On January 21, 1999, Respondent filed Respondent's Motion for Prehearing Conference, Motion for Leave to File Amended Motion to Dismiss, Motion to Exclude Petitioner's Exhibits, and Motion to Continue Hearing Date Pending Ruling on Motions. The ALJ rescheduled the hearing to commence on June 9, 1999 (Order Postponing Hearing), and on February 28, 1999, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss.

On April 13, 1999, the ALJ filed Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits. On April 30, 1999, Respondent appealed the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits to the Judicial Officer, and on May 3, 1999, Respondent filed Motion for Expedited Decision on Respondent's Appeal and Respondent's Motion to Continue Oral Hearing. On May 14, 1999, Petitioner filed Petitioner's Response to Respondent's Motion to Continue Oral Hearing, and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Continue Oral Hearing. On May 18, 1999, I granted Respondent's Motion to Continue Oral Hearing and cancelled the hearing scheduled by the ALJ to commence on June 9, 1999 (Ruling Granting Motion to Continue Oral Hearing and Cancellation of Hearing).

On May 27, 1999, Petitioner filed Petitioner's Opposition to Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and ruling on Respondent's Motion for Expedited Decision on Respondent's Appeal.

On June 11, 1999, Petitioner filed a motion to withdraw its Petition without prejudice (Petitioner's Request to Withdraw the Petition), and on June 17, 1999, Respondent filed Respondent's Response to Request by Petitioner Sierra Kiwi, Inc. to Withdraw Petition [hereinafter Respondent's Response] in which Respondent states that "[R]espondent does not oppose the granting of [P]etitioner's request to

withdraw its [P]etition, but urges that the [P]etition be dismissed `with prejudice' rather than `without prejudice.'"

Respondent cites no basis for urging that I dismiss Petitioner's Petition with prejudice. The right of a petitioner instituting a proceeding under the Rules of Practice to voluntarily withdraw a petition and reinstitute the proceeding should be preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to petitioner issued after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally res judicata of the merits, even if the merits have not been considered.[1] In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based solely on a petitioner's motion to dismiss the petition without prejudice.

Second, USDA should be reluctant to bar a petition filed in accordance with section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)), based solely upon a petitioner's request to withdraw the petition without prejudice. A petitioner has a right under section 8(c)(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) to file a petition seeking modification of, or exemption from, an order that is not in

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[1]*See, e.g., Aungst v. Continental Machines, Inc.*, 90 F.R.D. 348, 350 (M.D. Pa. 1981) (stating that dismissal with prejudice acts as a bar to further action upon the same claims); *Hicks v. Allstate Ins. Co.*, 799 S.W.2d 809, 810 (Ark. 1990) (stating that dismissal of an action with prejudice is as conclusive of the rights of the parties as if there were an adverse judgment as to the plaintiff after trial); *People v. Creek*, 447 N.E.2d 330, 333 (Ill. 1983) (stating that dismissal of an information with prejudice has the same effect as a final adjudication on the merits and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action); *Schuster v. Northern Co.*, 257 P.2d 249, 252 (Mont. 1953) (stating that the term *with prejudice*, as used in a judgment of dismissal, is the converse of the term *without prejudice*, and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff; the terms *with prejudice* and *without prejudice* have been recognized as having reference to, and being determinative of, the right to bring a future action); *Harris v. Moye's Estate*, 202 S.W.2d 360, 362 (Ark. 1947) (stating that the words *with prejudice*, when used in an order of dismissal, indicate that the controversy is thereby concluded); *Bryant v. Ryburn*, 174 S.W.2d 938, 939 (Ark. 1943) (stating that the "suit having been dismissed with prejudice by the plaintiffs therein, such action was as conclusive of the rights of the parties as would an adverse judgment after trial"); *Fenton v. Thompson*, 176 S.W.2d 456, 460 (Mo. 1943) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff); *Union Indemnity Co. v. Benton County Lumber Co.*, 18 S.W.2d 327, 330 (Ark. 1929) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the plaintiff); *In re Fresh Prep, Inc.* (Ruling on Certified Question), 58 Agric. Dec. ___, slip op. at 8 (Mar. 11, 1999) (stating that a dismissal with prejudice has the same effect as a decision adverse to a complainant issued after full consideration of the merits of the case).

accordance with law, and barring a petitioner from presenting its case, based solely upon the petitioner's motion to withdraw the petition without prejudice, could subject the petitioner to an order that is not in accordance with law.

Third, if, as a general matter, judges were to dispose of motions to withdraw petitions without prejudice by dismissing the petitions with prejudice, petitioners may become reluctant to file motions to withdraw petitions, even when such motions are appropriate. A case that is prosecuted by a petitioner only because the petitioner fears that a motion to withdraw the petition will result in the petition being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a petition is dismissed with prejudice should forestall any reluctance on the part of a petitioner to file a motion to withdraw a petition, if the petitioner is not certain that it should proceed against the respondent.

Nonetheless, there are circumstances in which a petition should be dismissed with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a petition, generally, a petitioner's motion to withdraw a petition in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the petitioner moves to withdraw the petition with prejudice; (2) error is apparent on the face of the petition such that the petitioner should be precluded from refiling essentially the same flawed petition;[2] (3) allowing the petitioner to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the petitioner has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same petition.

Petitioner has not moved to withdraw the Petition with prejudice; Petitioner's Request to Withdraw the Petition, filed June 11, 1999, is the first such motion filed by Petitioner; Respondent does not allege in Respondent's Response that error is apparent on the face of the Petition; and Respondent does not allege in Respondent's Response that allowing Petitioner to reinstitute the proceeding would legally prejudice Respondent.

Therefore, the Petition should be dismissed without prejudice. Further, an

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[2]*Cf. In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114 (1997) (dismissing with prejudice a petition filed in a proceeding instituted under 7 U.S.C. § 608c(15)(A); concluding that the petition, which alleged that petitioner was not a handler, left petitioner no standing to institute an action under 7 U.S.C. § 608c(15)(A); and holding that the administrative law judge erred by dismissing the petition without prejudice because dismissal without prejudice would allow the petitioner to file the same flawed petition, but stating that there is precedent for allowing the petitioner to file a similar petition in which it alleges that it is a handler).

Order dismissing the Petition renders moot both Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits, filed April 30, 1999, and Respondent's Motion for Expedited Decision on Respondent's Appeal, filed May 3, 1999. Therefore, Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits should be dismissed, and Respondent's Motion for Expedited Decision on Respondent's Appeal should be denied.

For the foregoing reasons, the following Order is issued.

Order

Petitioner's Request to Withdraw the Petition, filed June 11, 1999, is granted, and the Petition, filed April 8, 1998, is dismissed without prejudice. Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits, filed April 30, 1999, is dismissed, and Respondent's Motion for Expedited Decision on Respondent's Appeal, filed May 3, 1999, is denied.

In re: JAMES A. YAKLIGIAN, AN INDIVIDUAL, DOING BUSINESS AS SUNDACE FRUIT COMPANY, ALSO KNOWN AS SUNDANCE FRUIT, INC., A CALIFORNIA CORPORATION.
AMAA Docket No. 98-0001.
Complaint Withdrawn filed June 28, 1999.

Colleen A. Carroll, for Respondent.
Donald H. Hazel, Sanger, California, for Complainant.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

Pursuant to"Notice of Complainant's Withdrawal of Complaint," filed June 25, 1999, the Complaint filed herein on July 13, 1998, is withdrawn.

Copies hereof shall be served upon the parties.

In re: DAVID MEYER, d/b/a SPECTRUM GENETICS RIVERSIDE COLONY, d/b/a RIVERSIDE HOG FARM, DAVE WALDER, DAN KOSTER and ROBERT WOESSNER.
A.Q. Docket No. 99-0003.
Order Dismissing Complaint as to Robert Woessner filed February 10, 1999.

James D. Holt, for Complainant.
Walter C. Kilgus, Morrison, IL, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's "Motion to Dismiss as to Robert Woessner" is granted. Accordingly, the Complaint against Respondent Robert Woessner, filed on November 2, 1998, is dismissed.

In re: PATTY MARKELL, d/b/a WILLOW BAY FARM.
A.Q. Docket No. 99-0005.
Order Dismissing Complaint filed February 11, 1999.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

Complainant's motion to dismiss the Complaint against Respondent Patty Markell is granted. It is ordered that the Complaint filed on February 2, 1999, be dismissed.

In re: DAVID MEYER, d/b/a SPECTRUM GENETICS, RIVERSIDE COLONY, d/b/a RIVERSIDE HOG FARM, DAVE WALDNER, DAN KOSTER and ROBERT WOESSNER.
A.Q. Docket No. 99-0003.
Order Dismissing Complaint as to Dave Waldner filed June 29, 1999.

James D. Holt, for Complainant.
Jeffrey Sveen, Aberdeen, SD, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's June 29, 1999, "Motion to Dismiss as to Dave Waldner" is granted. The complaint against Respondent Dave Waldner, filed on November 2,

1998, is dismissed.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 98-0005.
Order Denying Petition for Reconsideration filed January 6, 1999.

Petition for reconsideration.

The Judicial Officer denied Respondent's Petition for Reconsideration for the reasons previously set forth in the Judicial Officer's decision.

Brian T. Hill and Frank Martin, Jr., for Complainant.
Eugene R. Campbell, York, PA, for Respondent.
Initial decision issued by Victor W. Palmer, Chief 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 administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on December 9, 1997.

The Complaint alleges that on or about May 13, 1997, through October 14, 1997, David M. Zimmerman [hereinafter Respondent] operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1). On December 29, 1997, Respondent filed an Answer denying the material allegations of the Complaint and requesting a hearing.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on August 25, 1998, in Lancaster, Pennsylvania. Brian T. Hill and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Eugene R. Campbell of York, Pennsylvania, represented Respondent. During the hearing, Complainant submitted Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Pre-hearing Brief in Support Thereof and a Proposed Decision and

Order. On September 2, 1998, Complainant filed Complainant's Supplemental Brief, and on September 10, 1998, Respondent filed Respondent's Supplemental Brief.

On September 16, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that from May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined by the Animal Welfare Act and the Regulations, when he was not 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); (2) assessed Respondent a civil penalty of $20,000; (3) revoked Respondent's Animal Welfare Act license; and (4) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations. (Initial Decision and Order at 2, 9.)

On October 14, 1998, Respondent appealed to 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 23, 1998, Complainant filed Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal. On November 13, 1998, Respondent filed Respondent's Response to Complainant's Cross-Appeal, and on November 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On November 18, 1998, I issued a Decision and Order in which I: (1) concluded that Respondent was a dealer, as defined in the Animal Welfare Act and the Regulations, and from May 13, 1997, through October 14, 1997, willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) by selling 33 dogs in commerce, for resale for use as pets, without being licensed; (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, ordered Respondent to cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations, without being licensed; (3) assessed Respondent a civil penalty of $20,000; and (4) permanently disqualified Respondent from obtaining a license under the Animal Welfare Act. *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 10, 45-46 (Nov. 18, 1998).

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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); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

On December 1, 1998, Respondent filed a Petition for Reconsideration, and on December 23, 1998, Complainant filed Complainant's Opposition to Respondent's Petition for Reconsideration. On December 28, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued November 18, 1998.

Respondent raises three issues in his Petition for Reconsideration. Respondent's one-page Petition for Reconsideration states in its entirety, as follows:

PETITION FOR RECONSIDERATION

Respondent requests Reconsideration of the Judicial Officer's Decision and Order dated November 18, 1998 for the following reasons:

1. The Judicial Officer erred in granting Complainant's Appeal and permanently disqualifying Respondent from obtaining a license.

2. The Judicial Officer erred in upholding the civil fine of $20,000.00 for the following reasons:

a. Respondent does not operate a "substantial" business.

b. Respondent was not acting in bad faith.

c. Complainant did not carry its burden of proof in establishing Respondent's alleged violations of the Animal Welfare Act.

3. The Judicial Officer erred in not upholding Respondent's other objections to the ALJ's decision.

Respondent does not cite the record or any authority for his contention that I erred. I have carefully reviewed my November 18, 1998, Decision and Order, and I find no error with respect to the issues raised by Respondent.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 18, 1998, *In re David M. Zimmerman, 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 November 18, 1998, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 18, 1998, is reinstated, with allowance for time passed.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations issued under the Animal Welfare Act and, in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act, without being licensed, as required. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $20,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to:

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[2] *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. ___, slip op. at 26 (June 1, 1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 24 (May 13, 1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. ___, slip op. at 23 (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. ___, slip op. at 4-5 (Feb. 2, 1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Frank Martin, Jr.
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Frank Martin, Jr., within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 98-0005.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act. The disqualification provisions of this Order shall become effective upon service of this Order on Respondent.

In re: KEVIN ACKERMAN and VICKI ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Order Denying Late Appeal as to Kevin Ackerman filed February 3, 1999.

Late appeal.

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 Decision and Order became final.

Robert A. Ertman, for Complainant.
Kevin Ackerman, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

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

on July 23, 1997.

The Complaint alleges that Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, willfully violated the Animal Welfare Act and the Regulations and Standards. On August 21, 1997, Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, filed an Answer to the Complaint denying the material allegations of the Complaint.

Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Vicki Ackerman agreed to the entry of a Consent Decision. The Consent Decision was entered by Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] on April 3, 1998. *In re Kevin Ackerman* (Consent Decision as to Vicki Ackerman), 57 Agric. Dec. 502 (1998).

The ALJ presided over a hearing on April 7, 1998, in Pierre, South Dakota. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Kevin Ackerman, d/b/a Ackerman's Puppy Palace [hereinafter Respondent], represented himself. On June 8, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; on July 10, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; and on July 17, 1998, Complainant filed Complainant's Reply Brief.

On October 2, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $5,000 civil penalty; and disqualifying Respondent from becoming licensed under the Animal Welfare Act for 3 years.

On December 22, 1998, Respondent appealed to the Judicial Officer. On February 2, 1999, Complainant filed Complainant's Response to Appeal, and on February 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

The record indicates that the Initial Decision and Order was served on Complainant on October 6, 1998,[1] and on Respondent on November 16, 1998.[2]

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[1]See letter dated October 5, 1998, from Joyce A. Dawson to Kevin Ackerman, signed by Robert A. Ertman, Counsel for Complainant, indicating receipt of the letter and attached Initial Decision and Order on "10 6 96 [sic]."

[2]See note by TMFisher, dated November 16, 1998, stating that the Initial Decision and Order was "remailed by regular mail" to:

(continued...)

The Initial Decision and Order informs Respondent that failure to file a timely appeal will result in the Initial Decision and Order becoming final, as follows:

> This Decision and Order will become final thirty-five (35) days after service upon the parties unless there is an appeal to the Judicial Officer within thirty (30) days, all as more fully set forth in 7 C.F.R. §§ 1.131 *et seq.*, 1.145).

Initial Decision and Order at 43.

A letter from the Office of the Hearing Clerk accompanying the Initial Decision and Order also informs Respondent that failure to file a timely appeal will result in the Initial Decision and Order becoming final, as follows:

> **CERTIFIED RECEIPT REQUESTED**
>
> October 5, 1998
>
> Mr. Kevin Ackerman d/b/a
> Ackerman [sic] Puppy Palace
> Route 1, Box 66
> Mounds [sic], SD 57646
>
> Dear Mr. Ackerman:
>
> Subject: In re: Kevin Ackerman d/b/a Ackerman [sic] Puppy Palace
> Respondent - AWA Docket No. 97-0039
>
> Enclosed is a copy of the Decision and Order issued in this proceeding by Administrative Law Judge Dorothea A. Baker on October 2, 1998.
>
> 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.

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[2](...continued)
Mr. Kevin Ackerman d/b/a
Ackerman [sic] Puppy Palace
Route 1, Box 66
Mounds [sic], SD 57646

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.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Section 1.145(a) of the Rules of Practice provides the time for filing an appeal, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time. On December 22, 1998, Respondent filed Respondent's Appeal. For the reasons set forth below, Respondent's Appeal must be rejected as untimely.

Respondent's Appeal, filed December 22, 1998, was not filed within 35 days after service of the Initial Decision and Order on Respondent. Respondent contends in his December 1, 1998, filing that he received the Initial Decision and Order on November 20, 1998, and that he had until December 20, 1998, to file his appeal, as follows:

I have received the Judges [sic] Decision and Order on November 20,

1998[,] by United States Mail and wish for you to acknowledge this in writing. I also understand that I have 30 days to appeal this decision[.] I also wish for you to acknowledge in writing that I have until December 20, 1998[,] to file this appeal. I will have the appeal filed by December 20, 1998[.]

Administrative Notice Pursuant to Administrative Procedures [sic] Act.

I disagree with Respondent's contention that he was served with the Initial Decision and Order on November 20, 1998. The record establishes that the Hearing Clerk sent a copy of the Decision and Order to Respondent by certified mail on October 5, 1998.[3] The envelope containing the Initial Decision and Order was returned to the Hearing Clerk, marked "unclaimed" by the United States Postal Service, and on November 16, 1998, the Hearing Clerk remailed the Initial Decision and Order to Respondent by ordinary mail.[4]

Section 1.147(c)(1) of the Rules of Practice provides that under these circumstances the date of service is the date that the Initial Decision and Order was remailed by ordinary mail, as follows:

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

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known

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[3]See letter dated October 5, 1998, from Joyce A. Dawson to Kevin Ackerman, and Domestic Return Receipt for Article Number P 368 426 997.

[4]See note 2.

> principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

Therefore, Respondent was served with the Initial Decision and Order on November 16, 1998, the date the Initial Decision and Order was remailed by ordinary mail by the Hearing Clerk to Respondent. In accordance with 7 C.F.R. § 1.142(c)(4), the Initial Decision and Order became final on December 21, 1998, 35 days after service of the Initial Decision and Order on Respondent. Respondent filed Respondent's Appeal on December 22, 1998. Therefore, the Judicial Officer 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 an initial decision and order becomes final.[5] USDA's construction of the Rules of Practice

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[5]*See In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that respondents' appeal, filed after the initial decision became final and effective, must be

(continued...)

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.

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[5](...continued)
dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the 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) (stating that 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 administrative law judge nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of USDA not to consider appeals filed more than 35 days after service of the initial decision).

> 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.[6]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time 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 (Fed. R. App. P. 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 an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes

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[6] *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. 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); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear 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.[7]

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).)

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

Order

Respondent's Appeal, filed December 22, 1998, is denied. The Decision and Order filed by Administrative Law Judge Dorothea A. Baker on October 2, 1998, is the final Decision and Order as to Kevin Ackerman in this proceeding.

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[7] *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).

In re: KEVIN ACKERMAN and VICKI ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Order Denying Petition for Reconsideration as to Kevin Ackerman filed April 14, 1999.

Failure to file timely petition for reconsideration.

The Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Order Denying Late Appeal as to Kevin Ackerman, as required by 7 C.F.R. § 1.146(a)(3).

Robert A. Ertman, for Complainant.
Kevin Ackerman, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 23, 1997.

The Complaint alleges that Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, willfully violated the Animal Welfare Act and the Regulations and Standards. On August 21, 1997, Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, filed an Answer to the Complaint denying the material allegations of the Complaint.

Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Vicki Ackerman agreed to the entry of a Consent Decision. The Consent Decision was entered by Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] on April 3, 1998. *In re Kevin Ackerman* (Consent Decision as to Vicki Ackerman), 57 Agric. Dec. 502 (1998).

The ALJ presided over a hearing on April 7, 1998, in Pierre, South Dakota. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kevin Ackerman, d/b/a Ackerman's Puppy Palace [hereinafter Respondent], represented himself. On June 8, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law,

and Order, and Brief in Support Thereof; on July 10, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; and on July 17, 1998, Complainant filed Complainant's Reply Brief.

On October 2, 1998, the ALJ issued a Decision and Order directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $5,000 civil penalty; and disqualifying Respondent from becoming licensed under the Animal Welfare Act for 3 years.

On December 22, 1998, Respondent appealed to the Judicial Officer. On February 2, 1999, Complainant filed Complainant's Response to Appeal, and on February 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On February 3, 1999, I issued an Order Denying Late Appeal as to Kevin Ackerman in which I found that Respondent filed his appeal more than 35 days after service of the ALJ's Decision and Order on Respondent, that the ALJ's Decision and Order had become final in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), and that I did not have jurisdiction to consider Respondent's appeal. *In re Kevin Ackerman* (Order Denying Late Appeal as to Kevin Ackerman), 58 Agric. Dec. ___, slip op. at 6, 11 (Feb. 3, 1999). On March 8, 1999, the Hearing Clerk served Respondent with the Order Denying Late Appeal as to Kevin Ackerman.[1]

On March 25, 1999, 17 days after the Hearing Clerk served Respondent with the Order Denying Late Appeal as to Kevin Ackerman, Respondent filed Motion for Reconsideration [hereinafter Petition for Reconsideration]. On April 13, 1999, Complainant filed Complainant's Response to Petition for Reconsideration, and on April 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the February 3, 1999, Order Denying Late Appeal as to Kevin Ackerman.

Section 1.146(a)(3) of the Rules of Practice provides:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

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[1]See memorandum from TMFisher, dated March 8, 1999.

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date of service on Respondent of the Order Denying Late Appeal as to Kevin Ackerman, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[2]

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

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[2]*See In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the respondent was served with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the respondents were served with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the respondent was served with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the respondent was served with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the respondent was served with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after service of the decision and order on the respondent); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after service of the decision and order on the respondent); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing petition for reconsideration because it was not filed within 10 days after service of the decision and order on the respondent); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after service of the decision and order on the respondent).

Order

Respondent's Petition for Reconsideration is denied. The Decision and Order filed by Administrative Law Judge Dorothea A. Baker on October 2, 1998, is the final Decision and Order as to Kevin Ackerman in this proceeding.

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Ruling Granting Respondent's Request for Information filed March 1, 1999.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 7, 1998.

The Complaint alleges that Harold P. Kafka [hereinafter Respondent] violated section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)) by exhibiting animals without an Animal Welfare Act license. The Complaint, the Rules of Practice, and a service letter from the Hearing Clerk were served on Respondent on September 18, 1998.[1]

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). On October 29, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. Respondent was served with Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon

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[1]See Domestic Return Receipt for Article Number P 368 428 319.

Admission of Facts by Reason of Default on November 5, 1998.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 1, 1998, 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: (1) found that Respondent exhibited animals without having an Animal Welfare Act license, in willful violation of section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)); (2) assessed Respondent a civil penalty of $5,000; and (3) ordered Respondent to pay a $22,500 civil penalty, which civil penalty had been assessed against Respondent in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision), but was suspended upon the condition that Respondent not violate the Animal Welfare Act, the Regulations, or the Standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) for a period of 20 years from the effective date of the order in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision).

The record indicates that, on January 14, 1999, Respondent was served with the Default Decision,[3] and on February 2, 1999, Respondent filed a letter addressed to the Hearing Clerk, which reads in its entirety, as follows:

> Dear Mrs. Joyce Dawson Hearing Clerk
>
> This letter is to inform your office that I am requesting an appeal in my case AWA Docket No. 98-0028 in the past I informed your office that of my decision to plea not guilty in this matter and never heard back from your office in this case till this letter was received by me the last week of Jan. inclosed is copy of envelope with post mark Jan 20, 1999. Please send to me any information needed to file this appeal as I can not afford a attorney to do so.

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[2]See Domestic Return Receipt for Article Number P 368 427 013.

[3]See Memorandum to the File, dated January 15, 1999, signed by Tonya M. Fisher, Legal Technician.

Thank you
Harold Kafka
901 Valley Rd
Watchung N.J. 07060
phone 908 322-4038
fax 718 967-7834

On February 10, 1998, the Hearing Clerk served Respondent's February 2, 1999, filing on Complainant. The Hearing Clerk's letter of service accompanying Respondent's February 2, 1999, filing refers to the February 2, 1999, filing as "Respondent's Appeal" and informs Complainant that it has 20 days in which to file a response to Respondent's Appeal.[4]

On February 24, 1999, Complainant filed Opposition to Motion by Respondent Harold Kafka to Vacate Default and a Memorandum of Points and Authorities in support of Complainant's Opposition to Motion by Respondent Harold Kafka to Vacate Default. On February 25, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

I find that the Hearing Clerk and Complainant have mischaracterized Respondent's February 2, 1999, filing. First, the Hearing Clerk refers to Respondent's February 2, 1999, filing as "Respondent's Appeal" of the ALJ's December 1, 1998, Default Decision. However, section 1.145(a) of the Rules of Practice describes the purpose and contents of an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately

[4]See the copy of the letter from Joyce A. Dawson, Hearing Clerk, to Harold Kafka, dated February 3, 1999, which Complainant's counsel, Brian T. Hill, signed, establishing Complainant's receipt, on February 10, 1999, of the Hearing Clerk's letter and Respondent's February 2, 1999, filing.

> numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Respondent's February 2, 1999, filing does not conform to the requirements in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) for an appeal; therefore, Respondent's February 2, 1999, filing is not an appeal petition.

Second, Complainant responds to Respondent's February 2, 1999, filing as if it is a motion to set aside, or vacate, the Default Decision. However, Respondent's February 2, 1999, filing does not include a request that I vacate or set aside the Default Decision.

I find that Respondent's February 2, 1999, filing is a request for information that Respondent asserts he needs in order to file an appeal petition.

The record establishes that Respondent was served with a copy of the Rules of Practice on September 18, 1998. I direct Respondent's attention to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), which describes the purpose and contents of an appeal petition. Any appeal petition and brief in support of the appeal petition, which Respondent intends to file, must conform to the requirements in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) and must be filed with the Hearing Clerk at the following address:

> United States Department of Agriculture
> Office of the Hearing Clerk
> 1400 Independence Avenue, SW
> Room 1081 South Building
> Washington, D.C. 20250-9200

While this Ruling Granting Respondent's Request for Information provides Respondent with information he requested in his February 2, 1999, filing, Respondent is advised that, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), a default decision becomes final and effective 35 days after service on a respondent. The record indicates that Respondent was served with the Default Decision on January 14, 1999. Therefore, the record indicates that the Default Decision became final and effective on February 18, 1999. 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.[5] Therefore, my jurisdiction to consider any

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[5]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that respondents' appeal, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the 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) (stating that since respondent's petition for reconsideration was not filed within 35 days after

(continued...)

appeal petition filed by Respondent is dependent on a showing that the record does not accurately reflect the date Respondent was served with the Default Decision and that any appeal petition filed by Respondent is filed within 35 days of the date on which Respondent was served with the Default Decision.

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Order Denying Late Appeal filed April 5, 1999.

Default — Late answer — Filing with hearing clerk — Late appeal.

The Judicial Officer denied Respondent's late-filed appeal petition. The Judicial Officer found that Respondent filed an Answer 33 days after he was served with the Complaint; therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his opportunity for a hearing. 7 C.F.R. §§ 1.136(a), (c), .139, .141(a). The Judicial Officer stated that appeal petitions must be filed with the Hearing Clerk and that the effective date of filing an appeal petition is the date the appeal petition reaches the Hearing Clerk. 7 C.F.R. §§ 1.145(a), .147(g). Therefore, Respondent's alleged continued unsuccessful efforts to file his Appeal Petition do not constitute filing the Appeal Petition with the Hearing Clerk. Respondent's Appeal Petition was not filed within 35 days after service of the Default Decision on Respondent; therefore, the Judicial Officer did not have jurisdiction to consider Respondent's appeal.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the

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[5](...continued)
service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 7, 1998.

The Complaint alleges that Harold P. Kafka [hereinafter Respondent] violated section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)) by exhibiting animals without an Animal Welfare Act license. The Hearing Clerk served the Complaint, the Rules of Practice, and a service letter on Respondent on September 18, 1998.[1]

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). On October 29, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default on November 5, 1998.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 1, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent exhibited animals without having an Animal Welfare Act license, in willful violation of section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)); (2) assessed Respondent a civil penalty of $5,000; and (3) ordered Respondent to pay a $22,500 civil penalty, which civil penalty had been assessed against Respondent in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision), but was suspended upon the condition that Respondent not violate the Animal Welfare Act, the Regulations, or the Standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) for a period of 20 years from the effective date of the order in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision).

On March 5, 1999, Respondent appealed to the Judicial Officer. On April 1, 1999, Complainant filed Complainant's Opposition to Motion by Respondent Harold Kafka to Vacate Default, and on April 2, 1999, the Hearing Clerk

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[1]See Domestic Return Receipt for Article Number P 368 428 319.

[2]See Domestic Return Receipt for Article Number P 368 427 013.

transmitted the record of this proceeding to the Judicial Officer for a decision.

The record establishes that the Hearing Clerk served the Default Decision on Complainant on December 7, 1998,[3] and the Hearing Clerk served the Default Decision on Respondent on January 14, 1999.[4]

A letter from the Hearing Clerk accompanying the Default Decision informs Respondent that failure to file a timely appeal will result in the Default Decision becoming final, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> December 1, 1998
>
> Mr. Harold P. Kafka
> 901 Valley Road
> Watchung, New Jersey 07060
>
> Dear Mr. Kafka:
>
> Subject: In re: Harold P. Kafka - Respondent
> AWA Docket No. 98-0028
>
> Enclosed is a copy of the Decision and Order Upon Admission of Fact by Reason of Default issued in this proceeding by Administrative Law Judge Edwin S. Bernstein, issued on December 1, 1998.
>
> 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.

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[3]See letter dated December 1, 1998, from Regina A. Paris, Acting Hearing Clerk, to Harold P. Kafka, signed by Brian T. Hill, Counsel for Complainant, indicating receipt of the letter and attached Default Decision on "12/7/98".

[4]See Memorandum to the File, dated January 15, 1999, signed by Tonya M. Fisher, Legal Technician.

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.

Sincerely,
/s/
Regina A. Paris
Acting Hearing Clerk

Section 1.145(a) of the Rules of Practice provides the time for filing an appeal, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time. On March 5, 1999, Respondent filed an appeal [hereinafter Appeal Petition].

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends that he timely filed his Appeal Petition. Respondent bases this contention on his allegation that on February 15, 1999, he received a letter from the Hearing Clerk, dated February 3, 1999, stating that he had 20 days from receipt of the letter to file "paper work." (Appeal Pet. at first unnumbered page.) The record does contain a letter from the Hearing Clerk to Respondent dated February 3, 1999, but the letter does not state that Respondent has 20 days from receipt in which to file "paper work" or an appeal. Instead, the February 3, 1999, letter informs Respondent that *Complainant* has 20 days in which to file a response to Respondent's February 2, 1999, filing.

Second, Respondent contends that he filed an Answer in which he "plead not guilty back when the complate [sic] was first filed" and that he was denied an opportunity for a hearing. Further, Respondent states in his Appeal Petition that

he did not violate the Regulations and attaches a letter from Rich Donovan, Youth Minister, St. Theresa's Church, to Brian Hill, which Respondent states is evidence that he did not violate the Regulations, as alleged in the Complaint. (Appeal Pet. at first unnumbered page and attach.)

The record establishes that Respondent filed an Answer on October 21, 1998, 33 days after he was served with the Complaint. Based upon Respondent's failure to file an answer within 20 days after he was served with the Complaint, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint and waived his opportunity for a hearing.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on September 18, 1998.[5] Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

§ 1.136 Answer.

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

. . . .

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

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

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that

[5]See note 1.

meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on September 18, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

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

Compl. at 2.

Likewise, the Hearing Clerk informed Respondent in the letter of service which accompanied the Complaint and 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, as follows:

CERTIFIED RECEIPT REQUESTED

September 1, 1998

Mr. Harold P. Kafka
901 Valley Road
Watchung, New Jersey 07060

Dear Mr. Kafka:

Subject: In re: Harold P. Kafka, Respondent
AWA Docket No. 98-0028

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 three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

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

You must notify us of any future address changes. Failure to do so may

result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

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

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

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated September 1, 1998, from Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, Office of Administrative Law Judges, to Mr. Harold P. Kafka (emphasis in original).

Third, Respondent contends that he has been "trying to file this appeal" since he received the Default Decision. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that appeal petitions must be filed with the Hearing Clerk and section 1.147(g) of the Rules of Practice provides that a document required or authorized to be filed under the Rules of Practice shall be deemed to be filed at the time it reaches the Hearing Clerk, as follows:

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

. . . .

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Therefore, Respondent's unsuccessful efforts to file his Appeal Petition do not constitute filing the Appeal Petition with the Hearing Clerk,[6] and despite Respondent's alleged continued efforts to file his Appeal Petition from the date he received the Default Decision, the record establishes that Respondent did not file his Appeal Petition until March 5, 1999.

For the reasons set forth below, Respondent's Appeal Petition must be rejected as untimely.

Respondent's Appeal Petition, filed March 5, 1999, was not filed within 35 days after service of the Default Decision on Respondent, which occurred on January 14, 1999. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, *viz.*, on February 18, 1999, 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.[7]

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[6]See *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the hearing clerk do not constitute filing an answer with the Hearing Clerk). *Cf. In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 3 n.1 (Mar. 22, 1999) (stating that appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7 (Mar. 8, 1999) (Order Denying Pet. for Recons.) (stating that the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk); *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

[7]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial

(continued...)

The United States Department of Agriculture's construction of the Rules of

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[7](...continued)
decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating that respondents' appeal, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the 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) (stating that 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 administrative law judge nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

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.[8]

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[8] *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. 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 (continued...)

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 a default decision 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 (Fed. R. App. P. 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 a default decision 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 a default 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.[9]

Accordingly, Respondent's Appeal Petition must be denied since it is too late

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[8](...continued)
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); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

[9]*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).

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. § 1.139.)

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

Order

Respondent's Appeal Petition, filed March 5, 1999, is denied. The Decision and Order Upon Admission of Facts by Reason of Default filed by Administrative Law Judge Edwin S. Bernstein on December 1, 1998, is the final Decision and Order in this proceeding.

In re: STEPHEN RICHARD DORNIN and LORI UNDERHILL, d/b/a TIGER TALE PRODUCTIONS.
AWA Docket No. 98-0032.
Order Withdrawing Complaint as to Respondent Lori Underhill filed March 12, 1999.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Edwin S. Bernstein, Administrative Law Judge.

Complainant's March 11, 1999, "Motion to Withdraw Complaint as to Respondent Lori Underhill" is granted. The Complaint, filed on August 10, 1998, is withdrawn as to Respondent Lori Underhill.

In re: JUDIE HANSEN, d/b/a WILD WIND PETTING ZOO.
AWA Docket No. 96-0048.
Order Denying Petition for Reconsideration filed March 15, 1999.

Civil penalty — Failing to remove and dispose of animal waste — Failing to allow APHIS inspector access to facilities — Failing to provide adequate housing — Failing to provide clean and safe primary enclosures — Failing to properly store food — Vague regulations — Hearsay evidence — Manure — Excessive fines.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contentions that the evidence was not sufficient to conclude that Respondent violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.126, 3.1(a)-(b), (e)-(f), 3.53(c), 3.125(d), and 3.131(a), (c). The Judicial Officer held that: (1) 9 C.F.R. § 3.131(c) is not unconstitutionally vague because it requires that buildings and grounds be kept clean, but does not specify how much dirt or dust would constitute a violation; (2) the Animal and Plant Health Inspection Service inspector's alleged failures to follow Department rules and supervisor demands are not relevant to the proceeding; (3) the failure of the Judicial Officer to find the proceeding humorous is not error and is not relevant to the proceeding; (4) neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence and responsible hearsay has long been admitted in the Department's administrative proceedings; (5) testimonials of Respondent's customers are not relevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards; and (6) the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Greg Bommelman, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself, with assistance from her partner, Gregory Bommelman. On

October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On January 30, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $3,000 civil penalty; and suspending Respondent's Animal Welfare Act license for 30 days.

On March 24, 1998, Respondent filed Motion to Arrest the Decision [hereinafter Respondent's Appeal]; on April 14, 1998, Respondent filed Motion for Dismissal; on May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order [hereinafter Complainant's Response and Cross-Appeal]; on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal; on October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal; and on October 15, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

On December 14, 1998, I issued a Decision and Order: (1) dismissing Respondent's Motion for Dismissal based upon section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that "[a]ny motion will be entertained other than a motion to dismiss on the pleading"[;] (2) concluding that Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c); (3) assessing Respondent a civil penalty of $4,300; (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (5) suspending Respondent's Animal Welfare Act license for 30 days. *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 3-4, 43, 98-101 (Dec. 14, 1998).

On January 11, 1999, Respondent filed Respondent's Reconsideration of Decision [hereinafter Petition for Reconsideration]. On February 8, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration of Decision and Order, and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the December 14, 1998, Decision and Order.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

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

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2149. Violations by licensees

. . . .

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2146(a), 2149(b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

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

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 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.

. . . .

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.

. . . .

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) *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 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 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.

. . . .

SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT AND TRANSPORTATION OF RABBITS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.53 Primary enclosures.

All primary enclosures for rabbits shall conform to the following requirements:

. . . .

(c) *Space requirements for primary enclosures acquired on or after August 15, 1990.*

(1) Primary enclosures shall be constructed and maintained so as to provide sufficient space for the animal to make normal postural adjustments with adequate freedom of movement.

(2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles[.] . . .

. . . .

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.

. . . .

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. . . .

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 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. . . .

. . . .

(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.

9 C.F.R. §§ 2.100(a), .126(a); 3.1(a)-(b), (e)-(f), .53(c)(1)-(2), .125(d), .131(a), (c).

Respondent raises 15 issues in her Petition for Reconsideration. First, Respondent contends that my conclusion that she willfully violated section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on October 25, 1995, is error because "injury has never occured [sic] and no dogs were ever found injured or entangled" (Pet. for Recons. at first unnumbered page (emphasis in original)).

Injury or entanglement is not a necessary prerequisite to a finding that a respondent violated 9 C.F.R. § 3.1(a). As discussed in *In re Judie Hansen, supra*, slip op. at 21-22, 57-58, the evidence and Respondent's admissions support a finding that on October 25, 1995, Respondent willfully violated 9 C.F.R. § 3.1(a). Therefore, I disagree with Respondent's contention that I erred in finding that on October 25, 1995, Respondent failed to design and construct housing facilities for

dogs so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury, in willful violation of 9 C.F.R. § 3.1(a).

Second, Respondent contends that my conclusion that she willfully violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) on June 19, 1995, and October 25, 1995, is error because the "USDA inspector has never seen any dog, puppy, or even evidence of vermin in the neatly organized shop material" (Pet. for Recons. at first unnumbered page).

Section 3.1(b) of the Standards requires that animal areas inside of housing facilities must be kept neat and free of clutter. Proof that an animal was in an animal area at the time that the animal area was cluttered is not required in order to find that a respondent violated 9 C.F.R. § 3.1(b). Moreover, as discussed in *In re Judie Hansen, supra,* slip op. at 22-23, 58, the evidence and Respondent's admissions support a finding that on June 19, 1995, and October 25, 1995, Respondent willfully violated 9 C.F.R. § 3.1(b). Therefore, I disagree with Respondent's contention that I erred in finding that on June 19, 1995, and October 25, 1995, Respondent failed to ensure that animal areas were free of clutter, including equipment, furniture, and stored material, in willful violation of 9 C.F.R. § 3.1(b).

Third, Respondent asserts that "Regulations do not require an empty (this is the secret word) need to be covered" (Pet. for Recons. at first unnumbered page (emphasis in original)).

I infer, based on Respondent's references to *In re Judie Hansen, supra,* slip op. at 24, and Complainant's Exhibit 3, that Respondent contends that I erred in finding that on October 25, 1995, she failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).[1] My conclusion that Respondent willfully violated 9 C.F.R. § 3.1(e) on October 25, 1995, is based on the evidence that bottles of bleach and other toxic substances were stored near animal feed. *In re Judie Hansen, supra,* slip op. at 24. Contrary to Respondent's apparent contention in her Petition for Reconsideration that containers were empty, Respondent admitted in Respondent's Appeal that bleach and food were not properly stored, but stated that the bleach was diluted and the open food sack contained only a small amount of feed (Respondent's Appeal B at 6). As stated in *In re Judie Hansen, supra,* slip op. at 58-59, the dilution of the bleach and the small quantity of feed involved do not exculpate Respondent's

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[1]I infer, based on Respondent's failure to reference Complainant's Exhibit 1, that Respondent does not request that I reconsider my conclusion that she violated 9 C.F.R. § 3.1(e) on June 19, 1995.

violation of 9 C.F.R. § 3.1(e). Therefore, I disagree with Respondent's contention that I erred in finding that on October 25, 1995, Respondent failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in willful violation of 9 C.F.R. § 3.1(e).

Fourth, Respondent asserts that an "open pail of feces is proof that a cleaning process. Leaving this open pail is no different than soiled newspapers that occured [sic] as part of regular cleaning. This is a double standard." (Pet. for Recons. at first and second unnumbered pages.)

I infer, based on Respondent's reference to *In re Judie Hansen, supra*, slip op. at 25, that Respondent contends that I erred in finding that on October 25, 1995, she failed to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease, in willful violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)).

Respondent contends that an open pail of feces is proof that Respondent was in the process of cleaning. While an open pail of feces could be evidence that Respondent was cleaning her facility, it is not dispositive of the fact that Respondent was in the process of cleaning feces from her facility. However, Respondent testified that a worker was using the pail to clean the cages and had left it on the ground to accompany the USDA inspector during the inspector's October 25, 1995, inspection (Tr. 211-12). I found that Respondent's leaving the pail of feces open for the period necessary for an inspection of her facility constituted a violation of 9 C.F.R. § 3.1(f), *In re Judie Hansen, supra*, slip op. at 25, 43, 59, and I do not, on reconsideration, find that my conclusion that Respondent willfully violated 9 C.F.R. § 3.1(f) on October 25, 1995, was error. However, Respondent should note that, based on Respondent's testimony regarding the circumstances surrounding Respondent's violation of 9 C.F.R. § 3.1(f), I found Respondent's violation of 9 C.F.R. § 3.1(f) to be minor and neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based on Respondent's violation of 9 C.F.R. § 3.1(f). *In re Judie Hansen, supra*, slip op. at 59.

Fifth, Respondent states, "[a]gain questioning Borchert's creditably [sic]. Does he know the difference between rabbits used for the petting zoo or for meat rabbits[?] Meat rabbits are <u>not</u> governed by [the Animal and Plant Health Inspection Service [hereinafter APHIS]]. Ms. Hansen testified truthfully that these are <u>meat</u> rabbits[.]" (Pet. for Recons. at second unnumbered page (emphasis in original).)

I infer that Respondent contends that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to construct and maintain primary

enclosures for rabbits so as to provide sufficient space for the rabbits to make normal postural adjustments with adequate freedom of movement, in willful violation of section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)). Respondent's contention appears to be based upon Mr. Borchert's alleged lack of credibility, Mr. Borchert's alleged inability to discern the difference between a "meat" rabbit that is not subject to regulation under the Animal Welfare Act and a rabbit that is subject to regulation under the Animal Welfare Act, and Respondent's testimony that the rabbits which Mr. Borchert inspected were "meat" rabbits.

I found Mr. Donovan Borchert, the APHIS inspector who conducted inspections of Respondent's facility on June 19, August 8, and October 25, 1995, and attempted to conduct an inspection of Respondent's facility on June 11, 1997, the inspections and attempted inspection relevant to this proceeding, to be credible. Moreover, Respondent testified that *some* of her rabbits are not subject to the Animal Welfare Act because they are meat rabbits (Tr. 189-93). However, there was nothing to distinguish Respondent's meat rabbits from Respondent's rabbits which are subject to regulation under the Animal Welfare Act. Therefore, I disagree with Respondent's contention that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the rabbits to make normal postural adjustments with adequate freedom of movement, in willful violation of 9 C.F.R. § 3.53(c).

Sixth, Respondent contends that "no inspection reports . . . indicate excessive accumulation of feces" (Pet. for Recons. at second unnumbered page (emphasis in original)).

I infer that Respondent contends that I erred in finding that on August 8, 1995, and October 25, 1995, Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors, in willful violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

I agree with Respondent that the inspection reports which evidence Respondent's violations of 9 C.F.R. § 3.131(a) do not state that there was an "excessive" accumulation of feces in primary enclosures for ferrets.[2] However, a finding that a primary enclosure has an "excessive" accumulation of feces is not a necessary prerequisite to a finding that a respondent violated 9 C.F.R. § 3.131(a). Instead, 9 C.F.R § 3.131(a) provides that excreta shall be removed from primary

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[2]See Complainant's Exhibit 2 at 3, item 7, III, #36 and Complainant's Exhibit 3 at 3, item 7, IV, #36.

enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors.

As explained in *In re Judie Hansen, supra*, slip op. at 35, 64, Respondent provided reasons for, but did not deny, her violations of 9 C.F.R. § 3.131(a).

Therefore, I disagree with Respondent's contention that I erred in finding that on August 8, 1995, and October 25, 1995, Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the ferrets contained therein and to minimize disease hazards and to reduce odors, in willful violation of 9 C.F.R. § 3.131(a).

Seventh, Respondent states that the "[m]anure pile is a[n] incorrect statement. A USDA investigator and the property owner agree that this pile in question is a decomposed totally harmless compose [sic] pile (in normal terms good dirt)[.]" (Pet. for Recons. at second unnumbered page.)

I infer that Respondent contends that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards, in willful violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

Respondent contends in her Petition for Reconsideration that she did not fail to remove animal waste, but instead, she failed to remove compost. However, the APHIS inspector described the pile that Respondent failed to remove as consisting of manure,[3] and while Respondent stated that the pile presented no health hazard to her animals, Respondent admitted in her Answer that the pile consisted of horse manure and straw that was largely decomposed (Answer at 8). Manure is animal waste.[4]

Moreover, Respondent argues in Respondent's Appeal that collecting animal and food wastes and bedding and composting this material in a pile at the kennel constitutes disposal of animal waste in accordance with 9 C.F.R. § 3.125(d) (Respondent's Appeal B at 10-11). As I stated in *In re Judie Hansen, supra*, slip op. at 63, heaping manure in a pile, with corral straw and bedding, next to the kennel, to allow the natural decomposition process to occur, is not "removal and disposal" as contemplated by 9 C.F.R. § 3.125(d).

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[3]See Complainant's Exhibit 1 at 2, item 7, III, #14 and Complainant's Exhibit 2 at 3, item 7, III, #14.

[4]See Merriam Webster's Collegiate Dictionary 709 (10th ed. 1997):

manure *n* (1549) : material that fertilizes land; *esp* : refuse of stables and barnyards consisting of livestock excreta with or without litter[.]

demands are not relevant to this proceeding, which concerns Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Twelfth, Respondent contends that "[i]f any judge would have looked at the dog breeder reports, they (the judges) would have laughed at this hearing" (Pet. for Recons. at fifth unnumbered page). The ALJ examined the dog breeder reports (RX 19) (Initial Decision and Order at 21-22), and I examined the dog breeder reports. While I do not know whether the dog breeder reports caused the ALJ to find the proceeding humorous, the ALJ gave the dog breeder reports little weight. Moreover, I reviewed the dog breeder reports, and the reports did not cause me to find the proceeding humorous. My failure to find the proceeding humorous is not error and is not relevant to the proceeding.

Thirteenth, Respondent contends that Mr. Borchert's testimony regarding "old soiled newspapers" is hearsay and should not have been admitted into evidence (Pet. for Recons. at fifth unnumbered page). I infer that Respondent is referring to the allegation in paragraph 6(a) of the Complaint that on August 8, 1995, Respondent failed to provide for the regular and frequent collection, removal, and disposal of animal waste and bedding, in willful violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)).

As an initial matter, I did not find that the soiled newspapers constituted a violation of 9 C.F.R. § 3.1(f), as they were present as part of the regular cleaning of the facility, and I dismissed the August 8, 1995, violation of 9 C.F.R. § 3.1(f) alleged in paragraph 6(a) of the Complaint. *In re Judie Hansen, supra*, slip op. at 24-25, 72-73. Second, Mr. Borchert's testimony regarding his observations during inspections of Respondent's facility was not hearsay. Moreover, 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.[7] Moreover,

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[7]*See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that 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*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

responsible hearsay has long been admitted in USDA's administrative proceedings.[8]

Fourteenth, Respondent contends that she "has taken the time to send out puppy buyer questioneers [sic] and they come back positive" (Pet. for Recons. at fifth unnumbered page).

As stated in *In re Judie Hansen, supra*, slip op. at 54, the testimonials of Respondent's customers (RX 20) are not relevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Fifteenth, Respondent states that "Article VIII of the constitution states that excessive fines not be imposed. Who determines what the value of this fine should be[?]" (Pet. for Recons. at fifth unnumbered page.)

The Eighth Amendment to the United States Constitution prohibits the imposition of excessive fines, as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. amend. VIII.

However, the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators.[9] The purpose of civil penalties assessed under the Animal

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[8]*In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 47 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 39 (Nov. 18, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (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).

[9]See *Austin v. United States*, 509 U.S. 602, 609 (1993) (stating that "[t]he purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) (stating that the word fine, as used in the Excessive Fines Clause, means payment to a sovereign as punishment

(continued...)

Welfare Act is to deter future violations of the Animal Welfare Act and the Regulations and the Standard; civil penalties assessed under the Animal Welfare Act are not for the purpose of punishment.

I have been delegated the authority to determine the amount of the civil penalty to be assessed in administrative disciplinary proceedings instituted under the Animal Welfare Act, and I assessed the $4,300 civil penalty against Respondent.

I found that Complainant proved 20 of the 33 violations alleged in the Complaint and Amended Complaint. I did not assess a civil penalty for three of these 20 violations because I found three of the violations *de minimis*. Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that a dealer or exhibitor may be assessed a civil penalty of $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Therefore, I could have assessed Respondent a maximum civil penalty of $50,000.

My reasons for assessment of a $4,300 civil penalty against Respondent are fully explained in *In re Judie Hansen, supra*, slip op. at 40-41, 89-98. On reconsideration of the $4,300 civil penalty assessed against Respondent, I do not find the civil penalty assessed against Respondent "excessive."

For the foregoing reasons and the reasons set forth in the Decision and Order filed December 14, 1998, *In re Judie Hansen, 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.[10]

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[9](...continued)
for some offense); *Little v. Commissioner*, 106 F.3d 1445, 1454 (9th Cir. 1997) (stating that the Excessive Fines Clause is not applicable to additions to income tax for negligence and for substantial understatement of tax because the additions serve only to deter noncompliance with tax laws by imposing a financial risk on those who fail to comply with tax laws); *United States v. One Parcel of Real Estate at 321 S.E. 9th Court*, 914 F. Supp. 522, 525-26 (S.D. Fla. 1995) (stating that the Excessive Fines Clause limits the government's power to extract payments as punishment for an offense).

[10]*In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 8, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the December 14, 1998, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed December 14, 1998, is reinstated, with allowance for time passed.

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

Order

1. Respondent Judie Hansen is assessed a civil penalty of $4,300. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Colleen A. Carroll
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Avenue, SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Colleen A. Carroll, within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0048.

2. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under

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[10](...continued)
Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

the Animal Welfare Act, and in particular, shall cease and desist from:

a. failing to ensure that primary enclosures for kittens have an elevated resting surface;

b. failing to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices;

c. failing to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards;

d. failing to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement;

e. failing to keep the premises where housing facilities for dogs are located clean and control weeds;

f. failing to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

g. failing to ensure that animal areas are free of clutter, including equipment, furniture, and stored material;

h. failing to design and construct housing facilities for dogs and cats so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them;

i. failing to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease;

j. failing to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards and to reduce odors;

k. failing to construct indoor and outdoor housing facilities so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them; and

l. failing to allow an APHIS inspector access to her facility and records.

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

3. Respondent's Animal Welfare Act license is suspended for a period of 30 days, and continuing thereafter, until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards 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 the conditions in this paragraph of this Order, a

Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 30-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 65th day after service of this Order on Respondent.

In re: JUDIE HANSEN, d/b/a WILD WIND PETTING ZOO.
AWA Docket No. 96-0048.
Order Denying Petition to Reopen Hearing filed May 12, 1999.

Petition to reopen hearing.

The Judicial Officer denied Respondent's petition to reopen hearing, which was filed 4 months and 1 week after the Judicial Officer issued the Decision and Order in *In re Judie Hansen*, 57 Agric. Dec. ___ (Dec. 14, 1998). The Judicial Officer held that the Rules of Practice (7 C.F.R. § 1.146(a)(2)) require that a petition to reopen hearing must be filed prior to the issuance of the Judicial Officer's decision, and Respondent's petition to reopen hearing was untimely.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Gregory Bommelman, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the

Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent represented herself with assistance from her partner, Gregory Bommelman. On October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On January 30, 1998, the ALJ issued an initial decision and order: (1) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (2) assessing Respondent a $3,000 civil penalty; and (3) suspending Respondent's Animal Welfare Act license for 30 days.

On March 24, 1998, Respondent appealed the initial decision and order; on April 14, 1998, Respondent filed Motion for Dismissal; on May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order [hereinafter Complainant's Response and Cross-Appeal]; on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal; on October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal; and on October 15, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

On December 14, 1998, I issued a Decision and Order: (1) dismissing Respondent's Motion for Dismissal; (2) concluding that Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c); (3) assessing Respondent a $4,300 civil penalty; (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (5) suspending Respondent's Animal Welfare Act license for 30 days. *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 3-4, 43, 98-101 (Dec. 14, 1998).

On January 11, 1999, Respondent filed Respondent's Reconsideration of Decision [hereinafter Petition for Reconsideration]. On February 8, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration of Decision and Order, and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the December 14, 1998, Decision and Order. On March 15, 1999, I denied Respondent's Petition for Reconsideration. *In re Judie Hansen*, 58 Agric. Dec. ___ (Mar. 15, 1999) (Order Denying Pet. for Recons.).

On April 21, 1999, Respondent filed Request for a New Administrive [sic] Hearing [hereinafter Petition to Reopen Hearing]. On May 11, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Rehearing, and on May 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Petition to Reopen Hearing.

Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite.* . . .
>
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I issued the Decision and Order in this proceeding on December 14, 1998. Respondent filed Respondent's Petition to Reopen Hearing on April 21, 1999. Therefore, Respondent's Petition to Reopen Hearing, filed 4 months and 1 week after the issuance of the Judicial Officer's Decision and Order, is untimely and is denied.[1]

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

---

[1]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 7 (July 7, 1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen hearing because the respondent filed the petition to reopen hearing 26 days after the Judicial Officer issued an Order Denying Late Appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision).

Order

Respondent's Petition to Reopen Hearing, filed April 21, 1999, is denied.

In re: VOLPE VITO, INC., d/b/a FOUR BEARS WATER PARK and RECREATION AREA.
AWA Docket No. 94-0008.
Order Lifting Stay filed April 5, 1999.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1997, I issued a Decision and Order: (1) concluding that Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area [hereinafter Respondent], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; (2) assessing Respondent a $26,000 civil penalty; (3) revoking Respondent's Animal Welfare Act license; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997). On February 18, 1997, Respondent filed a Petition for Reconsideration, and on April 16, 1997, I issued an Order Denying Petition for Reconsideration. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269 (1997).

On May 13, 1997, Respondent filed Motion to Stay Execution of Decision and Order Filed January 13, 1997 [hereinafter Respondent's Motion for Stay], requesting a stay of the Order in *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997), pending completion of proceedings for judicial review. On May 19, 1997, I granted Respondent's Motion for Stay. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 278 (1997) (Stay Order).

On January 7, 1999, the United States Court of Appeals for the Sixth Circuit issued a decision affirming *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997). *Volpe Vito, Inc. v. United States Dep't of Agric.*, No. 97-3603 (6th Cir. Jan. 7, 1999). On March 9, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay. The Hearing Clerk served Respondent

with Complainant's Motion to Lift Stay on March 11, 1999, and in accordance with section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)), Respondent had 20 days after service in which to respond to Complainant's Motion to Lift Stay. Respondent did not file a response to Complainant's Motion to Lift Stay within 20 days after Respondent was served with the Motion to Lift Stay, and on April 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant's Motion to Lift Stay is granted. The Stay Order issued May 19, 1997, *In re Volpe Vito, Inc.*, 56 Agric. Dec. 278 (1997) (Stay Order), is lifted and the Order issued in *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997), is effective, as follows:

Order

Paragraph I

Respondent is assessed a civil penalty of $26,000. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Sharlene A. Deskins within 60 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order 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 indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

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 Animal and Plant Health Inspection Service officials 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: KATHERINE T. FINCH, d/b/a PINELAND FARM KENNELS.
AWA Docket No. 95-0045.
Dismissal Order filed June 17, 1999.

Jeffery D. Kirmsse, for Complainant.
Lee Garrision, Bridgewater, Massachusetts, for Respondent.
Edwin S. Bernstein, Administrative Law Judge.

Pursuant to Complainant's Motion therefor, the Complaint filed herein on April 11, 1995, is dismissed.

Copies hereof shall be served upon the parties.

In re: JACK STEPP and WILLIAM REINHART.
HPA Docket No. 94-0014.
Stay Order filed July 1, 1998.

Sharlene A. Deskins, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On May 6, 1998, I issued a Decision and Order: (1) concluding that Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(B)) and that Respondent William Reinhart violated section 5(2)(D) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(D)); (2) assessing Jack Stepp and William Reinhart [hereinafter Respondents] each a civil penalty of $2,000; and (3) disqualifying each 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, horse sale, or horse auction, for 1 year. *In re Jack Stepp*, 57 Agric. Dec. ___, slip op. at 21-22, 28-30 (May 6, 1998). On May 27, 1998, Respondents filed a Petition for Reconsideration, which I denied based on my finding that Respondents' Petition for Reconsideration was not timely filed. *In re Jack Stepp*, 57 Agric. Dec. ___ (June 18, 1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondents filed a letter, dated June 26, 1998, stating:

. . . .

. . . [W]e consider the Petition for Reconsideration properly before you, having been timely filed.

Since, under your original Order, which was served on my [sic] on May 11, 1998, and since a 60 day deadline for appeal to the Federal courts on this matter would be July 10, 1998, this is to request that you immediately notify us as to whether you consider the Petition for Reconsideration properly before you. This request is made so as not to jeopardize our appeal to the Federal court which is our right under the law.

A resolution of this matter on whether our Petition for Reconsideration was timely filed is critical in that the Federal courts would not look favorably on our appeal unless we had exhausted all remedies under your administrative

law system.

Letter from William J. Reinhart and Jack Stepp to William G. Jenson, dated June 26, 1998, at 1-2.

On June 30, 1998, I telephoned Respondents at one of the telephone numbers set forth in their June 26, 1998, letter (Letter from William J. Reinhart and Jack Stepp to William G. Jenson, dated June 26, 1998, at 1). Respondent William Reinhart answered the telephone, and I informed him that Respondents' Petition for Reconsideration is no longer "before me" and that the June 18, 1998, Order Denying Petition for Reconsideration constitutes the final administrative disposition of Respondents' Petition for Reconsideration.

Respondent William Reinhart informed me that Respondents intend to seek judicial review of the May 6, 1998, Decision and Order, and the June 18, 1998, Order Denying Petition for Reconsideration, and requested a stay of the Order issued in the May 6, 1998, Decision and Order, pending the outcome of proceedings for judicial review.

On June 30, 1998, counsel for the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me, by telephone, that Complainant does not oppose Respondents' request for a stay order.

On July 1, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' request for a stay order.

Respondents' oral request for a stay order is granted. The Order issued in this proceeding on May 6, 1998, *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998), 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: BRETT EDWARD BOYD, JANETTE A. TREAT, and CARLOS L. TREAT.
HPA Docket No. 99-0002.
Order Withdrawing Complaint filed February 26, 1999.

Colleen A. Carroll, for Complainant.
David F. Broderick, Bowling Green, KY, for Respondent.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

On February 23, 1999, Complainant filed a "Notice of Complainant's Withdrawal of Complaint" in this matter.

It is ordered that the Complaint, filed herein on December 24, 1998, be withdrawn as to Respondents Brett Edward Boyd, Janette A. Treat and Carlos L. Treat.

In re: JACLYN ELAINE SMITH.
HPA Docket No. 99-0003.
Withdrawal of Complaint filed February 26, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant has withdrawn the Complaint filed January 11, 1999 in the above-entitled proceeding. Accordingly, the proceeding is concluded.

Copies hereof shall be served upon the parties.

In re: TIMOTHY E. GRAHAM and DONNA PRUITT.
HPA Docket No. 99-0005.
Order Withdrawing Complaint filed March 4, 1999.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

On March 3, 1999, Complainant filed a "Notice of Complainant's Withdrawal

of Complaint" in this matter.

It is ordered that the Complaint, filed herein on January 14, 1999, be withdrawn as to Respondents Timothy E. Graham and Donna Pruitt.

In re: ALAN L. HANBACK and KAREN L. HANBACK.
HPA Docket No. 99-0009.
Complaint Withdrawn, Proceeding Dismissed filed March 29, 1999.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

By document filed March 18, 1999, the Complainant withdraws Complainant No. HPA 99-0009, filed March 4, 1999. Accordingly the proceeding is dismissed.

Copies hereof shall be served upon the parties.

In re: TEDDY DeLONG.
HPA Docket No. 99-0007.
Order Dismissing Complaint filed April 15, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On April 14,1999, Complainant filed a "Notice of Complainant's Withdrawal of Complaint" in this proceeding.

It is ordered that the complaint, filed herein on March 4, 1999, be dismissed.

In re: FRANCISCA GAUDIA.
P.Q. Docket No. 96-0033.
Order Dismissing Complaint filed March 2, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's February 26, 1999, "Motion to Dismiss" is granted. It is ordered that the Complaint, filed herein on August 1, 1996, be dismissed.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: CALE BLOCKER.
AMAA Docket No. 98-0003.
Decision and Order filed January 5, 1999.

Colleen A. Carroll, for Complaint.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Order for Vidalia Onions Grown in Georgia, 7 C.F.R. Part 955 (the "Vidalia Onion Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Cale Blocker, willfully violated the Vidalia Onion Order.

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, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Cale Blocker is an individual whose mailing address is Route 1, Box 80, Glennville, Georgia 30427. At all times mentioned herein, said respondent was a "handler" as that term is defined in the Act, 7 U.S.C. § 608c(1), and the Vidalia Onion Order, 7 C.F.R. § 955.6.

2. Between approximately February 1997 and the present, respondent Cale Blocker has willfully violated sections 955.60 and 955.101 of the Vidalia Onion Order, 7 C.F.R. §§ 955.60, 955.101, by failing to file with the Vidalia Onion Committee monthly reports of the respondent's receipts and shipments of Vidalia onions.

3. Between approximately February 1997 and the present, respondent Cale Blocker has willfully violated sections 955.42 and 955.142 of the Vidalia Onion Order, 7 C.F.R. §§ 955.42, 955.142, by failing to remit $7,292.70 in assessments owed in the 1996-1997 fiscal period, plus late payment charges and accrued interest thereon.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 955.42, 955.60, 955.101, and 955.142 of the Vidalia Onion Order (7 C.F.R. §§ 955.42, 955.60, 955.101, 955.142).
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondents are assessed a civil penalty of $11,500, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.
2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the Vidalia Onion Committee $7,292.70 in past due assessments for crop year 1996-1997, plus interest of one percent per month pursuant to section 955.142 of the Vidalia Onion Order, and from paying to the Vidalia Onion Committee any and all assessments due under the Vidalia Onion Order for crop year 1997-1998.

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 15, 1999.-Editor]

In re: JOHN STEVE CAPERON.
A.Q. Docket No. 98-0001.
Decision and Order filed December 18, 1998.

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 Section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act), and the regulations promulgated thereunder governing the importation of birds into the United States from Mexico (9 C.F.R. §§ 92.100 *et seq.*)(regulations), in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under Act and the regulations by a complaint filed on January 14, 1998, 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. John Steve Caperon is an individual whose last know mailing address is c/o Pima County Jail, P. O. Box 951, Tucson, Arizona 85702.

2. On or about August 19, 1996 , the respondent brought two birds into the United States at Nogales, Arizona, from Mexico, in violation of 9 C.F.R. §§ 92.101, 92.101(c)(3), 92.102(a), 92.103(a)(1), 92.104, and 92.105(b).

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. § 92.100 *et seq.*). Therefore, the following Order is issued.

Order

The respondent, John Steve Caperon, is hereby assessed a civil penalty of two thousand dollars ($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 98-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final February 24, 1999.-Editor]

In re: RUDOLPH J. LUSCHER, JR.
A.Q. Docket No. 98-0008.
Decision and Order filed December 18, 1998.

Howard Levine, 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)

(Act), and the regulations promulgated thereunder (9 C.F.R. § 85.1 *et seq.*) (regulations).

This proceeding was instituted by a complaint filed against Rudolph J. Luscher, Jr., respondent, on May 8, 1998, by the Acting 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. Respondent Rudolph Luscher, Jr. is an individual with a mailing address of 6121 N.E. 284th, Battleground, WA, 98604.

2. Between February 15, 1996, and February 22, 1996, the respondent violated 9 C.F.R. § 78.9(a)(3)(iii) by the movement of 299 test-eligible cattle from Battleground, Washington to Adrian, Oregon, at least 32 of which were moved without a certificate containing prescribed information, as required.

3. Between February 15, 1996, and February 22, 1996, the respondent violated 9 C.F.R. § 71.18(a)(1)(iii) by the movement of 299 cattle two years of age or older from Battleground, Washington to Adrian, Oregon, of which at least 32 were moved without the required backtags, eartags, brands, or other acceptable individual identification.

Conclusion

By reason of the facts contained in paragraphs one through three above, Rudolph Luscher, Jr. has violated 9 C.F.R. §§ 78.9(a)(3)(iii) and 71.18(a)(1)(iii).

Therefore, the following order is issued.

Order

Rudolph Luscher, Jr., respondent, is hereby assessed a civil penalty of two thousand dollars ($2000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 17, 1999.-Editor]

In re: GARY THOMPSON.
A.Q. Docket No. 98-0009.
Decision and Order filed February 17, 1999.

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 violations of the regulations governing the interstate transportation of animals and animal products (9 C.F.R. § 70 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and the regulations promulgated thereunder, by

a complaint filed on June 8, 1998, 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. Gary Thompson is an individual whose mailing address is 456 Donald Perkins Road, Pitkin, Louisiana 70656.

2. On or about October 24, 1996, the respondent, in violation of 9 C.F.R. § 78.9(b)(3)(ii), moved approximately 15 test-eligible cattle interstate from Louisiana to Texas without such cattle being accompanied interstate by a certificate, as required.

3. On or about October 24, 1996, the respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i), moved approximately 15 cattle two years of age or older interstate from Louisiana to Texas without such cattle being accompanied interstate by an owner-shipper statement or other document with prescribed information, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (9 C.F.R. § 70 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 98-0009.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 28, 1999.-Editor]

In re: JOAQUIN LOPEZ.
A.Q. Docket No. 99-0002.
Decision and Order filed March 12, 1999.

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 transportation of animals and animal products (9 C.F.R. § 70 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and the regulations promulgated thereunder, by a complaint filed on October 15, 1998, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the 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. Joaquin Lopez, respondent, is an individual whose mailing address is 336 Colonial Road, Toms River, New Jersey 08753.

2. On or about January 12, 1997, respondent imported approximately 2 kilos of pork from Mexico into the United States at Houston, Texas, in violation of 9 C.F.R. § 94.9(b), because the pork was not treated, and other requirements were not complied with, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (9 C.F.R. § 70 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 99-0002

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 April 22, 1999.-Editor]

In re: ALEJANDRO HERRERA CAAMANO.
A.Q. Docket No. 96-0020.
Decision and Order filed April 1, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of birds into the United States (9 C.F.R. § 92.101 *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 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 September 3, 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 failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139).

In its proposed order, complainant seeks a $2,000 penalty. However, the Act provides for a maximum civil penalty of $1,000 for each violation. (21 U.S.C. § 122.) The complaint, although referring to the importation of two birds, does not specifically allege more than one violation. Thus, the maximum penalty in this case cannot exceed $1,000. This penalty in turn is reduced to $500 pursuant to *Ricky Bobo, et al.*, 49 Agric. Dec. 849 (1990). Finally, complainant, in proposing any penalty, should have considered that a penalty had already been imposed. *Simon Vejar Sanchez*, 43 Agric. Dec. 748 (1984).

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. Alejandro Herrera Caamano, herein referred to as the respondent, is an individual whose mailing address is 7915 Elmer Avenue, Sun Valley, California 91352.

2. On or about November 10, 1995, respondent imported one live White-fronted Amazon parrot and one live Green Conure from Mexico into the United States at Nogales, Arizona. The importation of the birds violated the Act and the regulations specified below:

A. The birds were not imported into the United States at a designated port in accordance with 9 C.F.R. § 92.101 and 102;

B. The birds were not accompanied by a permit in accordance with 9 C.F.R. § 92.103;

C. The birds were not accompanied by a certificate in accordance with 9 C.F.R. § 92.104; and

D. The birds were not inspected in accordance with 9 C.F.R. § 92.105.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (9 C.F.R. § 92.101 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 96-0020.

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 19, 1999.-Editor]

ANIMAL WELFARE ACT

In re: DAVID T. RICHTMAN, d/b/a DAVID RICHTMAN'S BEARS, ETC.
AWA Docket No. 98-0003.
Decision and Order filed August 18, 1998.

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

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent to the Respondent by regular mail on December 2, 1997. 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 as set forth herein by Respondent's failure to file an answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

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

Findings of Fact and Conclusions of Law

I

A. David T. Richtman, hereinafter referred to as Respondent, is an individual doing business as David Richtman's Bears, Etc., whose address is P.0. Box 359 Gonzales, Texas 78629.

B. The Respondent, was a licensed exhibitor until April 8, 1997. The Respondent's license was suspended from April 8, 1997, through May 7, 1997, due to an Order issued in AWA Docket No. 96-0081.

II

A. From April 8, 1997, through May 7, 1997, the Respondent operated 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). The Respondent exhibited animals while his license was suspended. Each day that the Respondent exhibited animals is a separate violation.

III

On April 10, 1997, APHIS inspected the Respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b)); and
2. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.125(a)).

IV

A. On December 3, 1996, APHIS inspected Respondent's premises and found that Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 3, 1996, APHIS inspected the Respondent's facility and found the Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified, since animals kept outdoors were not provided with adequate shelter from inclement weather and the sun (9 C.F.R. § 3.127(a) and (b)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the

Respondent has violated the Act and 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:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair;

(b) Failing to provide animals with adequate shelter from the elements;

(c) 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

(d) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The Respondent is assessed a civil penalty of $6,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The check shall be sent to the following address:

1400 Independence Ave., S.W.
Room 2014-South Building Stop 1417
Washington, D.C. 20250-1417

The disqualification from applying for a license as stated below shall continue until the civil penalty is paid.

3. Respondent's license is suspended until the license expires. After the license expires the Respondent is disqualified from applying for a license for ten years.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondent.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final October 7, 1998.-Editor]

In re: BRENDA McCURDY, d/b/a TEXAS ANIMAL EXPORT.
AWA Docket No. 98-0022.
Decision and Order filed October 23, 1998.

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 thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by personal service on July 23, 1998. 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 as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as 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. A. Brenda McCurdy, hereinafter referred to as respondent, is an individual doing business as Texas Animal Export whose address is P. O. Box 372, Crystal City, Texas 78839.

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

2. A. During 1995 and 1996, the respondent operated as a dealer as defined in the Act and 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, in commerce, at least 3,499 animals for research, for use as pets, or for exhibition. Each sale constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.
2. The respondent is assessed a civil penalty of $22,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.
3. The respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

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 28, 1999.-Editor]

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Decision and Order filed December 1, 1998.

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

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent 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, were served by the Hearing Clerk on the respondent on September 18, 1998. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

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

Findings of Fact and Conclusions of Law

1. Harold P. Kafka, hereinafter referred to as the respondent, is an individual with a mailing address of 901 Valley Road, Watchung, New Jersey 07060.

2. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

3. On December 24 and 25, 1997, the respondent exhibited animals without having a license as required, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1(a)).

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 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.
2. Furthermore, respondent shall pay a civil penalty of $22,500, which was imposed in the decision and order on December 5, 1998 in AWA Docket No. 97-0025 but was suspended upon the condition that the respondent not violate the Animal Welfare Act or the regulations and standards thereunder for a period of 20 years from the effective date of the order.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 21, 1999.-Editor]

In re: MILTON A. MURPHY, d/b/a RAY SINGLETON AND COMPANY.
AWA Docket No. 98-0031.
Decision and Order filed January 20, 1999.

Brian Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed July 28, 1998, 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 thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent via certified mail to the respondent, return receipt requested, on July 28, 1998. The copies were returned to the office of the Hearing Clerk marked "unclaimed" on August 25, 1998. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to the respondent on October 15, 1998. 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. By letter dated January 11, 1999, and filed with the Hearing Clerk on January 12, 1999, the respondent did not deny failing to file an Answer to the Complaint and he set forth reasons why he should be excused from such requirement. However, the circumstances recited by respondent do not furnish a basis for me to deny the Motion for a Default Decision. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

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

Findings of Fact and Conclusions of Law

I

A. Milton A. Murphy, hereinafter referred to as the respondent, is an individual doing business as Ray Singleton and Company, with a mailing address of 10346 B & R Cattle Ranch Road, Arcadia, Florida 34266.

B. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations. Respondent voluntarily terminated his license on September 4, 1997.

II

On August 6, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. §

2.100(a)) and the standards specified below:

1. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

2. The facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. The structural deficiencies included the absence of a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)).

III

A. On March 10, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 10, 1997, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

C. On March 10, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. The facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. The structural deficiencies included the absence of a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a));

2. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a));

3. Sufficient shade was not provided to allow animals to protect themselves from the direct sunlight (9 C.F.R. § 3.127(a)); and

4. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. § 3.131(c)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the respondent has violated the Act and the regulations and standards 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:

(a) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(b) 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;

(c) Failing to provide animals kept outdoors with adequate shelter from the sun;

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

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

(f) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

2. The respondent is assessed a civil penalty of $3,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified from obtaining a license under the Act and regulations for a period of two years, and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

The provisions of this order shall become effective on the first day after this decision becomes final.

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

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 8, 1999.-Editor]

In re: BRIAN ADRIAN NEELY, d/b/a TEXOTICS.
AWA Docket No. 98-0040.
Decision and Order filed February 12, 1999.

Frank Martin, Jr.. for Complainant.
Resondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by regular mail on October 15, 1997. 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 as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as 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

1. (a) Brian Adrian Neely, doing business as TEXOTICS, hereinafter referred to as the respondent, is an individual whose mailing address is 168 Pine Lane, Montgomery, Texas 77356.

(b) The respondent, at all times material hereto, was operating as a dealer as defined in the Act and regulations.

2. On or about July 21, 1997, the respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold, in commerce, one spider monkey for resale, for use as a pet or for exhibition.

3. On or about July 28, 1997, the respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold, in commerce, one cougar for resale, for use as a pet or for exhibition.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The respondent is assessed a civil penalty of $3,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondent is disqualified for a period of three years from becoming licensed under the Act and regulations.

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, 1999.-Editor]

In re: JO ANNE LOHSE.
AWA Docket No. 99-0003.
Decision and Order filed March 10, 1999.

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

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent 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 duly served on the Respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent 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

1. Jo Anne Lohse, hereinafter referred to as the Respondent, is an individual with a mailing address of P.O. Box 212, Tilden, Nebraska 68781.

2. The Respondent, at all times material hereto, was operating as a dealer as

defined in the Act and the regulations.

3. Between February 21, 1997, and June 8, 1997, the Respondent acted as a dealer of animals as defined in the Act and the regulations without having a license as required, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1(a)) on at least 14 occasions.

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 issued thereunder.

2. A. The Respondent is assessed a civil penalty of $14,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

B. In addition, the Respondent shall pay a civil penalty of $8,000.00, which was assessed but suspended by the Consent Decision and Order issued in AWA Docket 96-0029 on February 14, 1997.

3. The Respondent is permanently disqualified from becoming licensed under the Animal Welfare Act.

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 26, 1999.-Editor]

FEDERAL CROP INSURANCE ACT

In re: JOHN L. SHAW.
FCIA Docket No. 99-0001.
Decision and Order filed March 17, 1999.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding instituted by a Complaint filed October 23, 1998, under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq.*) and the regulations promulgated thereunder. The Complaint alleges that the Respondent should be disqualified from purchasing catastrophic risk protection or any other benefit under the Act, for specified periods.

A copy of the Complaint was mailed by certified mail to the Respondent on October 26, 1998 [P.O. stamp], at which time it was addressed to Respondent at P.O. Box 250, Byron, Georgia 31008. This certified mailing was returned to the Hearing Clerk's Office on November 17, 1998, marked "Unclaimed". Thereafter, on December 11, 1998, the Hearing Clerk remailed the Complaint, by regular mail, to the Respondent at 3424 Burnett Road, Byron, Georgia 31008.

The aforementioned procedure fulfills the requirements for valid service pursuant to section 1.147 of the Rules of Practice and Procedure (7 C.F.R. § 1.147). By communication dated January 14, 1999, the Hearing Clerk advised the Respondent that an Answer to the Complaint had not been received within the allotted time. On January 22, 1999, the Complainant filed a Motion for Decision, together with a Proposed Decision, premised upon Respondent's failure to file an Answer within the time allotted.

By objections filed February 19, 1999, the Respondent, through counsel, objected to the Complainant's Motion for Decision. Among other things, the Respondent's objections included certain denials of the allegations of the Complaint, and the assertion that Respondent's failure to file an Answer to the Complaint was due to lack of notice of the proceedings. It was further stated: "Respondent is without sufficient means to adequately participate in further hearing and, therefore, waives oral hearing and requests that this case be decided based upon the pleadings." The case was assigned to this Judge on February 23, 1999. On February 25, 1999, I issued a document entitled "Complainant to File Additional information." On March 5, 1999, the Complainant filed: "Complainant's Response to Respondent's Objection to Motion for Decision."

The "P.O. Box 250" address used was the same address used by United States District Court for the Middle District of Georgia on April 27, 1998 to serve a copy of the judgment against Respondent entered April 14, 1998, for making false statements regarding Federal Crop Insurance on August 12, 1994. Respondent's residence is listed on the judgment as the same address. No response by Respondent was ever received from the remailing, by regular mail, of the Complaint.

The Respondent has requested that this case be decided based upon the pleadings. I have done so. After consideration of all of the pleadings and the record as a whole, I find:

(1) That Respondent was properly served with the Complaint in accordance with the Rules of Practice;

(2) That no response was received from the Respondent within the period specified under the Rules for the filing of an Answer;

(3) Under the Rules of Practice, the failure to timely file an Answer is deemed an admission of the allegations of the Complaint;

(4) John L. Shaw hereinafter referred to as Respondent, has an address of P.O. Box 250, Burnett Road, Byron, Georgia 31008;

(5) Respondent was a participant in the Federal Crop Insurance Program under the Act and the regulations;

(6) Respondent concealed part of his 1994 wheat production and collected an indemnity payment for a reported loss of production on this concealed portion while participating in the federally sponsored Multiple Peril Crop Insurance (MPCI) Program;

(7) Respondent filed false claims with Crop Hail Management, a company reinsured by FCIC to receive an indemnity payment of $68,385.00;

(8) On August 12, 1994, Respondent pled guilty in the United States District Court for the Middle District of Geogia, to one count of false statements regarding crop insurance;

(9) On April 14, 1998, Respondent was ordered to make restitution to FCIC in the amount of $26,203.36, committed to the custody of the United States Bureau of Prison for Imprisonment for a term of six months and upon release of imprisonment a five-year term of supervised probation; and

(10) On August 8, 1998, Respondent reimbursed the Risk Management Agency $26,203.36 for indemnity overpayments.

Conclusions

Respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop insurance Corporation or to the insurer with respect to an insurance plan or policy under the Act [7 U.S.C. § 1506(n)].
Pursuant to section 506 of the Act (7 U.S.C. § 1506) and subpart R of the Regulations (7 C.F.R. § 400.454), the violations detailed above are grounds for disqualification of the Respondent from purchasing catastrophic risk protection and any other benefit under the Act, for a specified period.

Even if the allegations of the Complaint were not deemed admitted (which they are), the attachments submitted by Complainant in its Response filed March 5, 1999, show that Respondent willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act.

The Complainant has filed an Amendment to the Complaint changing the date in Paragraph II(c) from August 12, 1984 to August 12, 1994.

Order

Pursuant to section 506 of the Act (7 U.S.C. § 1506), Respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year and from receiving any other benefit under the Act for a period of five years. The period of disqualification shall be effective thirty-five (35) days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145 of the Rules of Practice.

If the period of disqualification would commence after the beginning of the crop year, and the Respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 28, 1999.-Editor]

FEDERAL MEAT INSPECTION ACT and POULTRY PRODUCTS INSPECTION ACT

In re: PALERMO SAUSAGE CO., and WILLIAM DEFELICE.
FMIA Docket No. 98-0006.
PPIA Docket No. 98-0004.
Decision and Order filed January 6, 1999.

Rick Herndon, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the denial and withholding of inspection services under Title I the FMIA (21 U.S.C. §§ 601 *et seq.*) and the PPIA (21 U.S.C. §§ 451 *et seq.*), in accordance with the rules of practice governing proceedings under the FMIA (9 C.F.R. § 335.1), the PPIA (9 C.F.R. § 381.230) and section 1.136 of the Uniform Rules of Practice (7 C.F.R. § 1.136).

This proceeding was instituted under the FMIA and the PPIA, by a complaint filed on August 13, 1998, by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. 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 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. Respondent Palermo Sausage Company is an unincorporated business with a mailing address of 837 Franklin Avenue, New Castle, Pennsylvania 16101

2. Respondent William DeFelice is an individual with a mailing address of 2009 Wilson Avenue, New Castle, Pennsylvania 16101.

3. On or about November 12, 1996, William DeFelice and Carolyn A. DeFelice, d/b/a Palermo Sausage Company, submitted an application for grant of meat inspection services under Title 1 of the FMIA and poultry products inspection

services under the PPIA for Palermo Sausage Company located at 3005 Ellwood-New Castle Road, New Castle, Pennsylvania 16101.

4. The respondents' application for inspection services stated that William DeFelice was president and Carolyn A. DeFelice was vice-president of Palermo Sausage Company. Palermo Sausage Company is not incorporated in any state.

5. On or about December 11, 1995, respondent William DeFelice pleaded guilty to six felony counts in the Court of Common Pleas of Lawrence County, State of Pennsylvania. The felony counts included one count of theft by unlawful taking or disposition, one count of criminal conspiracy to commit theft by unlawful taking or disposition, one count of receiving stolen property, one count of criminal conspiracy to commit receiving stolen property and two counts of corrupt organizations.

6. The respondent William DeFelice is and will remain responsibly connected with Palermo Sausage Company.

7. By reason of the aforestated facts, respondents William DeFelice and Palermo Sausage Company are unfit to engage in any business requiring inspection services under Title I of the FMIA and under the PPIA, within the meaning of Section 401 of the FMIA (21 U.S.C. § 671) and the PPIA (21 U.S.C. § 467).

WHEREFORE, it is hereby ordered, that inspection services are denied and withheld indefinitely under Title I of the FMIA and under the PPIA from the respondents William DeFelice and Palermo Sausage Company, and any affiliates, successors or assigns, as authorized by the FMIA and the PPIA.

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 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 March 9, 1999.-Editor]

PLANT QUARANTINE ACT

In re: VERONICA HYACINTH.
P.Q. Docket No. 97-0023.
Decision and Order filed December 18, 1998.

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 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 September 12, 1997, 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. Veronica Hyacinth is an individual whose mailing address is 1834 Andrews Avenue, The Bronx, New York, 10453.

2. On or about January 13, 1995 at Jamaica, New York, respondent imported juneplums into the United States from Jamaica, in violation of Section 7 C.F.R. § 319.56-2 because importation of juneplums without a permit 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 five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0023.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 17, 1999.-Editor]

In re: SIAGALIMA VAIMAONA.
P.Q. Docket No. 98-0005.
Decision and Order filed December 18, 1998.

Susan Golabek, 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 Hawaiian fruits and vegetables (7 C.F.R. §§ 318.13 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 14, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about October 10, 1996, the respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 9.6 pounds of fresh breadfruit from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

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 provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. 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. Siagalima Vaimaona, respondent herein, is an individual whose mailing address is 94-1291 Huakai St., Waipahu, HI 96797.

2. On or about October 10, 1996, the respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 9.6 pounds of fresh breadfruit from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. §§ 318.13(b) and 318.13-2(a)(1). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred 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
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 P.Q. Docket No. 98-0005.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final January 28, 1999.-Editor]

In re: SHELDON O. HIGGINS.
P.Q. Docket No. 98-0006.
Decision and Order filed December 18, 1998.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (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 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 14, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 12, 1996, the respondent imported approximately four cashew fruits and two mangoes

from the island of Jamaica into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56-2(e), because the cashew fruits and mangoes were not accompanied by a permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. 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. Sheldon O. Higgins, respondent herein, is an individual whose mailing address is 53 Acton St., Hartford, CT 06120.

2. On or about August 12, 1996, the respondent imported approximately four cashew fruits and two mangoes from the island of Jamaica into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56-2(e), because the cashew fruits and mangoes were not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and 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 P.Q. Docket No. 98-0006.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final March 5, 1999.-Editor]

In re: HECTOR HILDAGO, d/b/a H&L TRAVEL INTERNATIONAL.
P.Q. Docket No. 98-0014.
Decision and Order filed December 18, 1998.

Sheila Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of plants and animal products into the United States (7 C.F.R. § 319 *et seq.* and 9 C.F.R. § 94 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 12, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately three apples from Ecuador in violation of 7 C.F.R. § 319.56-2(e) because the apples were not accompanied by a permit and were not treated, as required. The complaint also alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States, approximately 10 pounds of fresh beef from Ecuador in violation of 9 C.F.R. § 94.1 because the importation of fresh beef from Ecuador is prohibited. Finally, the complaint alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately eight Optunia sp fruit, one papaya, and three giant grenadillas, from Ecuador, in violation of 7 C.F.R. § 319.56-2(e) because the fruit was not accompanied by a permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Hector Hildago is the owner and operator of H&L Travel International which is located at 287-B Monroe Street, Passaic, NJ 07055.

2. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately three apples from Ecuador in violation of 7 C.F.R. § 319.56-2(e) because the apples were not accompanied by a permit and were not treated, as required.

3. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States, approximately 10 pounds of fresh beef from Ecuador in violation of 9 C.F.R. § 94.1 because the importation of fresh beef from Ecuador is prohibited.

4. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately eight Optunia sp fruit, one papaya, and three giant grenadillas, from Ecuador, in violation of 7 C.F.R. § 319.56-2(e) because the fruit was not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e) and 9 C.F.R. § 94.1. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two thousand dollars ($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days

from the effective date of this Order to :

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403.

Respondents shall indicate that payment is in reference to P.Q. Docket No. 98-14.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 30, 1999.-Editor]

In re: HEMLATA KATBAMNA.
P.Q. Docket No. 98-0015.
Decision and Order filed December 18, 1998.

Sheila Novak, 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 plants into the United States (7 C.F.R. § 319 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on July 13, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about February 1, 1998, at Chicago, IL, respondent imported into the United States approximately two fresh yams from India in violation of 7 C.F.R. § 319.56-2(e) because the yams were not accompanied by a permit and were not treated, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a)

shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Hemlata Katbamna is an individual with a mailing address of 4320 Kennedy Drive, # 203, Racine, WI 53404.

2. On or about February 1, 1998, at Chicago, IL, respondent imported into the United States approximately two fresh yams from India in violation of 7 C.F.R. § 319.56-2(e) because the yams were not accompanied by a permit and were not treated, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. §§ 71.18 (a)(1)(i), 78.8, and 78.9 (b)(3)(ii). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to :

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403.

Respondents shall indicate that payment is in reference to P.Q. Docket No. 98-15.

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 1, 1999.-Editor]

In re: DARLINE SANON.
P.Q. Docket No. 98-0019.
Decision and Order filed April 1, 1999.

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 Haiti into the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted 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 September 28, 1998, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about December 1, 1997, the respondent imported fresh mangoes into the United States from Haiti, at Miami, Florida, in violation of 7 C.F.R. §§ 319.56(c), 319.56(e) and 319.56-3, because the mangoes were not imported under permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth 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. Darline Sanon, the respondent, is an individual whose mailing address is 3506 14th Street, West, Apartment 242, Bradenton, Florida 34205.

2. On or about December 1, 1997, the respondent imported fresh mangoes into the United States from Haiti, at Miami, Florida, in violation of 7 C.F.R. §§ 319.56(c), 319.56(e) and 319.56-3, because the mangoes were not imported under permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent Darline Sanon 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. 98-0019.

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 11, 1999.-Editor]

In re: TUNG T. NGUYEN.
P.Q. Docket No. 98-0018.
Decision and Order filed April 20, 1999.

Howard Levine, 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 Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed against Tung T. Nguyen, respondent, on September 22, 1998, by the Acting 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. Tung T. Nguyen, hereinafter referred to as the respondent, is an individual with a mailing address of 138 Southland Boulevard, #4, Louisville, Kentucky 40214.

2. On or about April 14, 1997, the respondent violated 7 C.F.R. § 319.56(c) by importing two (2) kilograms of fresh longan fruits from Vietnam into the United States.

3. On or about April 14, 1997, the respondent violated 9 C.F.R. § 94.9(b) by importing one (1) kilogram of pork sausage from Vietnam into the United States without the required certificate.

4. On or about April 14, 1997, the respondent violated 9 C.F.R. § 94.12(b) by importing one (1) kilogram of pork sausage from Vietnam into the United States without the required certificate.

Conclusion

By reason of the facts contained in paragraphs one through four above, Tung T. Nguyen, respondent, has violated 7 C.F.R. § 319.56(c), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).

Therefore, the following order is issued.

Order

Tung T. Nguyen is hereby assessed a civil penalty of three thousand dollars ($3000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 29, 1999.-Editorl

In re: MARIA MERAZ.
P.Q. Docket No. 98-0007.
Decision and Order filed May 6, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.),* hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, on November 14, 1997. The respondent failed to file an answer within the time provided under 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 a failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall 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. Maria Meraz, herein referred to as the respondent, is an individual whose mailing address is 7243 Kelvin Avenue, #220, Canoga Park, California 91306.

2. On or about May 14, 1996, at Los Angeles, Califomia, respondent imported fifty fresh mangoes from El Salvador into the United States in violation of 7 C.F.R. § 319.56, because the importation of mangoes from El Salvador 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 five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0007.

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 June 17, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

ANIMAL QUARANTINE and RELATED LAWS

Craig Kohl, d/b/a Red Cedar Preserve. A.Q. Docket No. 98-0005. 2/22/99.

Consent Decision as to Dan Koster. A.Q. Docket No. 99-0003. 3/25/99.

Gordon Appenzeller, d/b/a Hill Top Farms, Hill Top Dairy, Martin Farms, and C&C Farms. A.Q. Docket No. 97-0009. 5/26/99.

Consent Decision as to Riverside Colony, d/b/a Riverside Hog Farm. A.Q. Docket No. 99-0003. 6/23/99.

ANIMAL WELFARE ACT

Mary Moore, d/b/a D&M Kennel. AWA Docket No. 98-0023. 2/5/99.

L. D. Terry, d/b/a A&B Hatchery. AWA Docket No. 99-0006. 2/10/99.

Billy R. Holman. AWA Docket No. 98-0011. 2/17/99.

Jeanette and Swen Bergman, d/b/a Mountain Top Kennel. AWA Docket No. 98-0010. 2/17/99.

Galen and Audrey Rottinghaus. AWA Docket No. 98-0008. 5/5/99.

Sandra K. Pearson. AWA Docket No. 99-0004. 6/3/99.

FEDERAL MEAT INSPECTION ACT

Natural Beef Jerky, Inc., George R. Gieder, and Paul D. Schrader. FMIA Docket No. 99-0004. 2/24/99.

Custom Meats Corporation. FMIA Docket No. 99-0007. 3/25/99.

Thomas Beaver and T&D Meats and Lockers, Inc. FMIA Docket No. 98-0003. 4/9/99.

Brestensky's Meat Market, Inc. and Stephen T. Brestensky. FMIA Docket No. 98-0002. 6/30/99.

HORSE PROTECTION ACT

David Brown, doing business as Brownswood, Inc. HPA Docket No. 98-0010. 3/26/99.

Paul Kilburn and Marla Hatmaker. HPA Docket No. 99-0016. 5/5/99.

Donald E. Parmer, an individual, Deborah L. Parmer, an individual, Robert Nelson Hugh, an individual, and Hugh Stables, an unincorporated association. HPA Docket No. 99-0023. 5/24/99.

June B. Collins. HPA Docket No. 99-0006. 6/15/99.

INSPECTION AND GRADING

Esperanto Exports, Inc. I&G Docket No. 99-0002. 6/11/99.

PLANT QUARANTINE ACT

Whole Foods Market, Inc. P.Q. Docket No. 99-0006. 4/30/99.

La Popular. P.Q. Docket No. 99-0016. 5/7/99.

Video Garcia. P.Q. Docket No. 99-0022. 5/14/99.

Ortiz Mex-Produce, Inc. P.Q. Docket No. 99-0011. 5/20/99.

El Mercadito. P.Q. Docket No. 99-0034. 5/20/99.

Consent Decision as to Reyna's Super Market. P.Q. Docket No. 99-0032. 5/21/99.

Martinez Grocery. P.Q. Docket No. 99-0014. 5/26/99.

Emilio's Supermarcado Y Carn. P.Q. Docket No. 99-0031. 5/28/99.

Consent Decision as to Sonora Produce. P.Q. Docket No. 99-0040. 5/28/99.

Super Exito Video. P.Q. Docket No. 99-0017. 6/1/99.

Consent Decision as to La Principal. P.Q. Docket No. 99-0040. 6/3/99.

Los Americas #2. P.Q. Docket No. 99-0019. 6/16/99.

La Favorita. P.Q. Docket No. 99-0033. 6/24/99.

Sichanh Khamphavog, d/b/a Sichanh Asian Market. P.Q. Docket No. 99-0042. 6/24/99.

Consent Decision as to Bao La, d/b/a Hong Kong Food & Gift Company. P.Q. Docket No. 99-0046. 6/29/99.

POULTRY PRODUCTS INSPECTION ACT

Custom Meats Corporation. PPIA Docket No. 99-0005. 3/25/99.

Thomas Beaver and T&D Meats and Lockers, Inc. PPIA Docket No. 98-0001. 4/9/99.

VETERINARY ACCREDITATION

Randy J. Burgess, d/b/a Ouachita Equine Clinic. V.A. Docket No. 98-0001. 5/14/99.

LIST OF DECISIONS REPORTED

JANUARY - JUNE 1999

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: JIM ARON.
P&S Docket No. D-98-0030.
Decision and Order filed January 20, 1999.

Failure to file an answer — Default decision — Cease and desist order — Civil penalty.

The Judicial Officer affirmed the decision by Chief Administrative Law Judge Palmer ordering Respondent to cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act (Act) and the Regulations issued under the Act without maintaining an adequate bond or its equivalent and assessing Respondent a civil penalty of $1,000. Respondent's failure to file an 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. The Judicial Officer held that Respondent's automobile accident, loss of memory, status as a United States citizen, status as a veteran of the United States Army, and payment of taxes are not bases for setting aside the Default Decision. Moreover, the Judicial Officer rejected Respondent's contention that he was being punished for being in an automobile accident. The Judicial Officer stated that he was imposing the sanction because of Respondent's violations of the Act and the Regulations issued under the Act. Further, the Judicial Officer stated that the sanction was not imposed for any punitive reasons, but rather, the sanction was imposed to accomplish the remedial purposes of the Act by deterring future similar violations of the Act and the Regulations by Respondent and other livestock dealers.

Deborah Ben-David, 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 Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-.200) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 23, 1998.

The Complaint alleges that Jim Aron [hereinafter Respondent] engaged in

business as a dealer under the Packers and Stockyards Act without maintaining an adequate bond or its equivalent, in willful violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, .30) (Compl. ¶¶ II, III). Respondent failed to answer the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On October 28, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Decision Without Hearing and a Proposed Decision Without Hearing by Reason of Default. Respondent failed to file objections to Complainant's Motion for Decision Without Hearing or to Complainant's Proposed Decision Without Hearing by Reason of Default within 20 days after service of the Motion for Decision Without Hearing and the Proposed Decision Without Hearing by Reason of Default, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 1, 1998, Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Decision Without Hearing by Reason of Default [hereinafter Default Decision] in which the Chief ALJ: (1) found that Respondent failed to obtain a bond and has continued to engage in the business of a dealer without maintaining an adequate bond or its equivalent; (2) concluded that Respondent willfully violated section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, .30); (3) issued a cease and desist order, directing that Respondent cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the Regulations without filing and maintaining an adequate bond or its equivalent; and (4) assessed a civil penalty of $1,000 against Respondent (Default Decision at 2-3).

On December 28, 1998, 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 January 15, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on January 19, 1999, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section

---

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions.

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

Copies of the Complaint and the Rules of Practice were served upon Respondent by certified mail on July 27, 1998. Respondent was informed in a letter of service, which accompanied the Complaint and the Rules of Practice, that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent failed to file an answer within the time prescribed in the Rules of Practice, and the facts alleged in the Complaint, which are deemed admitted for the purposes of this proceeding by Respondent's failure to file an answer, are adopted and set forth in this Decision and Order, *infra*, as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Jim Aron is an individual doing business in the State of Mississippi and whose mailing address is P.O. Box 181, Bruce, Mississippi 38915.

2. Respondent is and, at all times material to this proceeding, was:

(a) Engaged in business as a dealer buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. In *In re Eddie Holcombe* (Consent Decision as to Jim Aron), 47 Agric. Dec. 1538 (1988), Respondent consented to an Order to cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act. Respondent, in connection with his operation subject to the Packers and Stockyards Act, was notified by certified mail received on January 23, 1998, as set forth in paragraph II in the Complaint, that he was required to maintain a surety bond or its equivalent in the amount of $10,000 to secure the performance of his livestock obligations under the Packers and Stockyards Act. Notwithstanding such notice, Respondent failed to obtain the bond and has continued to engage in the business as a dealer without maintaining an adequate

bond or its equivalent, as required by the Packers and Stockyards Act and the Regulations.

Conclusions

By reason of the facts found in the Finding of Facts in this Decision and Order, *supra*, Respondent has willfully violated section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, .30).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter, dated December 20, 1998 [hereinafter Appeal Petition] appears to be an appeal of the Chief ALJ's Default Decision. Respondent's Appeal Petition states in its entirety, as follows:

> Dear United States Dep of Ag. Dec. 20, 1998
>
> On Oct. 22, 1997[,] I had a car wreck that knocked my brain aloose [sic] an[d] nearly killed me. For about 2 weeks[,] my brain like to have busted. For app. 1 year & 6 months[,] I do not remember what I was doing an[d] since that time my memory bank in my brain has come back to me.
>
> I must tell you that during that 1 year & ½ I made a lots [sic] of bad business mistakes. I have not been to a cow sale in the last 3 or 4 months. If you'll [sic] are going to punish me for having a car wreck that knocked my brain aloose [sic] then just come after me.
>
> I am a taxpayer an[d] a[n] American citizen that spent time in the army when I was drafted. Berline [sic] crisis 1962 Fort Poke La.

Sections 1.136(a), (c), 1.139, and 1.141(a) 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) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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

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

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, 1.141(a).

Moreover, the Complaint served on Respondent on July 27, 1998, with the Rules of Practice, clearly informs Respondent of the consequences of failing to file an answer, as follows:

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

Compl. at 2.

Likewise, the letter from the Hearing Clerk accompanying the Complaint and the Rules of Practice expressly advises Respondent of the effect of failure to file a timely answer or deny any allegation in the Complaint, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> July 24, 1998
>
> Mr. Jim Aron
> P.O. Box 181
> Bruce, Mississippi 38915
>
> Dear Mr. Aron:
>
> Subject: In re: Jim Aron, Respondent
> P&S Docket No. D-98-0030
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Packers and Stockyards Act, 1921.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

July 24, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Jim Aron, at 1 (emphasis in original).

Respondent's answer was due no later than August 17, 1998. Respondent's first and only filing in this proceeding was filed December 28, 1998, 5 months and 1 day after the Complaint was served on Respondent and 133 days after Respondent's answer was due. Moreover, Respondent's December 28, 1998, filing does not admit, deny, or explain the allegations in the Complaint, and I find that Respondent's December 28, 1998, filing is not an answer, as provided in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).

Respondent's failure to file an 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 28, 1998, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Decision Without Hearing and a Proposed Decision Without Hearing by Reason of Default 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 Decision Without Hearing, a copy of the Complainant's Proposed Decision Without Hearing by Reason of Default, and a letter dated October 28, 1998, from the Hearing Clerk were served on Respondent by certified mail on November 3, 1998. The October 28, 1998, letter from the Hearing Clerk, which accompanied a copy of Complainant's Motion for Decision Without Hearing and a copy of Complainant's Proposed Decision Without Hearing by Reason of Default states, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> October 28, 1998
>
> Mr. Jim Aron
> P.O. Box 181
> Bruce, Mississippi 38915
>
> Dear Mr. Aron:
>
> Subject: In re: Jim Aron, Respondent
> P&S Docket No. D-98-0030
>
> Enclosed is a copy of Complainant's Motion for Decision Without Hearing, together with a copy of the Proposed Decision, which have been filed with this office in the above-captioned proceeding.

> In accordance with the applicable rules of practice, respondents [sic] will have 20 days from the receipt of this letter in which to file with this office an original and four copies of objections to the Proposed Decision.

October 28, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Jim Aron.

Respondent failed to file objections to Complainant's Motion for Decision Without Hearing and Complainant's Proposed Decision Without Hearing by Reason of Default within 20 days, as provided in 7 C.F.R. § 1.139, and on December 1, 1998, the Chief ALJ filed the Default Decision, which was served on Respondent on December 8, 1998.

On December 28, 1998, Respondent filed his Appeal Petition in which he asserts that he was in an automobile accident that caused him to lose memory and that he is a taxpayer, a United States citizen, and a veteran of the United States Army.

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 and allowing Respondent to file an answer.[3] The

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

[3]*See generally In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (holding that the default decision was proper where respondents filed an answer 49 days after they were served with the

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complaint); *In re Conrad Payne*, 57 Agric. Dec. ___ (Dec. 8, 1998) (holding that the default decision was proper where respondent's first filing was 60 days after the complaint was served on respondent); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision 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. 517 (1997) (holding the default decision 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) (holding that the 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) (holding the 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. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was 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) (holding the 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) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the 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) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an
(continued...)

[3](...continued)
answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a 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) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was 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) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was 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) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was 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) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the 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) (holding the default order
(continued...)

Rules of Practice, a copy of which was served on Respondent on July 27, 1998, with a copy of the Complaint, clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's first and only filing in this proceeding was filed December 28, 1998, 5 months and 1 day after Respondent was served with the Complaint and 133 days after Respondent's answer was due. Moreover, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed decision (7 C.F.R. § 1.139). Respondent did not file any objections to Complainant's Motion for Decision Without Hearing and Proposed Decision Without Hearing by Reason of Default.

Further, 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 USDA to handle its workload in an expeditious and economical manner. USDA's three administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 30 to 50 cases per year.

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 was permitted to contest some of the allegations of fact after failing to file an 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

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proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood USDA's procedural requirements, when there is no basis for the misunderstanding).

[4]*See 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) (stating that 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) (stating that 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) (stating that 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).

administrative process and would require additional personnel.

The record 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 an answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondent's failure to file an 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's automobile accident, loss of memory, payment of taxes, status as a United States citizen, and status as a veteran of the United States Army are not bases for setting aside the Default Decision issued in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).[5]

Moreover, Respondent states that "if you'll [sic] are going to punish me for having a car wreck that knocked my brain aloose [sic] then just come after me" (Appeal Pet.). As an initial matter, the sanction which I impose in this Decision and Order is not imposed because of Respondent's automobile accident, but rather, the sanction is imposed because of Respondent's violations of the Packers and Stockyards Act and the Regulations. Second, the sanction in this Decision and Order is not imposed for any punitive reasons. Instead, the sanction is imposed to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future similar violations of the Packers and Stockyards Act and the Regulations by Respondent and other livestock dealers.

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, 567-68 (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, Jim Aron, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from

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[5]*Cf. In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 22 (Jan. 6, 1999) (stating that the age, ill health, and hospitalization of one of the respondents at the time the complaint was served on respondents are not bases for setting aside the default decision, which was issued in accordance with 7 C.F.R. § 1.139, after respondents failed to file a timely answer).

engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act and the Regulations issued under the Packers and Stockyards Act without filing and maintaining an adequate bond or its equivalent, as required by the Packers and Stockyards Act and the Regulations. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $1,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

Assistant General Counsel
United States Department of Agriculture
Office of the General Counsel
Trade Practices Division
Room 2446 South Building
1400 Independence Avenue, SW
Washington, D.C. 20250-1413

The certified check or money order shall be forwarded to, and received by, the Assistant General Counsel, Trade Practices Division, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.& S. Docket No. D-98-0030.

PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: PRESS HARMON (ANDY) ANDREWS, d/b/a AA LIVESTOCK.
P&S Docket No. D-98-0034.
Decision and Order filed February 5, 1999.

Imani K. Ellis-Cheek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.)* herein referred to as the Act, instituted by a Complaint filed by the Deputy Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the Respondent wilfully violated the Act.

Copies of the Complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.)* governing proceedings under the Act were served upon Respondent by certified mail on August 29, 1998. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the facts alleged in the Complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Press Harmon (Andy) Andrews, hereinafter referred to as the Respondent, is an individual doing business as AA Livestock in the State of Alabama. His business mailing address is 6461 Eddins Road, Dothan, AL 36301.

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

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

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

3. Respondent, in connection with his operations subject to the P&S Act, on or about the dates and in the transactions set forth in paragraph II(a) in the Complaint, purchased livestock and in purported payment issued checks which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

4. Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions listed in paragraph II(a) and (b) of the Complaint and on other occasions, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

5. As of August 8, 1998, there remained an outstanding balance for livestock purchases in the amount of $10,723.79.

Conclusions

By reason of the facts found in the Findings of Fact herein, Respondent has willfully violated sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228(b)).

Order

Respondent, Press Harmon (Andy) Andrews, his agents and employees, directly or indirectly through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent Press Harmon Andrews is suspended as a registrant under the P&S Act for a period of 5 years; *Provided, however,* That upon application to the Packers and Stockyards Administration, GIPSA, a supplemental order may be issued terminating the suspension of the Respondent at any time after the expiration of the initial 120 days upon demonstration by the Respondent that the livestock

sellers identified by the Complaint in this proceeding have been paid in full, *And provided further,* That this Order may be modified upon application to the Packers and Stockyards Programs to permit the salaried employment of Respondent by another registrant or packer after the expiration of the initial 120 days of this suspension term and upon demonstration of circumstances warranting modification of the Order.

The provisions of this Order shall become effective on the sixth day after service of this Order on the Respondent.

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 March 31, 1999.-Editor]

In re: MELVIN KOLB, INC., ALMA KOLB, AND DENNIS KOLB.
P&S Docket No. D-99-0006.
Decision and Order with Respect to Respondent Melvin Kolb, Inc., filed March 3, 1999.

JoAnn Waterfield, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.),* herein referred to as the Act, instituted by a Complaint filed by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, charging that the financial condition of Melvin Kolb, Inc., a Pennsylvania corporation, does not meet the requirements of the Packers and Stockyards Act, and that Respondents Melvin Kolb, Inc., Dennis Kolb, and Alma Kolb willfully violated the Act.

Copies of the Complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon Respondent Melvin Kolb, Inc., by certified mail received November 19, 1998. Respondent Melvin Kolb, Inc., was informed in a letter of service that an answer should be filed pursuant to

the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent Melvin Kolb, Inc., has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint pertaining to Respondent Melvin Kolb, Inc., which are admitted by Respondent Melvin Kolb, Inc.'s failure to file an answer, are adopted and set forth herein as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Melvin Kolb, Inc. [hereinafter referred to as Respondent], is a corporation whose business mailing address is 621 Willow Road, Lancaster, Pennsylvania 17601.

(b) Respondent was at all times material herein:

(1) Engaged in the business of a dealer buying and selling livestock in commerce for its own account;

(2) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for its own account.

(c) Respondent ceased its operations subject to the Act on or about February 28, 1997, and is no longer an active registrant with the Secretary of Agriculture.

2. The financial condition of Respondent does not meet the financial requirements of the Act in that:

(a) As of November 30, 1995, Corporate Respondent's current liabilities exceeded its current assets. As of that date, Corporate Respondent had current liabilities totaling $928,905.00 and current assets totaling $432,028.00 resulting in an excess of current liabilities over current assets of $496,877.00.

(b) As of May 31, 1996, Corporate Respondent's current liabilities exceeded its current assets. As of that date, Corporate Respondent had current liabilities totaling $735,755.28 and current assets totaling $280,557.12 resulting in an excess of current liabilities over current assets of $455,198.16.

(c) As of June 30, 1996, Corporate Respondent's current liabilities exceeded its current assets. As of that date, Corporate Respondent had current liabilities totaling $755,032.00 and current assets totaling $326,440.83 resulting in an excess of current liabilities over current assets of $428,591.17.

(d) As of February 28, 1997 (the date Respondent ceased its operations subject to the Act), Corporate Respondent's current liabilities exceeded its current assets. As of that date, Corporate Respondent had current liabilities totaling

$1,754,822.00 and current assets totaling $165,980.00 resulting in an excess of current liabilities over current assets of $1,588,842.00.

3. Respondent, during the period set forth in paragraph III of the Complaint, operated subject to the Act while its current liabilities exceeded its current assets.

4. (a) Respondent, on or about the dates and in the transactions set forth in paragraph IV(a) of the Complaint, purchased livestock and, in purported payment, issued checks which were returned unpaid by the bank upon which they were drawn because Respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondent, on or about the dates and in the transactions set forth in paragraph IV(a), (b), (c), and (d) of the Complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As set forth in paragraph IV(e) of the Complaint, as of October 1, 1998, at least $320,905.00 of the livestock amounts set forth in Finding of Fact 4 above remained unpaid.

5. As set forth in paragraph V of the Complaint, Respondent failed to keep and maintain accounts, records, and memoranda which fully and accurately disclosed all transactions in its business as a market agency and dealer under the Act, including, but not limited to purchase and sales invoices for all transactions, records of all trades, documents reflecting Respondent's inventory of livestock, and records showing Respondent's true and accurate prices and payments for livestock.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the financial condition of Respondent does not meet the financial requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, Respondent willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

By reason of the facts found in Finding of Fact 4 herein, Respondent willfully violated sections 312(a) and 409(a) of the Act (7 U.S.C. §§ 213(a), 228b(a)).

By reason of the facts found in Finding of Fact 5 herein, Respondent violated section 401 of the Act (7 U.S.C. § 221).

By reason of the facts found in Finding of Fact 6 herein, Respondent violated section 401 of the Act (7 U.S.C. § 221).

Order

Respondent Melvin Kolb, Inc., its officers, directors, agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from:

1. Purchasing livestock while insolvent, that is, while its current liabilities exceed its current assets;
2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

Respondent Melvin Kolb, Inc., shall keep and maintain accounts, records, and memoranda which fully and correctly disclose all transactions involved in its operations subject to the Act, including purchase and sales invoices for all transactions, records of all trades, documents reflecting inventory of livestock, and documents of purchase that completely and accurately reflect the prices paid and payments received for livestock.

Respondent Melvin Kolb, Inc., is suspended as a registrant under the Act for a period of five (5) years and thereafter until solvency is demonstrated, *Provided, however*, That upon application to the Packers and Stockyards Programs, a supplemental order may be issued at any time after the expiration of 270 days upon demonstration by Respondent that it is solvent and restitution has been made to all unpaid sellers of livestock.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent Melvin Kolb, Inc., 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. Provisions of this Order shall become effective on the sixth day after service of this order on Respondent.

[This Decision and Order became final April 21, 1999.-Editor]

In re: KENT ALAN RIDDLE, d/b/a RIDDLE CATTLE COMPANY.
P&S Docket No. D-99-0003.
Decision and Order filed April 29, 1999.

Kimberly D. Hart, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This disciplinary proceeding brought pursuant to the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter the P&S Act, and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*), hereinafter the regulations, was instituted on October 6, 1998 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, by a Complaint alleging that Respondent wilfully violated the P&S Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*), hereinafter the Rules of Practice, were placed in regular mail to Respondent on November 5, 1998, when the attempts to serve Respondent by certified mail were unsuccessful. The copy of the Complaint sent by certified mail was returned unclaimed on October 28, 1998. Accompanying the Complaint, Respondent was mailed a cover letter informing him that an Answer must be filed within twenty (20) days of service and that failure to file an Answer would constitute an admission of all the material allegations of fact in the Complaint and a waiver of the right to oral hearing.

Respondent did not file an Answer within the time period required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission to all of the material allegations of fact in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision is entered without hearing or further procedure.

Findings of Fact

1. Kent Alan Riddle is an individual doing business as Riddle Cattle Company [hereinafter referred to as Respondent] with a mailing address of P.O. Box 129, Dale, Texas 78616.

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

a. Engaged in the business of a dealer buying and selling livestock in commerce for his own account; and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. As set forth in section II(a) of the Complaint, Respondent issued insufficient funds checks for livestock purchases.

4. As set forth in section II(a) and (b) of the Complaint, Respondent failed to pay, when due, for livestock purchases.

5. As set forth in section II(b) and (c) of the Complaint, Respondent failed to pay the full purchase price of livestock totaling $100,165.24.

Conclusions

1. By reason of the facts set forth above in Findings of Fact 3, 4, and 5, Respondent wilfully violated sections 312(a) and 409 of the P&S Act (7 U.S.C. §§ 213(a), 228b)).

Accordingly, the following Order is issued.

Order

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the P&S Act, shall cease and desist from:

1. Issuing insufficient funds checks in payment for livestock purchases;

2. Failing to pay, when due, the full purchase price for livestock purchases; and

3. Failing to pay the full purchase price of livestock.

Respondent Kent Alan Riddle is hereby suspended as a registrant under the Act for a period of five (5) years, *Provided, however*, That upon application to the Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of the Respondent at any time after 120 days upon demonstration by Respondent that the livestock sellers identified by the Complaint in this proceeding have been paid in full, *And provided further*, That this Order may be modified upon application to the Packers and Stockyards Programs to permit Respondent's salaried employment by another registrant or a packer after the expiration of the 120-day period of suspension and upon demonstration of circumstances warranting modification of the Order.

The provisions of this Order shall become effective on the sixth day after service of this Order on the Respondent.

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 1, 1999.-Editor]

CONSENT DECISIONS

(Not published herein.-Editor)

PACKERS AND STOCKYARDS ACT

Lovington Livestock Market, Inc., Jim Gray and Cindy Gray. P&S Docket No. D-98-0001. 1/12/99.

Ogden Livestock Auction, Inc., Dean Barrow, Duane Bitton, Kent Spencer and Kirk Hansen. Decision With Respect to Duane Bitton. P&S Docket No. D-98-0014. 2/5/99.

Mountain Home Livestock Auction, Inc. P&S Docket No. D-98-0010. 2/9/99.

Mark A. Miller. P&S Docket No. D-98-0029. 2/17/99.

Ogden Livestock Auction, Inc., Dean Barrow, Duane Bitton, Kent Spencer and Kirk Hansen. Decision With Respect to Dean Barrow. P&S Docket No. D-98-0014. 2/22/99.

Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding and Byron E. Thoreson. Decision as to Byron E. Thoreson. P&S Docket No. D-98-0027. 3/5/99.

Patrick Daly, d/b/a Daly Livestock, Glen Burkle and Earl Burkle. P&S Docket No. D-98-0021. 3/19/99.

L&S Cattle Company, a partnership, Doug Sasseen and Donnie Stidham. Decision With Respect to Respondent Donnie Stidham. P&S Docket No. D-96-0018. 3/30/99.

All-City Poultry Corp., S&S Food Inc., and Seth Goldberg. P&S Docket No. D-98-0012. 4/9/99.

Lloyd Nash, d/b/a Lloyd Nash Livestock. P&S Docket No. D-99-0007. 4/9/99.

Watson H. Coker, d/b/a Coker Livestock and William H. Coker. P&S Docket No. D-98-0007. 4/13/99.

Kenneth Wayne Swiney. P&S Docket No. D-99-0005. 4/19/99.

Hawk Mountain Poultry, Inc., Brothers Poultry, Inc., and Charles Saletan. P&S Docket No. D-98-0018. 4/22/99.

Palmetto Livestock Inc. and David C. Ellison. P&S Docket No. D-99-0009. 4/30/99.

Donnie Tyler. P&S Docket No. D-99-0002. 5/5/99.

Athens Livestock Auction Company, Inc. and Jerry Armstrong. P&S Docket No. D-98-0025. 5/7/99.

Ronald R. Cearley and Joy F. Cearley, a/k/a Cearley Management Partnership, d/b/a Douglas County Livestock Commission and Valley Livestock Exchange. P&S Docket No. D-98-0032. 5/11/99.

AGRICULTURE DECISIONS

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

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AGRICULTURE DECISIONS

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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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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

JSG TRADING CORP. v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 98-1342.
Decided May 25, 1999.

(Cite as 176 F.3d 536)

Perishable agricultural commodities — Remand — Commercial bribery — Promotional allowances — Per se standard.

A perishable agricultural commodities seller petitioned for review of the Judicial Officer's order revoking the seller's Perishable Agricultural Commodities Act (PACA) license. The Court held that the Judicial Officer's application of a *per se* test in determining that the seller's payments of more than *de minimis* amounts to purchasing agents constituted commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), was improper because the *per se* test did not conform to standards applied in previous cases and the Judicial Officer did not adequately explain the departure from prior agency practice. The Court found that in previous agency cases, the Judicial Officer required a showing that the produce buyer did not know of the produce seller's payments to the produce buyer's agents and that the produce seller made the payments to the produce buyer's agents to induce purchases from the produce seller. The Court also stated that several of the produce seller's payments arguably could be promotional allowances, which are allowed under the PACA. The Court remanded the case to the Judicial Officer stating that the Judicial Officer must: (1) explain the justification for employing a *per se* test for commercial bribery and must do so in conjunction with the promotional allowances provision in the PACA; or (2) abandon the *per se* test and apply the traditional commercial bribery test used in previous agency cases.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

Before: EDWARDS, *Chief Judge*, GARLAND, *Circuit Judge*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* HARRY T. EDWARDS.

EDWARDS, *Chief Judge*:

On an appeal from a decision of an Administrative Law Judge ("ALJ"), a Judicial Officer of the United States Department of Agriculture ("USDA") determined that petitioner JSG Trading Corporation ("JSG") had violated § 2(4) of

the Perishable Agricultural Commodities Act ("PACA" or "Act"), 7 U.S.C. § 499b(4), by making a series of payments to the purchasing agents of two separate tomato buyers, L&P Fruit Corporation ("L&P") and American Banana, at a time when those agents were buying tomatoes from JSG on behalf of their respective employers. The Judicial Officer subsequently revoked JSG's license to deal in perishable agricultural commodities.

In this petition for review, JSG challenges the revocation of its license, alleging that the Judicial Officer was proceeding from an incorrect legal premise, namely, that *any* payment by a produce dealer to a purchasing agent above a *de minimis* level constitutes "commercial bribery" in violation of § 2(4) of PACA. JSG argues that this *per se* standard represents a marked departure from prior agency precedent, and that the case should be remanded for factual findings in accordance with the correct legal standard.

We agree that, in adopting a *per se* standard to measure commercial bribery, the Judicial Officer departed from well established precedent without adequate justification. We therefore remand the case to the agency, so that it may either attempt to justify its creation of a new, *per se* standard or make explicit factual findings pursuant to established law.

I. BACKGROUND

A. Statutory and Regulatory Background

"Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices." *Tri-County Wholesale Produce Co. v. USDA*, 822 F.2d 162, 163 (D.C. Cir. 1987). A later Congress summarized the purpose of PACA as follows:

> [PACA] is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is

> of the grade and quality they are paying for.

S. REP. NO. 84-2507, at 3 (1956). U.S. Code Cong. & Admin. Serv. 1956, pp. 3699, 3701. "[T]he goal of . . . [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983) (citations and internal quotation marks omitted). To achieve this end, the Act requires persons who buy or sell significant quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture. *See* 7 U.S.C. § 499c.

Section 2 of the Act makes unlawful a number of activities by licensees. *See id.* § 499b. Relevant here is § 2(4), which makes it unlawful for any commission merchant, dealer, or broker, in any transaction involving any perishable agricultural commodity, to, *inter alia*, "fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." *Id.* § 499b(4).

In 1995, PACA was amended to establish that certain payments were not illegal under § 2(4). Specifically, the following sentence was added to § 2(4):

> However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 9(b)(3), 109 Stat. 424, 430 (1995) (codified as amended at 7 U.S.C. § 499b(4)). The term "collateral fees and expenses" was defined as

> any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity.

Pub. L. No. 104-48, § 9(a), 109 Stat. 424, 429-30 (1995) (codified as amended at 7 U.S.C. § 499a(b)(13)).

Upon a determination that a commission merchant, dealer, or broker has violated one of the provisions of § 2, the Act authorizes the Secretary of Agriculture to publish the facts and circumstances of the violation, and suspend the offender's PACA license for up to ninety days. *See* 7 U.S.C. § 499h(a). The Secretary may revoke the license if the violation is "flagrant or repeated." *Id.*

B. Factual Background

JSG is a New Jersey corporation in the business of buying and selling produce. In 1988, JSG was issued a PACA license, and that license was renewed annually thereafter. Beginning in January 1992, Steve Goodman served as JSG's president and controlled 75 percent of the company's stock. At all relevant times, Mr. Goodman was JSG's sole tomato buyer and seller. The transactions giving rise to the commercial bribery charges in this case originated from JSG's relationships with two tomato purchasers, L&P and American Banana, both produce dealers located at the Hunts Point Market in Bronx, New York.

The purchasing agents in the disputed L&P transactions were Tony and Gloria Gentile. Mr. Goodman and Mr. Gentile, as well as their families, apparently enjoyed a close social relationship. Long before any of the questioned transactions occurred—in fact, before Mr. Goodman had any relationship at all with JSG—Mr. Gentile taught Mr. Goodman the tomato business. The Goodman and Gentile families spent a great deal of time together, often dining out and going to shows in Atlantic City.

Mr. Gentile, who was the head tomato buyer for L&P from 1985 through 1991, had a joint account arrangement with L&P, whereby he would share profits and losses with L&P on the tomatoes that he purchased. Such joint accounts apparently are common in the New York produce industry. During the time that Mr. Gentile served as a buyer for L&P, he purchased tomatoes from JSG, as well as from other sellers.

In 1989, Mr. Goodman and Mr. Gentile formed a trucking company called Dirtbag Trucking Corp. ("Dirtbag"), and each was issued 75 shares of Dirtbag stock. Dirtbag, which operated out of JSG's office, always had a cash flow problem, and JSG advanced money to it on a number of occasions. Although JSG was Dirtbag's primary customer, Dirtbag also provided trucking services to other produce companies.

The purchasing agent in the questioned transactions with American Banana was Al Lomoriello. American Banana hired Mr. Lomoriello in 1991, on a joint account basis similar to L&P's arrangement with Mr. Gentile. According to Mr. Goodman and Mr. Lomoriello, Mr. Lomoriello sometimes provided various services to JSG, including delivering produce, collecting accounts receivable, and providing Mr. Goodman with pricing information on produce and market supplies.

C. Procedural Background

In January 1993, the USDA received a telephone complaint about JSG. The

caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying tomatoes for L&P. The USDA assigned two investigators to audit JSG, and a formal PACA complaint was eventually brought against JSG, the Gentiles, and Mr. Lomoriello. The complaint alleged that the respondents had "engaged in a scheme" whereby JSG made payments to the Gentiles and Mr. Lomoriello "to induce [them] to purchase tomatoes from . . . JSG on behalf of [L&P and American Banana, respectively]." Amended Complaint ¶¶ 6-7, *reprinted in* Joint Appendix ("J.A.") 10-11. On June 17, 1997, after a lengthy hearing, the ALJ determined that the respondents had committed wilful, flagrant, and repeated violations of § 2(4). *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (June 17, 1997), at 46-47 ("ALJ Decision"), *reprinted in* J.A. 61-62. The ALJ found that, during the time that Mr. Gentile was buying tomatoes from JSG on behalf of L&P, Mr. Goodman and JSG made payments and transferred items of value to the Gentiles. Similarly, the ALJ found that JSG had made a series of payments to Mr. Lomoriello, while Mr. Lomoriello was buying tomatoes from JSG on behalf of American Banana. The ALJ identified seven transactions that he considered illegal bribes. We summarize them as follows:

1. The Boat

Mr. Goodman bought a boat in 1987 for approximately $47,000. Beginning in late 1990, he allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's upkeep and maintenance. In late 1992, Mr. Goodman sold the boat to Mr. Gentile for $10,000. It is undisputed that Louis Beni, L&P's secretary-treasurer and 35 percent owner, was aware of the purchase. In fact, Mr. Gentile told Mr. Beni that he had gotten a good deal on the boat. Two years later, after he had spent approximately $7000 in repairs, Mr. Gentile sold the boat for approximately $20,000.

2. The Car

In 1990, a 1990 model Mercedes 300 SEL car was leased to Mr. Gentile for 48 months. The lease was authorized through Dirtbag, although, as with many of Dirtbag's creditors, some of the lease was paid for by JSG. Mr. Goodman testified that he gave the car to Mr. Gentile for him to drive while doing work for Dirtbag. When the car was presented to Mr. Gentile, Mr. Goodman placed a red ribbon on it. It is undisputed that Mr. Gentile's superiors at L&P knew about the car, and knew about Mr. Gentile's association with Mr. Goodman and Dirtbag. Despite Mr. Goodman's and Mr. Gentile's testimony as to the work Mr. Gentile did for Dirtbag,

the ALJ found it "doubtful" that Mr. Gentile used the car for Dirtbag business, concluding rather that the car was probably a gift from Mr. Goodman to Mr. Gentile. *See* ALJ Decision at 23-24, *reprinted in* J.A. 38-39.

3. The Watch

In July 1992, Mr. Goodman purchased a $3000 Rolex watch and gave it to Mr. Gentile as a gift. Mr. Goodman testified that he gave the watch to Mr. Gentile partly as a birthday present, partly as a present to celebrate Mr. Gentile's recovery from cancer, and partly in appreciation for Mr. Gentile's willingness to teach him about the tomato business. Mr. Gentile wore the watch openly, and it is undisputed that Mr. Beni knew about the gift.

4. The Stock Sale

When he was diagnosed with cancer, Mr. Gentile transferred his 75 shares of Dirtbag stock to Mrs. Gentile. In February 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag to Mr. Goodman for $80,000. The agreement provided that upon final payment, a loan of $40,000 from Mr. Gentile to Dirtbag would be released. There was also evidence that Mr. Gentile had invested an additional $7000 in Dirtbag for a new truck. The ALJ concluded that, because Dirtbag was an unprofitable company, Mr. Goodman had overpaid the Gentiles by at least $33,000 ($80,000 minus the $47,000 that Mr. Gentile had invested in Dirtbag). Neither party offered a valuation expert on this issue.

5. The Circular Checks

JSG issued 35 checks, totaling approximately $62,000, made payable to "A. Gentile." These checks were not deposited in a bank account controlled or owned by the Gentiles. Instead, they were endorsed in the name of "A. Gentile" by JSG's bookkeeper, and redeposited in a JSG account. Although the checks were "circular," in that they ended up back in JSG's account, the ALJ found that the checks were used in JSG's records to indicate that Mr. Goodman was sharing his profit with Mr. Gentile. *See* ALJ Decision at 30, *reprinted in* J.A. 45. Further, the ALJ found that sixteen of the checks were shown in JSG's records as reducing a loan that Mr. Gentile owed to JSG. *See id.*

6. The Payments to Mrs. Gentile

JSG also made several payments to Mrs. Gentile. According to Mr. Goodman and Mrs. Gentile, the payments were for services rendered to JSG by Mrs. Gentile. Specifically, Mrs. Gentile testified that, at Mr. Goodman's request, she checked tomatoes at Florida packing houses and gave reports on her findings to Mr. Goodman. The ALJ, however, relying primarily on the fact that there was no written agreement between Mr. Goodman and Mrs. Gentile, found the payments to be bribes rather than compensation for services rendered.

7. The Payments to Mr. Lomoriello

From December 1992 through February 1993, a period during which Mr. Lomoriello was responsible for buying tomatoes on behalf of American Banana, JSG issued seven checks to Mr. Lomoriello, totaling approximately $10,000. According to Mr. Goodman and Mr. Lomoriello, the payments were for various services Mr. Lomoriello rendered to JSG. American Banana's vice-president, Demetrius Contos, testified that he was aware that Mr. Lomoriello used his own truck during the evenings for his own business unrelated to American Banana. The ALJ, however, found that the payments were bribes, and cited evidence in JSG's records suggesting that Mr. Lomoriello was getting paid a certain amount for each box of tomatoes that JSG sold to American Banana.

After describing these seven payments, the ALJ interpreted prior agency precedent as dictating that "JSG could only make . . . payments [to the Gentiles and Mr. Lomoriello] with its customers' [*i.e.*, L&P's and American Banana's] permission." ALJ Decision at 18, *reprinted in* J.A. 33. The ALJ concluded that "[e]ven if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. These payments were more than *de minimis*. Therefore, these payments constituted commercial bribery, in violation of section 2(4) of the PACA." *Id.* The ALJ found that the PACA violations were "wilful, flagrant, and repeated," and ordered JSG's PACA license revoked. *Id.* at 46, *reprinted in* J.A. 61.

JSG and the Gentiles (but not Mr. Lomoriello) appealed the ALJ's decision to the Judicial Officer, to whom the Secretary has delegated authority as the final deciding officer in the agency's adjudicatory process. *See* 7 C.F.R. §§ 1.132, 2.35 (1998). On March 2, 1998, the Judicial Officer adopted, with minor and insignificant changes, the ALJ's factual and legal conclusions. *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (May 2, 1998), at 8 ("Judicial Officer Decision"), *reprinted in* J.A. 70. JSG filed a petition for

reconsideration with the Judicial Officer, which was denied on June 1, 1998. *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (June 1, 1998), at 25 ("Reconsideration Order"), *reprinted in* J.A. 182. On July 30, 1998, the Judicial Officer issued a stay of the order revoking JSG's license pending judicial review. JSG, alone, then petitioned this court for review of the Judicial Officer's final determination.

II. ANALYSIS

A. Standard of Review

This court has exclusive jurisdiction to review final orders of the USDA in disciplinary actions brought under PACA. *See* 28 U.S.C. § 2342(2). We review the agency's orders under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. That is, we will uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2)(A), (E).

B. The Prohibition Against Commercial Bribery Under PACA

Section 2(4) of PACA does not, by its terms, proscribe "commercial bribery." Nevertheless, the agency has, on two previous occasions, interpreted the provision to cover activity that falls within the traditional definition of commercial bribery. *See In re Tipco, Inc.*, 50 Agric. Dec. 871, 1991 WL 295153 (1991), *aff'd per curiam, Tipco, Inc. v. Yeutter*, 953 F.2d 639 (4th Cir. 1992) (unpublished table decision), available in 1992 WL 14586; *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1990 WL 320442 (1990), *aff'd per curiam, Sid Goodman & Co. v. United States*, 945 F.2d 398 (4th Cir.1991) (unpublished table decision), available in 1991 WL 193489.

Tipco and *Goodman* involved very similar facts, as well as some of the same parties. In each case, a wholesale produce dealer paid the purchasing agents of a supermarket chain 25 cents per package of produce bought by the chain, in an effort to induce the agents to buy from that dealer and not a competitor. The dealer then raised the price of each package by 25 cents, in order to cover the payment to the purchasing agents. The purchasing agents' employers—the supermarket chains—were unaware of the payments to their employees and the surcharge that they incurred. The payment schemes resulted in increased sales for the dealer, a kickback for the purchasing agents, and, of course, higher prices for the innocent supermarket chain. In each case, the agency brought complaints against the dealers

under PACA, and eventually revoked their PACA licenses, citing flagrant and repeated violations of § 2(4).

In *Goodman*, the first PACA case ever to address allegations of commercial bribery, the Judicial Officer applied the following definition of commercial bribery:

> [T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the gift, be sufficiently influenced by the offer to favor the offeror over other competitors."

In re Sid Goodman & Co., 49 Agric. Dec. 1169, 1184, 1990 WL 320442, at **10 (quoting 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 49 (3d ed. 1968)). The Judicial Officer went on to make specific findings that the dealer made the payments with the intent to induce the purchasing agents to buy from that dealer as opposed to its competitors, *see Goodman*, 49 Agric. Dec. at 1187, 1990 WL 320442, at **12, and that the payments were made surreptitiously, *i.e.*, without the knowledge of the purchasing agents' employers, *see id.* at 1187-88, 1990 WL 320442, at ** 13.

In *Tipco*, the same Judicial Officer once again made specific findings of both intent to induce, *see Tipco*, 50 Agric. Dec. at 896, 1991 WL 295153, at **16, and secrecy, *see id.* at 899, 1991 WL 295153, at **18. Although he did not repeat the definition of commercial bribery that he had used in *Goodman*, the Judicial Officer in *Tipco* made it clear that he was relying on the standard he had employed in the previous case. *See, e.g., id.* at 889, 1991 WL 295153, at **11 ("[T]he evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce, certainly, in derogation of its competitors. Under the precepts of the *Goodman* case, this is enough, in itself, for me to find that respondent Tipco deserves the same sanction for the same violation as found in the *Goodman* proceeding."). The Fourth Circuit, in unpublished dispositions, upheld the agency's interpretation of § 2(4) in both cases. *See Tipco, Inc. v. Yeutter*, 953 F.2d 639 (4th Cir. 1992) (unpublished table decision), available in 1992 WL 14586; *Sid Goodman & Co. v. United States*, 945 F.2d 398 (4th Cir. 1991) (unpublished table decision), available in 1991 WL 193489.

It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g.*, N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers,

or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); *see also* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4th ed. 1996 & Supp. 1999); BLACK'S LAW DICTIONARY 270 (6th ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").

We do not disagree with the Fourth Circuit that the broad and ambiguous language of § 2(4) can be read to proscribe activity that falls within one of the traditional definitions of commercial bribery described above. Indeed, JSG concedes that commercial bribery is illegal under PACA. *See* Reply Brief of Petitioner at 4. The issue presented here is whether the agency applied the same commercial bribery standard in the instant case that it applied in both *Goodman* and *Tipco*, and, if not, whether it adequately explained its reasons for departing from prior agency precedent.

C. The Commercial Bribery Standard Applied in This Case

JSG argues that the agency in the instant case departed from the precedent established in *Goodman* and *Tipco* by applying a *per se* test for commercial bribery. The agency concedes that the Judicial Officer applied a *per se* test, which deems illegal any payment above a *de minimis* level from a produce dealer to a purchasing agent, regardless of whether there is any secrecy or intent to induce. Indeed, agency counsel stated at oral argument that "[t]here is no way of characterizing [the test employed by the Judicial Officer] any other way." Tr. of Oral Argument at 18. Agency counsel also conceded that, because he was employing a *per se* test, the Judicial Officer did not make explicit findings with respect to secrecy or intent to induce. *See id.* at 18, 19, 36. In fact, the Judicial Officer specifically found that Mr. Gentile's employer was aware of at least one of Mr. Goodman's gifts. *See, e.g.*, Judicial Officer Decision at 33, *reprinted in* J.A. 95 (finding that Mr. Beni was aware that Mr. Goodman had given Mr. Gentile a good deal on the boat). The agency argues, however, that the Judicial Officer's use of the *per se* test was permissible under prior agency precedent. We disagree. It is clear here that the Judicial Officer adhered to a new definition of commercial

bribery that finds no support in the case law; it is also clear that he offered no justification whatsoever either for his re-definition of commercial bribery or for the necessity of a *per se* test in this or any other case.

The Judicial Officer did purport to follow *Goodman* and *Tipco*. *See, e.g.*, Judicial Officer Decision at 90, *reprinted in* J.A. 155 ("[T]he legal standard for bribery, in violation of section 2(4) of the PACA . . . is established by *Goodman* and *Tipco*. . . ."). Nevertheless, the Judicial Officer never once, in his entire 96-page opinion, cited the actual definition of commercial bribery that was quoted in *Goodman* and employed by the agency in both *Goodman* and *Tipco*. Instead, the Judicial Officer cited the following dicta from the Judicial Officer's opinion in *Tipco*:

> Included within [the obligations of a PACA licensee] is the positive duty to refrain from corrupting an employee of a person with whom [the licensee] is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (*e.g.*, more than a pen, calendar or lighter).

Judicial Officer Decision at 28, *reprinted in* J.A. 90 (quoting *Tipco*, 50 Agric. Dec. at 882-83, 1991 WL 295153, at **9). On the basis of that dicta—which, at most, establishes a risk of a PACA violation—the Judicial Officer reached the following conclusion with respect to the record in the instant case:

> As in *Goodman* and *Tipco*, JSG was obligated to refrain from making payments to Mr. Gentile and Mr. Lomoriello since such payments would encourage Mr. Gentile and Mr. Lomoriello to purchase tomatoes from JSG. JSG could only make such payments with its customers' permission. Even if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. The payments [made by JSG to Messrs. Gentile and Lomoriello] were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA.

Id. at 28-29, *reprinted in* J.A. 90-91 (brackets in original). This conclusion

blatantly ignores the legal test of commercial bribery established and applied in *Goodman* and *Tipco*, applying instead a *per se* rule that was never even contemplated in the prior cases.

Under the Judicial Officer's *per se* test, produce dealers are guilty of commercial bribery when they transfer items of value to purchasing agents, even if the agents' employers are fully aware of the gifts, and even if the dealers have no intent to induce the agents to buy from them. For example, Mr. Goodman claimed that he gave the Rolex watch to Mr. Gentile essentially as a gesture of friendship, and to celebrate Mr. Gentile's recovery from cancer. The Judicial Officer held that "[a]lthough Mr. Goodman said he was motivated by his friendship with Mr. Gentile, the [act of] bestowing such an expensive present upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P . . . was unlawful." *Id.* at 35, *reprinted in* J.A. 97 (brackets in original); *see also* Reconsideration Order at 17, *reprinted in* J.A. 174 ("Mr. Goodman's alleged personal relationship with Mr. Gentile does not obviate the requirement that JSG refrain from making gifts of substantial value to Mr. Gentile[,] who was working for one of JSG's customers."). Under this theory, as agency counsel conceded at oral argument, *see* Tr. of Oral Argument at 27-31, it would have been illegal for Mr. Goodman to give the *owner* of L&P a Rolex watch, or even for Mr. Goodman to take the owner of L&P out to lunch. These are far-fetched notions of commercial bribery, at least under established law. We have been unable to find any precedent, in any context, that defines commercial bribery as here suggested, and agency counsel cited none.

Putting aside for the moment the question whether the Judicial Officer adequately justified his creation of this rather novel theory of commercial bribery, it is quite clear that this *per se* test deviates dramatically from the standard test for commercial bribery that was actually employed in *Goodman* and *Tipco*. For example, under the test cited in *Goodman*, the gift of the watch would not have been illegal unless there had been specific findings that Mr. Gentile's employer was not aware of the gift, and that Mr. Goodman intended to induce Mr. Gentile to purchase from JSG. Likewise, Mr. Goodman would hardly be guilty of commercial bribery under the traditional definition if he had taken the owner of L&P out to lunch, even if the purpose of the lunch was for Mr. Goodman to extoll the virtues of his product.

Although the agency was not strictly bound to follow the test for commercial bribery applied in prior cases, it was obligated to articulate a principled rationale for departing from that test. *See Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995) ("It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency

changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnote omitted). We find that the agency manifestly failed to explain its abrupt departure from prior precedent. We therefore are constrained to remand this case to the agency.

The agency may be able to provide a justification for applying a different and lesser standard for commercial bribery under § 2(4) than that cited in *Goodman*. Given the broad language of § 2(4), the agency is not necessarily bound by traditional statutory definitions of commercial bribery. Nonetheless, some justification for a lesser standard is necessary, for there is certainly no immediately apparent, or intuitive, rationale for a *per se* rule that does not require a finding of secrecy or intent to induce. Indeed, traditionally it is precisely the secrecy and intent to induce elements that are thought to transform otherwise innocent gifts into pernicious bribes that destroy marketplace competition. *See* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50 (4th ed. 1996 & Supp. 1999) ("When the fact that the seller is paying a commission to the buyer's purchasing agent is revealed to the buyer, there is no commercial bribery."); *id.* § 12.01, at 8-9 ("The consideration paid by the briber may involve such pecuniary benefits as cash payments, commissions and loans, or such nonpecuniary pleasures as dinner and entertainment (*e.g.*, theatre tickets), and trips. In any case, the true test is the intent or purpose of the offeror: Is the consideration given to influence the agent and cause him to subordinate his bargaining function and judgment?") (footnote omitted); Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 370-71 (1987) ("Businesses may (and usually do) provide gratuities, entertainment, campaign contributions, and the like in the hope of disposing the recipient favorably toward them. There must be more than this, however, to constitute a bribe. An agreement must exist between the payor and the recipient that there will be a *quid pro quo*."). Even the PACA official who testified on behalf of the agency at the hearing conceded that a gift exchanged between old friends who happened to be in a seller-buyer relationship was unlikely to run afoul of PACA. *See* J.A. 249-50 (testimony of Bruce Summers, Senior Market Specialist in the Trade Practices Section of the USDA's PACA Branch).

Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with Mr. Gentile, it is not immediately obvious how the marketplace is disturbed—or how Mr. Goodman is violating any implied duty under PACA—if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and

Mr. Gentile. *Cf. United States v. Sun-Diamond Growers of California*, ___ U.S. ___, 119 S. Ct. 1402, 1406, ___ L.Ed.2d ___, ___ (1999) (explaining that the "intent to influence" element of the federal bribery of public officials statute, 18 U.S.C. § 201(b)(1), (2), means that "for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act"). In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift. *Cf. id.* at 1407 (criticizing as "peculiar" a reading of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), (B), that would "criminalize, for example, token gifts to the President . . . such as the replica jerseys given by championship sports teams each year during ceremonial White House visits [or] . . . a high school principal's gift of a school baseball cap to the Secretary of Education . . . on the occasion of the latter's visit to the school") (citation omitted). At oral argument, agency counsel acknowledged that it is, of course, not illegal for a seller to reduce his or her prices in an effort to induce purchases. But agency counsel admitted that, under the agency's *per se* standard, it *would* be illegal for the seller, rather than lowering prices, to instead take the owner of a purchasing entity out to dinner in an effort to promote his or her product. *See* Tr. of Oral Argument at 29, 31. There is no basis in the record or in the explanations offered by the agency for treating the latter transaction as illegal if the former is legal.

Indeed, Congress appeared to recognize the legality of promotional efforts when it passed the 1995 amendment to PACA, which allows the "good faith . . . payment . . . of collateral fees and expenses," which are defined as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. §§ 499a(b)(13), 499b(4). Several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered "promotional allowances" made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG's product. The Judicial Officer summarily dismissed this suggestion, asserting in a conclusory manner that the payments were not promotional devices. *See* Judicial Officer Decision at 76, *reprinted in* J.A. 138. But no reasoning is offered to support this conclusion. Agency counsel suggested at oral argument that the amendment was intended only to cover trivial promotional devices, such as sales banners provided by wholesale dealers to retail outlets. *See* Tr. of Oral Argument at 33. Counsel was unable, however, to cite to any legislative history to support that interpretation, and the agency has never proffered it in any previous adjudication. Such a limited interpretation of the 1995 amendment may be entitled to deference under *Chevron*, but the agency has yet to advance a coherent theory to support it.

On remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman* and *Tipco*. In any event, the agency must make factual findings that are precisely connected to the standard employed. Although the Judicial Officer alluded to record evidence that might support findings of both secrecy and intent to induce—particularly with respect to the payments to Mr. Lomoriello, *see, e.g.*, Judicial Officer Decision at 54-61, *reprinted in* J.A. 116-23—even agency counsel concedes that the Judicial Officer did not follow a traditional commercial bribery test and made no explicit findings that were tied to such a test.

This court, of course, cannot sift through the record evidence to find support for the result reached by the agency, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."), nor can we affirm an agency's final order on the assumption that the agency might reach the same result upon remand, *see FEC v. Akins*, 524 U.S. 11, 118 S. Ct. 1777, 1786, 141 L.Ed.2d 10 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). Accordingly, we offer no view on the appropriate disposition of this case; the matters at issue here must be addressed by the agency in the first instance on remand of this case. Appropriate findings and conclusions by the agency may be made on the existing record or on a supplemented version of the existing record, as is deemed appropriate.

III. CONCLUSION

For the reasons stated above, we grant the petition for review and remand this case for further proceedings consistent with this opinion.

So ordered.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PRODUCE DISTRIBUTORS, INC., and IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Decision and Order as to Produce Distributors, Inc., filed October 21, 1998.

Failing to account honestly to consignors - Alteration of produce inspection certificates.

Judge Bernstein found that Respondents violated the PACA by failing to accurately account to consignors by making false and misleading statements to them and that Respondents also altered federal inspection statements, thereby making false and misleading statements to consignors.

Kimberly D. Hart, for Complainant.
David L. Durkin, Washington, DC, for Respondent Produce Distributors, Inc.
Lawrence A. Omansky, New York, NY, for Respondent Irene T. Russo, d/b/a Jay Brokers.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; the "PACA"), the regulations promulgated pursuant to the PACA, (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*; the "Rules of Practice").

This proceeding was instituted by a Complaint filed on January 3, 1997, by the United States Department of Agriculture ("USDA" or "Complainant"). The Complaint alleges that Respondents, Produce Distributors, Inc. ("PDI") and Irene T. Russo, doing business as Jay Brokers, pursuant to a verbal joint venture agreement, made false and misleading statements for a fraudulent purpose by failing to truly and accurately account to 16 consignors for the net proceeds resulting from the sale of their produce in the amount of $43,242.58 in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Complaint also alleges that Respondents altered federal inspection certificates, thereby making false and misleading statements for the purpose of failing to truly and accurately account to consignors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I presided over a hearing on January 27-30, March 4-5, and April 15, 1998 in New York City. Complainant was represented by Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Produce Distributors, Inc., was represented by David L. Durkin, Olsson, Frank &

Weeda, Washington, D.C. Irene Russo was represented by Lawrence Omansky and Dan Cherner, New York, New York.

Complainant introduced numerous exhibits into evidence at the hearing. Neither Respondent introduced any exhibits into evidence. Complainant's exhibits are referred to as "CX"; the hearing transcript for April 15, 1998, is referred to as "2 Tr."; and the remainder of the hearing transcript is referred to as "Tr."

Complainant and Respondent Irene Russo filed post-hearing briefs, proposed findings of fact, proposed conclusions of law and reply briefs. All proposed findings of fact, conclusions of law, 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 record.

Findings of Fact

1. Respondent, Produce Distributors, Inc. ("PDI") is a corporation organized and existing under the laws of the state of New Jersey. Its address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, 3).

2. At all times relevant, PDI was licensed under the provisions of the PACA, holding license number 771923. This license was renewed annually and was last subject to renewal on or before September 15, 1998 (CX 1).

3. Respondent Irene Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).

4. At all times relevant, Jay Brokers was licensed under the PACA, holding license number 891361. This license was renewed annually and was subject to renewal on or before June 8, 1998 (CX 2).

5. In May 1995, USDA initiated an investigation of PDI based on four reparation complaints made against PDI. USDA dispatched Robert Rucker, a senior marketing specialist, to examine the records of PDI and Jay Brokers. Ms. Rucker first visited PDI's office on May 24, 1995 (Tr. 29). She subsequently visited Jay Brokers' office. Ms. Rucker examined and photocopied documents and interviewed individuals.

5A. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers. USDA did not notify PDI or Irene Russo in writing that the investigation had been expanded and would include Irene Russo.

6. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions such as files in which there were two accounts of sales with the gross proceeds, net proceeds and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained

copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

7. PDI's records indicated that records were often falsified by Joe Russo and/or Irene Russo to mislead shippers as to the amounts of profits involved in transactions and that inspection reports were often falsified by Joe Russo and/or Irene Russo.

8. PDI's president, Thomas Gangemi, Jr., told Ms. Rucker that PDI was involved in a joint venture arrangement with Joe Russo in which PDI would assume 60% of any profit or loss and Jay Brokers would assume 40% of any profit or loss (Tr. 30; 2 Tr. 6).

9. PDI's records showed that PDI's profits in the transactions at issue were apportioned 60% to PDI and 40% to Jay Brokers (Tr. 35; e.g., CX 16, p. 46; CX 18, p. 28; CX 20, p. 22; CX 33, p. 39; CX 36, p. 79; CX 38, p. 48; and CX 41, p. 40).

10. The records with respect to the transactions at issue contained numerous memoranda from Irene Russo to the shippers or customers proposing modifications of prices, and records of other communications between Irene Russo and the shippers and customers.

11. The records with respect to the transactions at issue also contained numerous memoranda signed by Irene Russo and faxed from Jay Brokers' fax number that instructed PDI as to fraudulent amounts to remit to shippers and amounts to bill customers in the produce transactions at issue (Tr. 37-40).

12. Based upon the evidence that Irene Russo actively participated in these transactions and that Jay Brokers received 40% of PDI's profits for the transactions at issue, I find that PDI and Irene Russo, doing business as Jay Brokers, were involved in a joint venture in the transactions at issue.

13. Although Joe Russo was listed in PDI's records as an employee, this was a subterfuge. In fact, Joe Russo, together with his wife, Irene Russo, was involved in the joint venture with PDI and he was listed falsely as an employee in PDI's records for his personal convenience.

14. Based upon the evidence, I find that PDI and Irene Russo made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with their joint venture.

Conclusions of Law

1. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment

basis.

2. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60% to PDI and 40% to Irene Russo.

I. The False and Misleading Statements

In a "Notice" filed on June 16, 1998, Respondent PDI appeared to admit the alleged violation. That Notice stated in applicable part, ". . . on the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also stated that PDI had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi's testimony to which the Notice may have referred includes, ". . . my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (2 Tr. 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- in judgment in bringing him into my organization . . ." (2 Tr. 31).

After Mr. Gangemi made that statement, I stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that, directly, you were not involved, but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee" (2 Tr. 31).

PDI presented no defense with respect to either issue. However, Irene Russo denied that the alleged violations took place and denied that she was involved in a joint venture with PDI in connection with the alleged violations. Virtually all of Respondents' evidence was presented by Irene Russo.

Included in Complainant's evidence were 41 exhibits, each containing documents with regard to one of the 41 transactions at issue (CX 16-39, 41-56, 58). Complainant's investigator, Roberta Rucker, marked on the reverse side of each document from whose office the document was obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, 28, 33, 36, 38, 41) and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr.

110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions contained conduct similar to that in one or more of the six prototype transactions and my examination of the exhibits in connection with the 35 other transactions supports the conclusion that Respondents' improper conduct was similar in those 35 other transactions.

Joe Russo represented PDI in all of these transactions. Joe Russo is married to Irene Russo. Irene Russo operated a produce business under the name of "Jay Brokers" from an office in her home. Joe Russo worked on the PDI transactions at issue from this home office. Irene Russo also assisted Joe in his work in these transactions and Irene participated in these transactions. Forty percent of the profits from these transactions was paid by PDI to Jay Brokers, after deducting from the 40% salaries and employer expenses in connection with listing Joe Russo in PDI's records as a PDI employee.

In all of the 41 transactions, PDI, represented by Joe Russo, sold produce on a consignment basis on behalf of consignors or suppliers. Thus, PDI acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russo office and based upon memoranda, faxes, and telephone calls from the Russo's, the consignors were led to believe that less money was received for the produce than was actually received and, based upon these falsified documents and representations, the consignors agreed to accept less money than PDI actually received. The differences between the amounts of money that PDI actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by PDI and these "profits" were divided 60% to PDI and 40% to Jay Brokers.

The six prototype transactions are as follows:

1. The Isaak Brothers Transaction (CX 16)

This transaction involved 1,716 cartons of peaches sold by PDI for Isaak Brothers on June 24, 1993. The produce was resold by PDI to BT Produce. Jay Brokers submitted a copy of an account of sales to Isaak Brokers from BT Produce on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16, p. 15). The gross proceeds for the sale were reported as being $352 and the cost was shown to exceed the proceeds for a loss of $13,629. On September 20, 1993, Jay Brokers faxed a memo signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16, p. 7).

The documents in BT Produce's records indicated that PDI invoiced BT Produce for $9,106 for the produce, an amount that was subsequently reduced to $5,674 (CX 16, p. 25). Isaak Brothers was not paid any of this money. The $5,674 was apportioned between PDI and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16, p. 46). There was a notation on PDI's jacket file next to "JB" and "Produce" of "J/V" which Karyn Hertzberg, PDI's bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16, p. 46). PDI's records indicated that Jay Brokers was paid $2,269.60 (40%) and PDI was paid $3,404.40 (60%) of the $5,674.

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene and Joe Russo that there were negative net proceeds from the sale of the produce and that more than 95% of the produce was dumped. Mr. Isaak stated that he was unaware that BT Produce paid Respondent $5,764 for the same produce (Tr. 634-38).

2. The Sun Pacific Transaction (CX 28)

This transaction involves the sale of grapes by PDI for Sun Pacific on September 22, 1994, for a contract price of $12,841.50 (CX 28, p. 8). The produce was resold by PDI to L&P Fruit and was inspected upon arrival. PDI invoiced L&P at $6,632.90 for the produce (Tr. 140-41; CX 28, p. 18). Jay Brokers' records included a copy of another account of sales on L&P's letterhead reflecting net proceeds of $3,432 (Tr. 144-45; CX 28, p. 26). In response to a memo signed by "Irene" to Sun Pacific requesting authorization to accept a reduced price for the produce, Sun Pacific agreed (Tr. 137-38; CX 28, pp. 2, 23, 26).

PDI's file jacket shows that PDI received $6,632.90 from L&P Fruit but remitted $3,173.50 to Sun Pacific and allocated the difference between these amounts of $3,459.40 between "JB" and "Produce" as profit on a 60-40 basis (CX 28, p. 28).

3. The John Simon Produce Transaction (CX 33)

John Simon Produce sold 2,100 watermelons through PDI at the original delivered contract price of $5,510.75 on May 12, 1994 (CX 33, pp. 3, 20). The produce was sold to Frankie Boy Produce. John Simon Produce received a typewritten account of sales from Frankie Boy Produce indicating gross proceeds of $1,864.74 minus a deduction for "COMM. & Repack" of $511.66, resulting in a net proceeds of $1,353.08 (CX 33, p. 13). John Simon issued an adjusted invoice for $1,353.08 (CX 33, pp. 20-22). Jay Brokers' records contains a copy of the adjusted invoice for $1,353.08. However, their copy of the adjusted invoice

contains a note from "Irene" instructing that Frankie Boy be billed $1,864.74 (CX 33, p. 30) and Frankie Boy paid PDI $1,864.74 (Tr. 159; CX 33, p. 25). Ms. Rucker found a blank copy of Frankie Boy's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33, p. 37, 38; Tr. 160-62). It appears that Frankie Boy's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon (Tr. 162). Thus, the false account represented to John Simon that PDI received $1,353.08, whereas PDI actually received $1,864.74. The $511.66 was split between "JB" and "Produce" on a 60-40 basis (Tr. 163-64; CX 33, pp. 39, 41, 42). The amount of $204.66 which corresponds to 40% of the $511.66 is the same amount reflected on PDI's invoice number 263900 and check number 1453 which PDI issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33, p. 44).

Terri Llorente, a representative of John Simon, who negotiated the transaction, testified that Joe Russo told her that there was a charge to commission and repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce might have charged commission and repack charges, however, she was unaware that PDI and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 498; CX 33, p. 39).

4. The Sun World Transaction (CX 36)

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through PDI for an original contract price of $13,518.37 (CX 36, p.1-2). PDI resold the fruit to L&P and the produce was inspected upon arrival. Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of $13,768, deductions of $11,698.55, and net proceeds of $2,069.45 (Tr. 172, 521; CX 36, pp. 11-12). Based upon PDI's representations that these were the net proceeds from the sale, Sun World issued a corrected invoice to PDI for $2,069.45 (Tr. 172, 521-22; CX 36, p. 13) and another corrected invoice for $2,055.51 (CX 33, p. 82).

L&P's records revealed a different account of sales which showed net proceeds of $8,023.45 (Tr. 174-75; CX 36, pp. 65-66).

Jay Brokers' records contained copies of these two different accounts of sales (Tr. 177-79; CX 36, pp. 75-78). Another irregularity was that L&P's records contained an invoice from PDI to L&P billing L&P at $8,805.26, which was $781.81 more than the $8,023.45 reflected on the account of sales (Tr. 176; CX 36, p. 67). L&P paid $8,805.26 to PDI and PDI remitted $2,055.51 to Sun World. PDI and Jay Brokers divided the difference on a 60-40 basis.

5. The Sun World Transaction (CX 38)

Sun World sold 3,040 cartons of grapefruit to PDI at the original contract price of $15,814.70 on or about July 28, 1994 (CX 38, pp. 1-2). PDI resold the produce to L&P Fruit. The produce was inspected upon arrival at L&P Fruit (CX 38, pp. 5-6). An account of sales on L&P letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of $1,588.35 (Tr. 215-16; CX 38, pp. 7-8). Based upon this account of sales, Sun World issued a corrected invoice for $1,695.50 (CX 38, p. 17). Sun World received a check from PDI dated September 7, 1994, which included $1,695.50 for the invoice in question (Tr. 216; CX 38, p. 18). A copy of an account of sales obtained from L&P's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P's records showed net proceeds of $4,551.35 instead of the $1,588.35 reported to Sun World (Tr. 217-19; CX 38, pp. 17-18, 35-36). Jay Brokers' records revealed copies of two different accounts of sales on L&P's letterhead for the same produce, one showing net proceeds of $1,588.35 and the other showing net proceeds of $4,551.35 (Tr. 220-21; CX 38, pp. 43-46). PDI's records showed that finally L&P was invoiced and paid $5,367 but that Sun World was paid only $1,695.50. The difference of $3,671.50 was divided between Produce Distributors and Jay Brokers on a 60-40 basis (Tr. 224; CX 38, pp. 47, 48). A copy of a stub of a check issued by PDI to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40% allocated to Jay Brokers by PDI for this transaction (CX 38, p. 54).

6. The Pacific International Marketing Transaction (CX 41)

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to PDI at the original contract price of $25,959.30. The produce was sold to BT Produce. The produce was inspected on July 7, 1994, and reinspected on July 8, 1994. The second inspection report submitted to Pacific International showed a total of 29% average defects including 8% serious damage of which 3% represented decay (CX 41, p. 12). A copy of the July 8, 1994, inspection report was not found in BT Produce's records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. That showed 27% average defects including 6% serious damage of which only 1% was for decay (CX 41, p. 38). A copy of the inspection report obtained from USDA Inspection Service indicated that the inspection report submitted to Pacific International had been altered in three places (Tr. 183-86; CX 41, p. 47). BT Produce's records contained a copy of a July 7, 1994, inspection report but not the July 8, 1994, inspection report that had been altered (CX 41, p. 33).

PDI's jacket file shows that BT Produce paid $13,932.50 to PDI for the produce

but PDI remitted only $13,003.50 to Pacific International and allocated the difference of $929 on a 60-40 basis - $557.40 to PDI and $371.60 to Jay Brokers (Tr. 198; CX 41, p. 40).

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The prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene Russo, doing business as Jay Brokers, and PDI made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is twenty-five cents per carton (Tr. 132). However, after deducting such usual and customary fees, Respondents received approximately $43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents' actions clearly violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five shippers who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon PDI's representations in agreeing to accept less money than was actually received by PDI. All of these representatives felt that PDI had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them.

While neither Joe Russo nor Irene Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Broker's files; and Joe Russo and Irene Russo were actively involved in negotiating the transactions for PDI and in handling the paperwork. I conclude that Joe Russo and/or Irene Russo, as agents for PDI, intentionally altered the accounts of sales and inspection certificates.

Section 2(4) of the PACA requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than were received.

Respondents knew or should have known that these fraudulent actions violated the PACA. PDI and Irene Russo have been active in the produce industry as PACA licensees for many years.

PDI is responsible for the acts of Joe Russo and Irene Russo. PDI hired Joe Russo as its agent and "employee" and allowed Joe Russo to use its company name and credit rating in connection with these transactions. PDI also received and

retained substantial profits from the fraudulent transactions. PDI cannot escape liability by claiming that it never questioned the records submitted to it by the Russos. PDI had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) are most serious because they involve breaches of fiduciary duty by an agent to its principal. Respondent PDI, as an agent, owed its consignors a high degree of care, honesty and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-6, 170 (1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978).

Respondents' actions were wilful, repeated, and flagrant. "Wilfulness" is defined as "if an act is done intentially, irrespective of evil intent, or done with careless disregard to statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joe Russo and Irene Russo, as PDI's agents, intentionally altered accounts of sales and inspection certificates in violation of section 2(4) of the PACA and they also acted with careless disregard of the statute's requirements.

Repeated violations are those occurring more than once. Respondents' actions violated the PACA in 41 separate transactions. *In re Atlantic Produce*, 35 Agric. Dec. 1631, 1640 (1976) *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978). Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. *Veg Mix, Inc.*, 48 Agric. Dec. 595 (1989); *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980) (Per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-269 (1973).

II. The Joint Venture

There is no question in my mind that Irene Russo participated in a joint venture with PDI in connection with the fraudulent transactions at issue.

Irene Russo actively participated in the transactions and Jay Brokers received 40% of PDI's fraudulent gains after PDI deducted its expenses of listing Joe Russo as a PDI employee.

Many of the transaction files contained copies of notes written by Irene Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16, p. 7; CX 18, p. 7; CX 24, p. 20; CX 26, p. 17; CX 29, p. 5; CX 35, p. 3; CX 43, p. 5; CX 45, p. 4; and CX 48, p. 6).

At the bottom of PDI's file jackets for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written "Jay

B" which stands for "Jay Brokers" and "Produce" which stands for PDI. Adjacent to "Jay B" is an amount equal to 40% of PDI's profit in the transaction and adjacent to "Produce"is an amount equal to 60% of the profit (e.g., CX 16, p. 46; CX 28, p. 28; CX 33, p. 39; CX 43, p. 24; CX 55, p. 44).

Other relevant documentary evidence included a balance sheet for PDI as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet listed payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7; Tr. 70-73). PDI's aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers." (CX 10, pp. 3-4; Tr. 87). Additionally, PDI's check register and canceled checks show payments by PDI to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue (CX 15, 59; Tr. 95-98).

Several representatives of firms involved in the transactions testified. Some testified that they believed that Irene Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18, p. 7). Teresa Llorente, a sales associate for John Simon Produce Company, also testified about significant dealings with Irene Russo (CX 33, p. 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers, testified that he dealt with Joe Russo at times and with Irene Russo at other times and he believed that Irene Russo worked for PDI (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World International, stated that her conversations with Irene Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl,other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not PDI and Irene Russo were involved in the joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene Russo, to PDI's records that show the joint venture, and to the testimony of several employees and representatives of PDI who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, PDI's billing clerk, testified that she believed that there was such a joint venture and that PDI's bookkeeper, Karyn Hertzberg, told her to record this in PDI's books and records. Ms. Dowe testified that in PDI's records, "J/V" meant

"joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that she had with Irene Russo regarding the transactions (Tr. 974, 976, 978-82, 984, 996).

Ms. Rucker testified that Karyn Hertzberg, PDI's office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in PDI's books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that PDI maintained a ledger which recorded the balance owed to Jay Brokers for their share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joe Russo's gross salary and PDI's expenses of listing him as an employee were deducted from the 40% that was paid to Jay Brokers (Tr. 51). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony but did not do so.

Thomas Gangemi III, the son of PDI's president who had worked as a salesman for PDI, testified that, based upon his conversations with his father and based upon PDI's paperwork, he also concluded that PDI was involved in a joint venture with Jay Brokers (Tr. 1034). He stated:

Answer
It all came the day they came in the office and it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Question
Well, who explained that to you.

Answer
My father.

Question
And was Irene present when this. . .

Answer
Yes, they were both present.

(Tr. 1045)

Mr. Gangemi further testified regarding Irene and Joe Russo:

> They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

(Tr. 1046)

Paul Martucci, PDI's certified public accountant, also testified that PDI's employees told him that PDI and Jay Brokers were involved in such a joint venture (Tr. 947-50). He understood that there was no difference between Irene Russo and Joe Russo in connection with the work performed for PDI (Tr. 962-63). He confirmed that in PDI's records any expenses to PDI that resulted from listing Joe Russo as a PDI employee were offset against payments made by PDI to Jay Brokers (Tr. 959-61).

The final two witnesses were PDI's president, Thomas Gangemi, Jr., and Irene Russo. Their testimonies are important.

Mr. Gangemi testified that he was involved in a joint venture with Joe Russo and not with Irene Russo with regard to the transactions at issue; that Joe Russo requested that Joe be listed on PDI's books as an employee; and that Joe Russo requested that his 40% share of the profits to be paid to Jay Brokers after PDI deducted Joe Russo's gross salary and PDI's employee-related expenses (2 Tr. 6, 7, 33). Mr. Gangemi stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (2 Tr. 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi stated:

> That could have been supported by the constant messages they received signed "Irene" and the communications, telephone communications, you know. They could have assumed that.

(2 Tr. 16)

Irene Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "because my husband has the most horriblest handwriting in the world and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene was the one speaking to Ms. Dowe and not Joe, Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joe ever mentioned the 60-40 split to her, Ms. Russo again

answered in a manner that strained credibility. She answered:

> He said he had - he was working for Buddy [Thomas Gangemi, Jr.] and that him and Buddy were, you know, they set up a deal and this is -- you know, this is what it was.

(Tr. 1060)

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidently" equal to 40% of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by PDI to Jay Brokers were to cover office expenses incurred by Joe for sharing her home office such as the use of the telephone and fax machine (Tr. 1065-67). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from PDI for $8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

> Well, I know I was complaining about the phone bill and, you know, I had heat, I had the - and I told him, I said it's not enough. I told my husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a little extra. So I know he spoke to Buddy. And he said, please, you know, help us out, we need a little extra into the - to be paid. And Buddy was always there.

(Tr. 1067-68)

When asked how much her telephone bills increased as a result of their use for the PDI work, Ms. Russo again did not make sense. Her answer:

> They increased on a large - maybe $500 to $600 higher than - maybe up to $1,000 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

(Tr. 1103)

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

> Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So. . .

(Tr. 1103)

The weight of the evidence overwhelmingly supports the conclusion that Irene Russo, doing business as Jay Brokers, was involved in a joint venture with PDI with regard to the transactions at issue. Ms. Russo actively participated in the transactions and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key PDI employees - Ms. Dowe and Ms. Hertzberg; PDI's certified public accountant, Mr. Martucci; and Thomas Gangemi, Jr., the son of PDI's president, all concluded that there was such a joint venture. PDI's records labelled the transactions as a joint venture between PDI and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had such a joint venture agreement with Joe Russo and that Joe Russo requested that payment be made to Irene's company. As I have previously stated, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers share of the profits but are reimbursement for office expenses is preposterous. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents as alleged.

III. The Issue of Expanding the Investigation

Section 6(c) of the PACA (7 U.S.C. § 499f(c) reads in applicable part:

> **(c)(1). Commencing or expanding an investigation**
> If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation,

if the Secretary determines that violations of this Act are indicated other than the alleged violations specified in the complaint or notification that served as a basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(c)(3). Special notification requirements for certain investigations
Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section, or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

The investigation in this matter was initiated in May 1995. PDI was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an eight-month time period to a two-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify PDI or Irene Russo in writing of the expansion of the investigation.

Respondent Russo contends that because Complainant failed to notify Respondents in writing that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA and, therefore, the Complaint must be dismissed. Respondent Russo also cites H.R. No. 104207, found in 1995 USCAN, p. 453 dated July 26, 1995, which includes a letter of Secretary of Agriculture Dan Glickman.

The language in section 6(c) of the PACA became effective in November 1995. The legislative history is not helpful in clarifying the language. The Senate issued no report. The House Report merely sets forth the language which was subsequently enacted.

However, in accordance with the Judicial Officer's decision in *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), I find that, since the beginning of this

investigation preceded the enactment of the amendment, the requirement for written notification of the expansion of the investigation does not apply here.

IV. Miscellaneous Comments

Respondent Irene Russo argues in her Reply Brief that New York State partnership law should be applied with respect to the joint venture. However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent's arguments in its Reply Brief that there cannot be a joint venture without "holding out to third parties." Respondent cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing it; there is no requirement that it be publicized.

Complainant does not need to prove that the altered produce records were actually done by Irene Russo herself. The evidence leads to the conclusion that the documents were altered at the Russo home office on behalf of PDI; and Irene Russo was involved in the joint venture with PDI with regard to the transactions at issue.

Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world - financial gain.

Respondent Russo argues that a negative inference must be drawn against Complainant because it failed to call PDI's bookkeeper or office manager, Karyn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Respondent Russo also failed to call Ms. Hertzberg to contradict such statements. I also found it interesting that neither party called as a witness Joe Russo, an individual who was so deeply involved in these transactions.

Additionally, Ms. Rucker did not recant her testimony that PDI was involved in a joint venture with Jay Brokers, as Respondent Irene Russo alleges in its brief. Furthermore, I found Ms. Rucker to be an extremely credible witness.

V. The Appropriate Sanction

I agree with Complainant that given the serious breaches of fiduciary relationships here, the alteration of numerous documents, the wilfulness, and the repeated and flagrant nature of the violations, that the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc.

and Irene Russo, doing business as Jay Brokers. The imposition of a monetary fine as a civil penalty would be wholly inadequate. Nothing short of revocation of both Respondents' licenses would serve to protect the public and to serve notice upon others in the produce industry that such conduct is intolerable and will not be countenanced.

Order

Respondents Produce Distributors, Inc., and Irene Russo, doing business as Jay Brokers, have committed wilful, repeated, and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) and Respondents' PACA licenses are revoked.

This Decision will become final without further proceedings 35 days after service upon Respondents unless appealed to the Secretary by a party to the proceeding within 30 days after its service upon that party in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final as to Produce Distributors, Inc., on January 13, 1999.-Editor]

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999.

False or misleading statements - Joint venture - Investigation - Sanction - Willful violations - Repeated and flagrant violations - ALJ Credibility determinations - Motive for violations - Preponderance of the evidence - License revocation.

The Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) concluding that Irene T. Russo, d/b/a Jay Brokers (Respondent), violated 7 U.S.C. § 499b(4) by making false and misleading statements to produce consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis. The Judicial Officer found that consignees owed consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987). The Judicial Officer found that Respondent participated in a joint venture with Produce Distributors, Inc., in connection with the fraudulent transactions, and that a joint venture may exist even though the joint venture is not made known to third persons or the general public. The Judicial Officer found that Respondent's violations were willful, repeated, and flagrant. 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. Willfulness is reflected by Respondent's violations of express requirements of 7 U.S.C. § 499b(4) and the number of Respondent's violations. Respondent's violations were "repeated" because repeated means more than one. Respondent's violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which they occurred. The Judicial Officer stated that, while he is not bound by the ALJ's credibility determinations (5 U.S.C. § 557(b)), he gives great weight to an administrative law judge's credibility determinations because the administrative law judge has the opportunity to see and hear witnesses testify and the Judicial Officer found that the record supported the ALJ's credibility determinations. The Judicial Officer rejected Respondent's contention that her motive for violating 7 U.S.C. § 499b(4) was relevant to the issue of Respondent's violations. The Judicial Officer concluded that Complainant proved Respondent's violations by a preponderance of the evidence and revoked Respondent's PACA license.

Kimberly D. Hart, for Complainant.
David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., for Respondent Produce Distributors, Inc.
Lawrence A. Omansky and Daniel Cherner, New York, New York, for Respondent Irene T. Russo, d/b/a Jay Brokers.
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 the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 3, 1997.

The Complaint: (1) alleges that during the period June 24, 1993, through April 14, 1995, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], failed to account truly and correctly to 16 consignors, the net proceeds for 40 lots of perishable agricultural commodities, which Respondents received, accepted, and sold on behalf of the consignors, in interstate commerce (Compl. ¶ V(a)); (2) alleges that during the period June 24, 1993, through October 21, 1994, Respondents created false and inaccurate accounts of sales and altered existing accounts of sales for perishable agricultural commodities received, accepted, and sold on behalf of seven consignors for the fraudulent purpose of concealing from the consignors the accurate net proceeds amounts due them from the sale of their produce on a consignment basis (Compl. ¶ V(b)); (3) alleges that Respondents altered the contents of two United States Department of Agriculture, Agricultural Marketing Service, inspection certificates issued on October 18, 1993, and July 8, 1994, respectively, by changing the information

reported on the inspection certificates as they pertained to either the shipper's identity or percentage of decay and defects (Compl. ¶ V(c)); and (4) requests a finding that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Respondents' PACA licenses (Compl. at 5).[1]

Produce Distributors, Inc., filed an Answer on February 18, 1997, in which it denied the material allegations of the Complaint and raised two factual defenses and four affirmative defenses. Irene T. Russo, d/b/a Jay Brokers, filed an Answer on February 28, 1997, in which she denied the material allegations of the Complaint and raised six factual defenses and three affirmative defenses.

The ALJ presided over a hearing on January 27-30, March 4-5, and April 15, 1998, in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. David L. Durkin, of Olsson, Frank & Weeda, Washington, D.C., represented Produce Distributors, Inc.[2] Lawrence A. Omansky and Daniel Cherner, New York, New York, represented Irene T. Russo, d/b/a Jay Brokers.

On June 15, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief; on June 16, 1998, Produce Distributors, Inc., filed Notice stating that it had surrendered its PACA license (PACA License No. 771923), effective March 1, 1998, and that the Notice is filed in lieu of a full brief on the merits; on June 19, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Memorandum of Law [hereinafter Respondent Russo's Brief]; on July 8, 1998, Complainant filed Complainant's Reply Brief; and on July 10, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Reply Memorandum of Law [hereinafter Respondent Russo's Reply Brief].

On October 21, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents made false statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA

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[1]On January 15, 1998, Complainant filed a Motion to Amend Complaint to correct a typographical error that appears on Exhibits A and B of the Complaint, and Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint). References in this Decision and Order to "Complaint" are to the Complaint as amended by the ALJ's January 15, 1998, Order Amending Complaint.

[2]On March 3, 1998, Produce Distributors, Inc., filed Notice stating that it: (1) would not offer further evidence or witnesses; (2) would not participate in the examination of witnesses; and (3) surrendered its PACA license (PACA License No. 771923), effective March 1, 1998.

(7 U.S.C. § 499b(4)); (2) concluded that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) found that Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated; and (4) revoked Respondents' PACA licenses (Initial Decision and Order at 5, 24).

On November 10, 1998, Irene T. Russo, d/b/a Jay Brokers, 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).[3] On December 10, 1998, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Appeal Petition [hereinafter Complainant's Response].

Produce Distributors, Inc., did not appeal the Initial Decision and Order, which was served on Produce Distributors, Inc., on December 9, 1998. In accordance with the Initial Decision and Order (Initial Decision and Order at 24) and section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became final and effective as to Produce Distributors, Inc., on January 13, 1999. On January 20, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision as to Irene T. Russo, d/b/a Jay Brokers.

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

Complainant's exhibits are designated by the letters "CX." The portion of the transcript that relates to those segments of the hearing conducted on January 27-30 and March 4-5, 1998, are in six volumes containing pages numbered 1 through 1131. The portion of the transcript that relates to that segment of the hearing conducted on April 15, 1998, is in a single volume containing pages numbered 1 through 83. References in this Decision and Order to "Tr." are to the six volumes of the transcript that relate to the January 27-30 and March 4-5, 1998, segments of

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[3]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

the hearing, and references in this Decision and Order to "Tr. Vol. II" are to the volume of the transcript that relates to the April 15, 1998, segment of the hearing.

PERTINENT STATUTORY PROVISION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

7 U.S.C. § 499b(4) (1994).

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

Findings of Fact

1. Respondent, Produce Distributors, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Produce Distributors, Inc.'s address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, CX 3).

2. At all times relevant to this proceeding, Produce Distributors, Inc., was licensed under the PACA, holding license number 771923. Produce Distributors, Inc., is no longer licensed under the PACA (Complainant's Response at 3; Produce Distributors, Inc.'s Notice, filed March 3, 1998; Produce Distributors, Inc.'s Notice, filed June 16, 1998).

3. Respondent Irene T. Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).

4. At all times relevant to this proceeding, Jay Brokers was licensed under the PACA, holding license number 891361. Jay Brokers' license was renewed annually and is subject to renewal on or before June 8, 1999 (CX 2).

5. In May 1995, USDA initiated an investigation of Produce Distributors, Inc., based on four reparation complaints made against Produce Distributors, Inc. USDA dispatched Roberta L. Rucker, a senior marketing specialist, to examine the records of Produce Distributors, Inc. Ms. Rucker first visited Produce Distributors, Inc.'s office on May 24, 1995 (Tr. 29).

6. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers (Tr. 42-43). USDA did not notify Produce Distributors, Inc., or Irene T. Russo, in writing, that the investigation had been expanded and would include Jay Brokers. Ms. Rucker examined and photocopied documents and interviewed individuals at Produce Distributors, Inc., and Jay Brokers. (Tr. 29-41, 47-49, 54-56.)

7. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions, such as files in which there were two accounts of sales with the gross proceeds, net proceeds, and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

8. Produce Distributors, Inc.'s records indicate that documents were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo, to mislead produce consignors as to the amounts of profits involved in

transactions and that produce inspection reports were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo.

9. Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., told Ms. Rucker that Produce Distributors, Inc., was involved in a joint venture arrangement with Joseph Russo in which Produce Distributors, Inc., would assume 60 per centum of any profit or loss and Jay Brokers would assume 40 per centum of any profit or loss on the sale of produce by Produce Distributors, Inc. (Tr. 29-31; Tr. Vol. II at 6).

10. Produce Distributors, Inc.'s records show that Produce Distributors, Inc.'s profits in the transactions at issue in this proceeding were apportioned 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers (Tr. 34-35; e.g., CX 16 at 46, CX 18 at 28, CX 20 at 22, CX 33 at 39, CX 36 at 79, CX 38 at 48, CX 41 at 40).

11. The records with respect to the transactions at issue in this proceeding contain numerous memoranda from Irene T. Russo to the produce consignors or customers proposing modifications of prices and records of other communications between Irene T. Russo and the produce consignors and customers (e.g. CX 16 at 7, 15, 48, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 28 at 2, 20, 22, 23, CX 29 at 5, CX 33 at 30, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

12. The records with respect to the transactions at issue in this proceeding also contain numerous memoranda signed by Irene T. Russo and faxed from Jay Brokers' fax number that instructed Produce Distributors, Inc., as to fraudulent amounts to remit to produce consignors and amounts to bill customers in the produce transactions (Tr. 37-40).

13. Based upon the evidence that Irene T. Russo actively participated in the transactions at issue in this proceeding and that Jay Brokers received 40 per centum of Produce Distributors, Inc.'s profits for the transactions at issue in this proceeding, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture in the transactions at issue in this proceeding.

14. Although Joseph Russo was listed in Produce Distributors, Inc.'s records as an employee, the identification of Joseph Russo as a Produce Distributors, Inc., employee was a subterfuge. In fact, Joseph Russo, together with his wife, Irene T. Russo, was involved in the joint venture with Produce Distributors, Inc., and he was listed falsely as an employee in Produce Distributors, Inc.'s records for his personal convenience.

15. Based upon the evidence, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with

their joint venture.

Conclusions of Law

1. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis.

2. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60 per centum to Produce Distributors, Inc., and 40 per centum to Irene T. Russo, d/b/a Jay Brokers.

I. The False and Misleading Statements

In a "Notice" filed on June 16, 1998, Produce Distributors, Inc., appeared to admit the alleged violations. Produce Distributors, Inc.'s Notice states, in applicable part: "on the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also states that Produce Distributors, Inc., had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi, Jr.'s testimony to which Produce Distributors, Inc.'s Notice, filed June 16, 1998, may refer includes, "my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (Tr. Vol. II at 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- my error -- my error in judgment in bringing him into my organization. I don't know what else to say." (Tr. Vol. II at 31.)

After Mr. Gangemi made that statement, the ALJ stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that directly, you were not involved, but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee." (Tr. Vol. II at 31.)

Produce Distributors, Inc., presented no defense with respect to either the issue

of its violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint, or the issue of its relationship with Joseph Russo. However, Irene T. Russo denied that the alleged violations took place and denied that she was involved in a joint venture with Produce Distributors, Inc., in connection with the alleged violations.

Included in Complainant's evidence are 41 exhibits, each containing documents with regard to one transaction in which Respondents are alleged to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 16-39, CX 41-56, CX 58). Complainant's investigator, Roberta L. Rucker, marked on the reverse side of many of the documents, the office from which the documents were obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, CX 28, CX 33, CX 36, CX 38, CX 41), and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr. 110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions evidence conduct similar to that in one or more of the six prototype transactions. I have examined the exhibits in connection with the 35 other transactions and find that they support the conclusion that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) in these 35 transactions in a manner similar to Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the six prototype transactions.

Joseph Russo represented Produce Distributors, Inc., in all 41 of these transactions. Joseph Russo is married to Irene T. Russo (Tr. 800-01). Irene T. Russo operated a produce business under the name of "Jay Brokers" from an office in her home (Tr. 799-800). Joseph Russo worked on the Produce Distributors, Inc., transactions at issue from this home office (Tr. 800-01). Irene T. Russo also assisted Joseph Russo in his work in these transactions, and Irene T. Russo participated in these transactions. Forty percent of the profits from these transactions was paid by Produce Distributors, Inc., to Jay Brokers, after deducting from the 40 percent, salaries and employer expenses in connection with listing Joseph Russo in Produce Distributors, Inc.'s records as a Produce Distributors, Inc., employee (Tr. 51-53).

In all of the 41 transactions, Produce Distributors, Inc., represented by Joseph Russo, sold produce on a consignment basis on behalf of consignors. Thus, Produce Distributors, Inc., acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russos' office and based upon memoranda, faxes, and telephone calls from Joseph Russo and Irene T. Russo, the consignors were led to believe that less money was received for the produce than was actually received, and based upon these falsified documents

and representations, the consignors agreed to accept less money than Produce Distributors, Inc., actually received. The differences between the amounts of money that Produce Distributors, Inc., actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by Produce Distributors, Inc., and these "profits" were divided 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers.

The six prototype transactions are as follows:

1. The Isaak Brothers Transaction (CX 16)

This transaction involved 1,716 cartons of peaches sold by Produce Distributors, Inc., for Isaak Brothers on June 24, 1993 (CX 16 at 1). The produce was resold by Produce Distributors, Inc., to B.T. Produce Co., Inc. (CX 16 at 15). Jay Brokers submitted a copy of an account of sales to Isaak Brothers from B.T. Produce Co., Inc., on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16 at 15). The gross proceeds for the sale were reported as being $352 and the cost was shown to exceed the proceeds for a loss of $13,629 (CX 16 at 15). On September 20, 1993, Jay Brokers faxed a memorandum signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16 at 7).

The documents in B.T. Produce Co., Inc.'s records indicate that Produce Distributors, Inc., invoiced B.T. Produce Co., Inc., for $9,106 for the produce, an amount that was subsequently reduced to $5,674 (Tr. 113; CX 16 at 25, 32). Isaak Brothers was not paid any of this money. The $5,674 was apportioned between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16 at 46). "J/V" is noted on the jacket of Produce Distributors, Inc.'s file next to "Jay B" and "Produce" which Taryn Hertzberg, Produce Distributors, Inc.'s bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16 at 46). Produce Distributors, Inc.'s records indicate that Jay Brokers was paid $2,269.60 (40 per centum of the $5,674 paid by B.T. Produce Co., Inc.) and Produce Distributors, Inc., was paid $3,404.40 (60 per centum of the $5,674 paid by B.T. Produce Co., Inc.) (CX 16 at 46).

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene T. Russo and Joseph Russo that there were negative net proceeds from the sale of the produce and that more than 95 percent of the produce was dumped. Mr. Isaak stated that he was unaware that B.T. Produce Co., Inc., paid

Produce Distributors, Inc., $5,674 for the same produce. (Tr. 633-38.)

2. The Sun Pacific Transaction (CX 28)

This transaction involved the sale of grapes by Produce Distributors, Inc., for Sun Pacific Enterprises on September 22, 1994, for a contract price of $12,841.50 (CX 28 at 8). The produce was resold by Produce Distributors, Inc., to L&P Fruit Corporation and was inspected upon arrival (CX 28 at 10-11). Produce Distributors, Inc., invoiced L&P Fruit Corporation for $6,632.90 for the produce (Tr. 140-41; CX 28 at 18). Jay Brokers' records included a copy of another account of sales on L&P Fruit Corporation's letterhead reflecting net proceeds of $3,432 (Tr. 144-45; CX 28 at 26). In response to a memorandum signed by "Irene" to Sun Pacific Enterprises requesting authorization to accept a reduced price for the produce, Sun Pacific Enterprises agreed (Tr. 137-38; CX 28 at 2, 23, 26).

The jacket of Produce Distributors, Inc.'s file shows that Produce Distributors, Inc., received $6,632.90 from L&P Fruit Corporation, but remitted $3,173.50 to Sun Pacific Enterprises and allocated the difference between these amounts of $3,459.40 between "Jay B" and "Produce" as profit on a 60/40 basis (CX 28 at 28).

3. The John Simon Produce Transaction (CX 33)

John Simon Produce Co. sold 2,100 watermelons through Produce Distributors, Inc., at the original contract price of $5,510.75 on May 13, 1994 (CX 33 at 3, 20). The produce was sold to Frankie Boy Produce Corporation. John Simon Produce Co. received a typewritten account of sales from Frankie Boy Produce Corporation indicating gross proceeds of $1,864.74 minus a deduction for "COMM. & Repack" of $511.66, resulting in net proceeds of $1,353.08 (CX 33 at 13). John Simon Produce Co. issued an adjusted invoice for $1,353.08 (CX 33 at 20-22). Jay Brokers' records contain a copy of the adjusted invoice for $1,353.08. However, its copy of the adjusted invoice contains a note from "Irene" instructing that Frankie Boy Produce Corporation be billed $1,864.74 (CX 33 at 30), and Frankie Boy Produce Corporation paid Produce Distributors, Inc., $1,864.74 (Tr. 159; CX 33 at 25). Ms. Rucker found a blank copy of Frankie Boy Produce Corporation's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33 at 37-38; Tr. 160-62). It appears that Frankie Boy Produce Corporation's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon Produce Co. (Tr. 162). Thus, the false account represented to John Simon Produce Co. that Produce Distributors, Inc., received

$1,353.08, whereas Produce Distributors, Inc., actually received $1,864.74. The $511.66 was split between "Jay B" and "Produce" on a 60/40 basis. (Tr. 163-64; CX 33 at 39, 41-42.) The amount of $204.66, which corresponds to 40 per centum of the $511.66, is the same amount reflected on Produce Distributors, Inc.'s invoice number 263900 and check number 1453, which Produce Distributors, Inc., issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33 at 44).

Theresa Llorente, a representative of John Simon Produce Co. who negotiated the transaction, testified that Joseph Russo told her that there were charges for commission and to repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce Corporation might have commission and repack charges; however, she was unaware that Produce Distributors, Inc., and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 497-98; CX 33 at 39).

4. The Sun World Transaction (CX 36)

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through Produce Distributors, Inc., for an original contract price of $13,518.37 (CX 36 at 1-2). Produce Distributors, Inc., resold the fruit to L&P Fruit Corporation, and the produce was inspected upon arrival (CX 36 at 4-5). Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of $13,768, deductions of $11,698.55, and net proceeds of $2,069.45 (Tr. 172, 521; CX 36 at 11-12). Based upon Produce Distributors, Inc.'s representations that these were the net proceeds from the sales, Sun World issued a corrected invoice to Produce Distributors, Inc., for $2,069.45 (Tr. 172, 521-22; CX 36 at 13) and another corrected invoice for $2,055.51 (CX 33 at 82).

L&P Fruit Corporation's records reveal a different account of sales which show net proceeds of $8,023.45 (Tr. 174-75; CX 36 at 65-66).

Jay Brokers' records contain copies of these two different accounts of sales (Tr. 177-79; CX 36 at 75-78). Another irregularity was that L&P Fruit Corporation's records contain an invoice from Produce Distributors, Inc., to L&P Fruit Corporation billing L&P Fruit Corporation $8,805.26, which was $781.81 more than the $8,023.45 reflected on the account of sales (Tr. 176; CX 36 at 67). L&P Fruit Corporation paid $8,805.26 to Produce Distributors, Inc., and Produce Distributors, Inc., remitted $2,055.51 to Sun World. Produce Distributors, Inc., and Jay Brokers divided the difference on a 60/40 basis. (Tr. 181; CX 36 at 79.)

5. The Sun World Transaction (CX 38)

Sun World sold 3,040 cartons of grapefruit to Produce Distributors, Inc., at the original contract price of $15,814.70 on or about July 28, 1994. Produce Distributors, Inc., resold the produce to L&P Fruit Corporation. (CX 38 at 1-2.) The produce was inspected upon arrival at L&P Fruit Corporation (CX 38 at 5-6). An account of sales on L&P Fruit Corporation letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of $1,588.35 (Tr. 215-16; CX 38 at 7-8). Based upon this account of sales, Sun World issued a corrected invoice for $1,695.50 (CX 38 at 17). Sun World received a check from Produce Distributors, Inc., dated September 7, 1994, which included $1,695.50 for the invoice in question (Tr. 216; CX 38 at 18). A copy of an account of sales obtained from L&P Fruit Corporation's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P Fruit Corporation's records shows net proceeds of $4,551.35, instead of the $1,588.35 reported to Sun World (Tr. 217-19; CX 38 at 17-18, 35-36). Jay Brokers' records reveal copies of two different accounts of sales on L&P Fruit Corporation's letterhead for the same produce, one showing net proceeds of $1,588.35 and the other showing net proceeds of $4,551.35 (Tr. 220-21; CX 38 at 43-46). Produce Distributors, Inc.'s records show that finally L&P Fruit Corporation was invoiced and paid $5,367, but that Sun World was paid only $1,695.50. The difference of $3,671.50 was divided between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis. (Tr. 224; CX 38 at 47-48.) A copy of a stub of a check issued by Produce Distributors, Inc., to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40 per centum allocated to Jay Brokers by Produce Distributors, Inc., for this transaction (CX 38 at 54).

6. The Pacific International Marketing Transaction (CX 41)

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to Produce Distributors, Inc., at the original contract price of $25,959.30. The produce was sold to B.T. Produce, Co., Inc. (CX 41 at 1). The produce was inspected on July 7, 1994, and reinspected on July 8, 1994 (CX 41 at 11-12). The July 8, 1994, inspection report submitted to Pacific International Marketing shows a total of 29 percent average defects, including 8 percent serious damage of which 3 percent represented decay (CX 41 at 12). A copy of the July 8, 1994, inspection report was not found in B.T. Produce, Co., Inc.'s records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. The version of the July 8, 1994, inspection report found in Jay

Brokers' records shows 27 per centum average defects, including 6 per centum serious damage of which only 1 per centum was for decay (CX 41 at 38). A copy of the inspection report obtained from USDA Inspection Service indicates that the inspection report submitted to Pacific International Marketing had been altered in three places (Tr. 183-86; CX 41 at 47). B.T. Produce, Co., Inc.'s records contain a copy of a July 7, 1994, inspection report, but not the July 8, 1994, inspection report that had been altered (CX 41 at 33).

The jacket of Produce Distributors, Inc.'s file shows that B.T. Produce, Co., Inc., paid $13,932.50 to Produce Distributors, Inc., for the produce, but Produce Distributors, Inc., remitted only $13,003.50 to Pacific International Marketing and allocated the difference of $929 on a 60/40 basis; $557.40 to Produce Distributors, Inc., and $371.60 to Jay Brokers (Tr. 198; CX 41 at 40).

The six prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is 25 cents per carton (Tr. 132-33). However, after deducting such usual and customary fees, Respondents received approximately $43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents clearly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five produce consignors who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon Produce Distributors, Inc.'s representations in agreeing to accept less money than was actually received by Produce Distributors, Inc. All of these representatives testified that Produce Distributors, Inc., had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them (e.g. Tr. 387-90, 407-09, 493-94, 498-99, 534-36, 559-65, 573-77, 630-32, 635-36, 651-53).

While neither Joseph Russo nor Irene T. Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Brokers' files; and Joseph Russo and Irene T. Russo were actively involved in negotiating the transactions for Produce Distributors, Inc., and in handling the paperwork. I conclude that Joseph Russo or Irene T. Russo or both Joseph Russo and Irene Russo, as agents for Produce Distributors, Inc., intentionally altered the accounts of sales and inspection

certificates.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than Produce Distributors, Inc., received.

Respondents knew, or should have known, that these fraudulent actions violated the PACA. Respondents have been active in the produce industry as PACA licensees for many years (Tr. 800; CX 1, CX 2).

Produce Distributors, Inc., is responsible for the acts of Joseph Russo and Irene T. Russo. Produce Distributors, Inc., hired Joseph Russo as its agent and "employee" and allowed Joseph Russo to use its company name and credit rating in connection with these transactions. Produce Distributors, Inc., also received and retained substantial profits from the fraudulent transactions. Produce Distributors, Inc., cannot escape liability by claiming that it never questioned the records submitted to it by Joseph and Irene T. Russo. Produce Distributors, Inc., had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are serious because they involve breaches of fiduciary duty by an agent to its principal. Produce Distributors, Inc., as an agent, owed its consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978); *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

Respondents' violations were willful, repeated, and flagrant. A violation is willful "if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joseph Russo and Irene T. Russo, as Produce Distributors, Inc.'s agents, intentionally altered accounts of sales and inspection certificates, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and they also acted with careless disregard of PACA's requirements.

Repeated violations are those occurring more than once. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978). Respondents violated the PACA in 41 separate transactions. Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred.

II. The Joint Venture

There is no question in my mind that Irene T. Russo participated in a joint venture with Produce Distributors, Inc., in connection with the fraudulent transactions at issue.

Irene T. Russo actively participated in the transactions and Jay Brokers received 40 per centum of Produce Distributors, Inc.'s fraudulent gains after Produce Distributors, Inc., deducted its expenses of listing Joseph Russo as a Produce Distributors, Inc., employee.

Many of the transaction files contain copies of notes written by Irene T. Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16 at 7, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 29 at 5, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

At the bottom of the jackets of Produce Distributors, Inc.'s files for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written "Jay B" which stands for "Jay Brokers" and "Produce" which stands for "Produce Distributors, Inc." Adjacent to "Jay B" is an amount equal to 40 per centum of Produce Distributors, Inc.'s profit in the transaction and adjacent to "Produce" is an amount equal to 60 per centum of the profit (e.g., CX 16 at 46, CX 28 at 28, CX 33 at 39, CX 43 at 24, CX 55 at 44).

Other relevant documentary evidence includes a balance sheet for Produce Distributors, Inc., as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it, but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet lists payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7 at 2; Tr. 70-73). Produce Distributors, Inc.'s aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers" (CX 10 at 3-4; Tr. 87-88). Additionally, Produce Distributors, Inc.'s check register and canceled checks show payments by Produce Distributors, Inc., to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue in this proceeding (CX 15, CX 59; Tr. 95-98).

Several representatives of firms involved in the transactions at issue in this proceeding testified. Some testified that they believed that Irene T. Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18 at 7). Theresa Llorente, a sales associate for John Simon Produce Company, also testified about significant dealings with Irene T. Russo (CX 33 at 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers,

testified that he dealt with Joseph Russo at times and with Irene T. Russo at other times, and he believed that Irene T. Russo worked for Produce Distributors, Inc. (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World, stated that her conversations with Irene T. Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl, other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene T. Russo, to Produce Distributors, Inc.'s records that show the joint venture, and to the testimony of several employees and representatives of Produce Distributors, Inc., who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, Produce Distributors, Inc.'s billing clerk, testified that she believed that there was such a joint venture and that Produce Distributors, Inc.'s bookkeeper, Taryn Hertzberg, told her to record sales handled by Joseph Russo as a joint venture by Produce Distributors, Inc., and Jay Brokers in Produce Distributors, Inc.'s books and records. Ms. Dowe testified that in Produce Distributors, Inc.'s records, "J/V" meant "joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that she had with Irene T. Russo regarding the transactions (Tr. 974, 976, 978-82, 984-88, 991, 996).

Ms. Rucker testified that Taryn Hertzberg, Produce Distributors, Inc.'s office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in Produce Distributors, Inc.'s books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that Produce Distributors, Inc., maintained a ledger which recorded the balance owed to Jay Brokers for its share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joseph Russo's gross salary and Produce Distributors, Inc.'s expenses of listing him as an employee were deducted from the 40 percent that was paid to Jay Brokers (Tr. 51-52). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings, and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony, but did not do so.

Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president who had worked as a salesman for Produce Distributors, Inc., testified that, based upon his

conversations with his father and based upon Produce Distributors, Inc.'s paperwork, he also concluded that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers (Tr. 1034), as follows:

[MR. OMANSKY:]

Q. Did you have any joint venture deals with any other sales people?

[MR. THOMAS GANGEMI, III:]

A. No. Just, you know, the Russos.

Q. Okay. And did Irene ever say she had a joint venture with Produce Distributors?

A. I don't recall.

Q. And any information you did have about any possible or alleged joint venture, that all came from your father?

A. It all came the day they came in the office. And it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Q. Well, who explained that to you?

A. My father.

Q. And was Irene present when this --

A. Yes, they were both present.

Tr. 1045.

Mr. Gangemi, III, further testified regarding the relationship between Irene T. and Joseph Russo, as follows:

They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

Tr. 1046.

Paul Martucci, Produce Distributors, Inc.'s certified public accountant, also testified that Produce Distributors, Inc.'s employees told him that Produce Distributors, Inc., and Jay Brokers were involved in a joint venture (Tr. 946-50). He understood that there was no difference between Irene T. Russo and Joseph Russo in connection with the work performed for Produce Distributors, Inc. (Tr. 962-63). Mr. Martucci confirmed that in Produce Distributors, Inc.'s records, any expenses to Produce Distributors, Inc., that resulted from listing Joseph Russo as a Produce Distributors, Inc., employee were offset against payments made by Produce Distributors, Inc., to Jay Brokers (Tr. 959-61).

The final two witnesses were Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., and Irene T. Russo. Their testimonies are important.

Mr. Gangemi, Jr., testified that he was involved in a joint venture with Joseph Russo and not with Irene T. Russo with regard to the transactions at issue in this proceeding; that Joseph Russo requested that Joseph Russo be listed on Produce Distributors, Inc.'s books as an employee; and that Joseph Russo requested that his 40 percent share of the profits be paid to Jay Brokers after Produce Distributors, Inc., deducted Joseph Russo's gross salary and Produce Distributors, Inc.'s employee-related expenses (Tr. Vol. II at 6-8, 33). Mr. Gangemi, Jr., stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (Tr. Vol. II at 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi, Jr., stated:

> . . . That could have been supported by the constant messages they received signed Irene and the communications, telephone communications, you know. They could have assumed that.

Tr. Vol. II at 16.

Irene T. Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "[b]ecause my husband has the most horriblest handwriting in the world, and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene T. Russo was the one speaking to Ms. Dowe and not Joseph Russo, Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joseph Russo ever mentioned the 60/40 split to her, Ms. Russo again answered in a manner that strained credibility. She answered:

He said he had -- he was working for Buddy [Thomas Gangemi, Jr.,] and that him and Buddy were -- you know, they set up a deal and that this is -- you know, this is what it was.

Tr. 1060.

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidentally" equal to 40 per centum of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by Produce Distributors, Inc., to Jay Brokers were to cover office expenses incurred by Joseph Russo for sharing her home office, such as the use of the telephone and fax machine (Tr. 1065-68). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from Produce Distributors, Inc., for $8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

Well, I know I was complaining about the phone bill and, you know, I had heat, I had the -- and I told him, I said it's not enough. I told my husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a little extra. So I know he spoke to Buddy [Thomas Gangemi, Jr]. And he said, please, you know, help us out; we need a little extra into the -- to be paid. And Buddy was always there.

Tr. 1067-68.

When asked how much her telephone bills increased as a result of the use of Jay Brokers' telephones for the Produce Distributors, Inc., work, Ms. Russo again did not make sense. Her answer:

They increased on a large -- maybe $500.00 to $600.00 higher than -- maybe up to a $1,000.00 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

Tr. 1103.

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

> Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So --

Tr. 1103.

The weight of the evidence overwhelmingly supports the conclusion that Irene T. Russo, d/b/a Jay Brokers, was involved in a joint venture with Produce Distributors, Inc., with regard to the transactions at issue. Ms. Russo actively participated in the transactions, and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key Produce Distributors, Inc., employees, Ms. Dowe and Ms. Hertzberg; Produce Distributors, Inc.'s certified public accountant, Mr. Martucci; and Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president, all concluded that there was such a joint venture. Produce Distributors, Inc.'s records labelled the transactions as a joint venture between Produce Distributors, Inc., and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had such a joint venture agreement with Joseph Russo and that Joseph Russo requested that payment be made to Irene T. Russo's company. As stated in this Decision and Order, *supra*, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers' share of the profits, but are reimbursement for office expenses, is not credible. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses, and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene T. Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents, as alleged in the Complaint.

III. The Issue of Expanding the Investigation

Section 6(c) of the PACA provides, as follows:

§ 499f. Complaints, written notifications, and investigations

. . . .

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(c) (Supp. II 1996).

The investigation in this matter was initiated in May 1995. Produce Distributors, Inc., was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an 8-month time period to a 2-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify Produce Distributors, Inc., or Irene T. Russo, d/b/a Jay Brokers, in writing, of the expansion of the investigation.

Respondent Irene T. Russo, d/b/a Jay Brokers, contends that because Complainant failed to notify Respondents, in writing, that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA (7 U.S.C. § 499f(c)(3)), and therefore, the Complaint must be dismissed.

However, section 6(c) of the PACA was not amended to require notification of investigation until November 15, 1995,[4] after the investigation of Respondents was begun. Therefore, in accordance with *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998), I find that, since the beginning of this investigation preceded the enactment of the November 1995 amendment of section 6(c) of the PACA, the requirement for written notification of the expansion of the investigation does not apply to the investigation at issue in this proceeding.

IV. Miscellaneous Comments

Irene T. Russo, d/b/a Jay Brokers, argues that New York State partnership law should be applied with respect to the joint venture (Respondent Russo's Reply Brief at 33-36). However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent Irene T. Russo's arguments that there cannot be a joint venture "[a]bsent [a] `holding out [of the joint venture] to third parties' (the general public)" (Respondent Russo's Reply Brief at 38). Irene T. Russo, d/b/a Jay Brokers, cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing

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[4]Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 7(b), 109 Stat. 424, 428-29.

the joint venture; there is no requirement that a joint venture be publicized.[5]

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[5]Courts that have addressed the elements of a joint venture have not included as an element of a joint venture that it must be publicized either to third persons or to the general public, as Irene T. Russo contends. See, e.g., *United States v. USX Corp.*, 68 F.3d 811, 826 (3d Cir. 1995) (stating that the *sine qua non* of a joint venture is a contract, express or implied, between the parties; other requisite elements of a joint venture are: (1) the contribution by each party of money, property, effort, knowledge, or some other asset to a common undertaking, (2) the existence of a joint property interest in the subject matter of the venture, (3) the right of mutual control or management over the venture, and (4) an agreement to share profits or losses of the venture); *Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990) (stating that in order to form a joint venture: (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit; (2) their agreement must evidence their intent to be joint venturers; (3) each must make a contribution of property, financing, skill, knowledge, or effort; (4) each must have some degree of joint control over the venture; and (5) there must be provision for the sharing of both profits and losses); *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964) (stating that a joint venture is an association of persons or corporations who by contract, express or implied, agree to engage in a common enterprise for their mutual profit; the essential elements of a joint venture are: (a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services, or knowledge; and (c) a right to participate in the expected profits); *McGhan v. Ebersol*, 608 F. Supp. 277, 282 (S.D.N.Y. 1985) (stating that, under New York law, a joint venture is defined as an association to carry out a single business enterprise for profit; a common enterprise for mutual benefit; or a combination of property, efforts, skill, and judgment in a common undertaking; in order to find a joint venture, the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Sherrier v. Richard*, 564 F. Supp. 448, 457 (S.D.N.Y. 1983) (stating that, under New York law, a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Williams v. Forbes*, 571 N.Y.S.2d 818, 819 (N.Y. App. Div. 1991) (stating that a joint venture is an association of two or more persons to carry out a single business enterprise for a profit, for which purpose they combine their property, money, effects, skill, and knowledge; and indispensable to the creation of a joint venture is sharing in the profits and losses of the business); *Mendelson v. Feinman*, 531 N.Y.S.2d 326, 328 (N.Y. App. Div. 1988) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Ackerman v. Landes*, 493 N.Y.S.2d 59, 60 (N.Y. App. Div. 1985) (stating that a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the essential elements are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses); *Ramirez v. Goldberg*, 439

(continued...)

Complainant does not need to prove that the altered produce records were actually altered by Irene T. Russo herself. The evidence leads to the conclusion that the documents were altered at the Russo home office on behalf of Produce Distributors, Inc., and Irene T. Russo was involved in the joint venture with Produce Distributors, Inc., with regard to the transactions at issue in this proceeding.

Irene T. Russo, d/b/a Jay Brokers, also argues that she had no motive to falsify certificates of inspection (Respondent Russo's Brief at 44). Her motive was financial gain.

Irene T. Russo, d/b/a Jay Brokers, argues that a negative inference must be drawn against Complainant because Complainant failed to call Produce Distributors, Inc.'s bookkeeper or office manager, Taryn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Irene T. Russo, d/b/a Jay Brokers, also failed to call Ms. Hertzberg to contradict such statements.

Additionally, Ms. Rucker did not recant her testimony that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers, as Irene T. Russo, d/b/a Jay Brokers, contends (Respondent Russo's Brief at 16). Furthermore, I found Ms. Rucker to be an extremely credible witness.

V. The Appropriate Sanction

I agree with Complainant that, given the Respondents' serious breaches of their fiduciary relationships, the alteration of numerous documents, the willfulness, and the repeated and flagrant nature of the violations, the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Irene T. Russo, d/b/a Jay Brokers, raises three issues in her Appeal for Reconsideration on Docket No. D-97-0013 [hereinafter Appeal Petition]. First, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erroneously found that Jay

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[5](...continued)
N.Y.S.2d 959, 961 (N.Y. App. Div. 1981) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge).

Brokers and Produce Distributors, Inc., engaged in a joint venture (Appeal Pet. at 1). Specifically, Respondent Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ's credibility determinations, as they relate to testimony concerning the existence of a joint venture between Jay Brokers and Produce Distributors, Inc., are error (Appeal Pet. at 1-2).

I disagree with the contention by Irene T. Russo, d/b/a Jay Brokers, that the ALJ's credibility determinations are error. The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).[6] The

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[6]*See also In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 21-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 48 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 688 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that 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) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir.
(continued...)

Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review. . . .*
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate

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[6](...continued)
1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that 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).

> officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[7] The ALJ explained in great detail his reasons for his credibility determinations regarding the testimony concerning the existence of a joint venture between Produce Distributors, Inc., and Jay Brokers (Initial Decision and Order at 14-21). The record supports the ALJ's credibility determinations, and I do not find that the ALJ erred.

Second, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erred by finding that she was motivated to violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) by financial gain (Appeal Pet. at 2).

The ALJ does address Irene T. Russo's motive for her violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as follows:

> Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world -

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[7] *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

financial gain.

Initial Decision and Order at 23.

The record supports the ALJ's statement regarding Ms. Russo's motive for her violations of the PACA. However, the motive for Irene T. Russo's violations of section 2(4) of the PACA is not relevant to whether she violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and even if I found that the ALJ erred with respect to Irene T. Russo's motive, that error would not affect the determination that Irene T. Russo, d/b/a Jay Brokers, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) or the sanction to be imposed for her violations.

Third, Irene T. Russo, d/b/a Jay Brokers, contends that she did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that she should never have been involved in the investigation that resulted in Complainant filing the Complaint (Appeal Pet. at 3).

I disagree with the contention that Irene T. Russo, d/b/a Jay Brokers, did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,[8] and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.[9] I have

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[8]*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

[9]*In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (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*,

(continued...)

carefully reviewed the record in this proceeding, and I agree with the ALJ that Complainant has proved its case by much more than a preponderance of the evidence.

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

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers, filed March 23, 1999.

Joint venture - Notification of investigation - License revocation.

The Judicial Officer denied a Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers. The Judicial Officer stated that the evidence supported a conclusion that Irene T. Russo, d/b/a Jay Brokers, participated in a joint venture with Produce Distributors, Inc., in which Irene T. Russo, d/b/a Jay Brokers, shared profits with Produce Distributors, Inc., resulting from their violations of 7 U.S.C. § 499(b)(4). The Judicial Officer stated that the requirement for notification of the expansion of an investigation under the PACA (7 U.S.C. § 499f(c)) did not apply to the investigation at issue in the proceeding because the PACA was not amended to require notification until November 15, 1995, after the investigation of Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, had begun.

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[9](...continued)
506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Kimberly D. Hart, for Complainant.
David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., for Respondent Produce Distributors, Inc.
Lawrence A. Omansky and Daniel Cherner, New York, New York, for Respondent Irene T. Russo, d/b/a Jay Brokers.
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 the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 3, 1997.

The Complaint: (1) alleges that during the period June 24, 1993, through April 14, 1995, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], failed to account truly and correctly to 16 consignors, the net proceeds for 40 lots of perishable agricultural commodities, which Respondents received, accepted, and sold on behalf of the consignors, in interstate commerce (Compl. ¶ V(a)); (2) alleges that during the period June 24, 1993, through October 21, 1994, Respondents created false and inaccurate accounts of sales and altered existing accounts of sales for perishable agricultural commodities received, accepted, and sold on behalf of seven consignors for the fraudulent purpose of concealing from the consignors the accurate net proceeds amounts due them from the sale of their produce on a consignment basis (Compl. ¶ V(b)); (3) alleges that Respondents altered the contents of two United States Department of Agriculture, Agricultural Marketing Service, inspection certificates issued on October 18, 1993, and July 8, 1994, respectively, by changing the information reported on the inspection certificates as they pertained to either the shipper's identity or percentage of decay and defects (Compl. ¶ V(c)); and (4) requests a finding that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Respondents' PACA licenses (Compl. at 5).[1]

[1]On January 15, 1998, Complainant filed a Motion to Amend Complaint to correct a typographical error that appears on Exhibits A and B of the Complaint, and Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint). References in this Order Denying Petition for Reconsideration, as to Irene T. Russo, d/b/a Jay Brokers, to "Complaint" are to the Complaint as amended by the ALJ's January 15, 1998, Order Amending Complaint.

Produce Distributors, Inc., filed an Answer on February 18, 1997, in which it denied the material allegations of the Complaint and raised two factual defenses and four affirmative defenses. Irene T. Russo, d/b/a Jay Brokers, filed an Answer on February 28, 1997, in which she denied the material allegations of the Complaint and raised six factual defenses and three affirmative defenses.

The ALJ presided over a hearing on January 27-30, March 4-5, and April 15, 1998, in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., represented Produce Distributors, Inc.[2] Lawrence A. Omansky and Daniel Cherner, New York, New York, represented Irene T. Russo, d/b/a Jay Brokers.

On June 15, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief; on June 16, 1998, Produce Distributors, Inc., filed Notice stating that it had surrendered its PACA license (PACA License No. 771923), effective March 1, 1998, and that the Notice is filed in lieu of a full brief on the merits; on June 19, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Memorandum of Law; on July 8, 1998, Complainant filed Complainant's Reply Brief; and on July 10, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Reply Memorandum of Law.

On October 21, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents made false statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluded that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) found that Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated; and (4) revoked Respondents' PACA licenses (Initial Decision and Order at 5, 24).

On November 10, 1998, Irene T. Russo, d/b/a Jay Brokers, appealed to the Judicial Officer. On December 10, 1998, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Appeal Petition.

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[2]On March 3, 1998, Produce Distributors, Inc., filed Notice stating that it: (1) would not offer further evidence or witnesses; (2) would not participate in the examination of witnesses; and (3) surrendered its PACA license (PACA License No. 771923), effective March 1, 1998.

Produce Distributors, Inc., did not appeal the Initial Decision and Order, which was served on Produce Distributors, Inc., on December 9, 1998. In accordance with the Initial Decision and Order (Initial Decision and Order at 24) and section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became final and effective as to Produce Distributors, Inc., on January 13, 1999. On January 20, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision as to Irene T. Russo, d/b/a Jay Brokers.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers: (1) concluding that Respondents made false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___, slip op. at 9, 42 (Jan. 25, 1999).

On March 2, 1999, Irene T. Russo, d/b/a Jay Brokers, filed Petition for Reconsideration of the Judicial Officer's Decision, PACA Docket No. D-97-0013 [hereinafter Petition for Reconsideration]. On March 17, 1999, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Petition for Reconsideration, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers.

Irene T. Russo, d/b/a Jay Brokers, raises two issues in her Petition for Reconsideration. First, Irene T. Russo, d/b/a Jay Brokers, contends that my conclusion that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is error.

I have carefully reviewed the record, and the evidence supports the conclusion that Respondents were involved in a joint venture. The basis for my conclusion that Respondents were involved in a joint venture is fully explained in *In re Produce Distributors, Inc., supra*, slip op. at 22-30, 33, 36-39.

Second, Irene T. Russo, d/b/a Jay Brokers, contends that she was not notified of an investigation of Irene T. Russo, d/b/a Jay Brokers (Pet. for Recons. at 1).

I found that in May 1995, the United States Department of Agriculture [hereinafter USDA] initiated an investigation of Produce Distributors, Inc., and that in June 1995, without notifying Produce Distributors, Inc., or Irene T. Russo in

writing, USDA expanded its investigation to include Jay Brokers. *In re Produce Distributors, Inc., supra*, slip op. at 6-7 (Findings of Fact Nos. 5-6).

Section 6(c) of the PACA provides, as follows:

§ 499f. Complaints, written notifications, and investigations

. . . .

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify

> the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(c) (Supp. III 1997).

The investigation in this matter was initiated in May 1995. Produce Distributors, Inc., was notified of the investigation on May 24, 1995. In June 1995, Complainant expanded the time period of the investigation from an 8-month time period to a 2-year time period and also expanded the investigation to include Jay Brokers. The investigation was also expanded in March 1996 and in April 1997. When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify Produce Distributors, Inc., or Irene T. Russo, d/b/a Jay Brokers, in writing, of the expansion of the investigation. *In re Produce Distributors, Inc.*, *supra*, at 32.

However, section 6(c) of the PACA (7 U.S.C. § 499f(c)) was not amended to require notification of investigation until November 15, 1995,[3] after the investigation of Respondents was begun. Therefore, in accordance with *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998), I find that, since the beginning of this investigation preceded the enactment of the November 1995 amendment of section 6(c) of the PACA, the requirement for notification of the expansion of the investigation does not apply to the investigation at issue in this proceeding.

For the foregoing reasons and the reasons set forth in the Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999, *In re Produce Distributors, Inc.*, *supra*, the Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers, is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the

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[3]Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 7(b), 109 Stat. 424, 428-29.

decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[4] Irene T. Russo's Petition for Reconsideration was timely filed and automatically stayed the January 25, 1999, Decision and Order. Therefore, since the Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers, is denied, I hereby lift the automatic stay, and the Order in the Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999, is reinstated, with allowance for time passed.

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

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

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[4]*In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.
PACA Docket No. D-97-0013.
Stay Order as to Irene T. Russo, d/b/a Jay Brokers, filed May 17, 1999.

Kimberly D. Hart, for Complainant.
Irene T. Russo, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers: (1) concluding that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], made false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) concluding that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of the PACA; and (3) revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___, slip op. at 9, 42 (Jan. 25, 1999). On March 2, 1999, Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondent], filed a petition for reconsideration of the January 25, 1999, Decision and Order, and on March 23, 1999, I denied Respondent's petition for reconsideration. *In re Produce Distributors* (Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___ (Mar. 23, 1999).

On May 4, 1999, Respondent filed a request for a stay [hereinafter Motion for Stay Order] of the January 25, 1999, Order revoking Jay Brokers' PACA license, pending the outcome of proceedings for judicial review.

On May 12, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant],
opposed Respondent's Motion for Stay Order because "Complainant has not received any notice indicating that a petition for appeal has been filed by Respondent . . . in a [c]ourt of [a]ppeals." On May 13, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay Order.

The January 25, 1999, Order revoking Jay Brokers' PACA license will become effective May 26, 1999, unless a stay order is issued. Failure to issue a stay order until Complainant has received notice, establishing that Respondent has filed a

petition to review the January 25, 1999, Order, may result in revocation of Jay Brokers' PACA license during proceedings for judicial review. Therefore, in accordance with 5 U.S.C. § 705, I find justice requires postponement of the effective date of the January 25, 1999, Order revoking Jay Brokers' PACA license.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on January 25, 1999, *In re Produce Distributors* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___ (Jan. 25, 1999), 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: SUNLAND PACKING HOUSE COMPANY.
PACA Docket No. D-96-0532.
Decision and Order filed February 17, 1999.

Misrepresentation of produce — Willful and repeated violations — Agency recommendation — License suspension — Civil penalty.

The Judicial Officer affirmed the Decision by Judge Baker (ALJ) concluding that the evidence was not sufficient to find that Respondent made false or misleading statements for a fraudulent purpose, in violation of 7 U.S.C. § 499b(4); however, any misrepresentation of the subject matter described in 7 U.S.C. § 499b(5), even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5) and the Judicial Officer found that Respondent misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of 7 U.S.C. § 499b(5). The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify. 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. Willfulness is reflected by Respondent's violations of express requirements of 7 U.S.C. § 499b(5) and the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of hybrid grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5). Sanction recommendations of administrative officials charged with responsibility for achieving the congressional purpose of the PACA are entitled to great weight. However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. The Judicial Officer rejected the sanction recommendation of administrative officials because it was based, in part, on the allegation that Respondent violated 7 U.S.C. § 499b(4), and the Judicial Officer did not find that Respondent violated 7 U.S.C. § 499b(4). Further, Respondent did not engage in the violations in order to deceive its customers; but rather, the violations appear to have been the result of Respondent's negligence, inadvertence, or carelessness with respect to distinguishing between the Oroblanco variety

and the Melogold variety of hybrid grapefruit. The Judicial Officer concluded that a 30-day suspension of Respondent's PACA license or, in lieu of a 30-day suspension, a $120,000 civil penalty would be appropriate for Respondent's violations of 7 U.S.C § 499b(5). The Judicial Officer rejected Respondent's request that Respondent be given credit for the time that Respondent closed its business based upon erroneous advice from the Hearing Clerk's office that Complainant had not filed an appeal. Respondent is bound by federal statutes and regulations, irrespective of erroneous advice of federal employees, and Respondent did not demonstrate that the Secretary was estopped from imposing a sanction against Respondent because of Respondent's closure of its business based on erroneous advice.

Andrew Y. Stanton, for Complainant.
Steven M. McClean, Fresno, California, 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, 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 the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 30, 1996.

The Complaint alleges that: (1) Sunland Packing House Company [hereinafter Respondent] willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 growing season by misrepresenting 7,718 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ III, VIII); (2) Respondent willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1995-1996 growing season by misrepresenting 2,904 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ IV, VIII); and (3) Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to growers for shipments of Melogolds and Oroblancos (Compl. ¶¶ V-VIII).

Respondent filed Answer and Request for Oral Hearing [hereinafter Answer] on August 26, 1996, denying the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] presided over a hearing on July 10-11, 14-18, 1997, in Fresno, California. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Steven M. McClean, Kane, McClean & Mengshol, Fresno, California, represented Respondent.

On October 15, 1997, Complainant filed Complainant's Proposed Findings of

Fact, Conclusions and Order, and on January 26, 1998, Respondent filed Respondent's Objection To Claimant's [sic] Proposed Findings of Fact. On February 6, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Proposed Findings of Fact, Conclusions and Order; and also on February 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order with Revised Transcript Citations [hereinafter Complainant's Brief]. On February 13, 1998, Complainant filed Complainant's Reply Brief. On May 4, 1998, Respondent filed Respondent's Reply to Complainant's Reply Brief.

On June 1, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Complainant failed to prove by a preponderance of the evidence the violations alleged in paragraphs V and VI of the Complaint; (2) stated that Complainant had withdrawn the alleged violation in paragraph VII of the Complaint; (3) concluded that, as a result of negligence, mistake, accident, or inadvertence, Respondent misrepresented Melogolds as Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 47-48, 62, 70).

On July 1, 1998, Complainant appealed to the Judicial Officer; on July 30, 1998, Respondent filed Response to Complainant's Appeal Petition [hereinafter Respondent's Response] and Respondent's Request For Oral Argument; and on July 31, 1998, the Hearing Clerk transmitted the record of the proceeding 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 have been fully briefed by the parties; thus, oral argument would appear to serve no useful purpose.

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

Complainant's exhibits are designated by the letters "CX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has

violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided 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. §§ 499b(4)-(5), 499h(a), (e) (1994 & Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(z) *Account promptly*, except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

. . . .

(2) . . . And *Provided further*, That nothing in the regulations in this part shall prohibit cooperative associations from accounting to their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. . . .

. . . .

(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. . . .

. . . .

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

. . . .

GROWERS' AGENTS AND SHIPPERS

. . . .

§ 46.32 Duties of growers' agents.

(a) *General.* The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and

conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent for handling in his usual manner, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date the statement was delivered to the grower, shall be retained in the agent's files. An agent who does not have in his files either written contacts or a written statement as required herein is failing to prepare and maintain full and complete records as required by the Act. *Provided*, That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

(b) *Accounting for charges.* A growers' agent whose operations include such services as the planting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. . . . The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting. If an agent is working under a pool agreement with growers, the accounting shall show how the pool cost and pool sales prices are computed. If the agent and the growers have agreed on a fixed charge to cover the various operations conducted by the agent, actual expenses incurred for these services covered by the agreement are not required to be shown in the accounting. The failure of the agent to render prompt, accurate and detailed accountings in accordance with § 46.2(z) and (aa), is a violation of the Act.

. . . .

§ 46.45 Procedure in administering section 2(5) of the Act.

It is a violation of section 2(5) for a commission merchant, dealer or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce.

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

(1) *Serious violations.* Include the following:

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

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

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

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) *Very serious violations.* Include the following:

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

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produced was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified

as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

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

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the container without first, correcting the misbranding;

(ii) To offer for resale or consignment, a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, *written* notice must be given that the lot is misbranded and must be corrected before resale; or

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

(b) *Evidence.* (1) Evidence concerning a misrepresentation or misbranding includes official certificates of an inspection made by any person authorized by the Department to inspect fruits and vegetables or other public certifiers, and includes investigations and audit findings and any business records, testimony or other evidence bearing on the subject.

7 C.F.R. §§ 46.2(z), (aa), .32(a)-(b), .45(a)-(b)(1) (1996).

CALIFORNIA CODES

Food and Agricultural Code

. . . .

Division 20

PROCESSORS, STORERS, DEALERS, AND DISTRIBUTORS

OF AGRICULTURAL PRODUCTS

Chapter 1

NONPROFIT COOPERATIVE ASSOCIATIONS

. . . .

Article 2

GENERAL PROVISIONS

§ 54033. Nonprofit nature of associations

Associations which are organized pursuant to this chapter are "nonprofit," since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

§ 54034. Exemption from conflicting laws

Any provisions of law which are in conflict with this chapter do not apply to any association which is provided for in this chapter.

. . . .

§ 54036. Use of the word "cooperative"

A person, firm, corporation, or association, that is hereafter organized or doing business in this state, may not use the word "cooperative" as part of its corporate name or other business name or title for producers' cooperative marketing activities, unless it has complied with this chapter.

Article 3

PURPOSES

§ 54061. Persons authorized to form association; purposes

Three or more natural persons, a majority of whom are residents of this state, who are engaged in the production of any product, may form an association pursuant to this chapter for the purpose of engaging in any activity in connection with any of the following:

(a) The production, marketing, or selling of the products of its members.

(b) The harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization of any product of its members, or the manufacturing or making of the byproducts of any product of its members.

(c) The manufacturing, selling, or supplying to its members of machinery, equipment or supplies.

(d) The financing of the activities which are specified by this section.

(e) Any one or more of the activities which are specified in this section.

Cal. Food & Agric. Code §§ 54033, 54034, 54036, 54061 (West 1986).

CALIFORNIA CODE OF REGULATIONS

Title 3. Food and Agriculture

. . . .

Division 3. Economics

Chapter 1. Fruit and Vegetable Standardization

. . . .

Subchapter 4. Fresh Fruits, Nuts and Vegetables

. . . .

Article 22. Citrus

§ 1430.13. Citrus, Marking Requirements.

. . . [E]very nonconsumer container, except master containers, shall be clearly and conspicuously marked with the following information:

. . . .

(b) Variety Designation.

(1) Oranges, grapefruit, tangerines, or mandarins shall show the name of the variety, if known, or the words "Unknown Variety."

(2) For all varieties of navel oranges, the varietal designation shall be "Navel."

(3) For all varieties of valencia oranges, "Valencia."

(4) For all varieties of white marsh grapefruit, "Marsh White" or "Golden."

(5) For all varieties of pink marsh grapefruit, "Marsh Ruby" or "Marsh Red."

(6) For all varieties of Oroblanco, the varietal designation shall be "Oroblanco" or "Sweetie," provided that only one such designation shall be marked on the container. For all varieties of Melogold, the varietal designation shall be "Melogold". For the purpose of this article, the common name or identity of Oroblancos and Melogolds, and similar type hybrids resulting from a cross between pummelo and grapefruit shall be "grapefruit hybrid".[1]

Cal. Code Regs. tit. 3, § 1430.13(b) (1998).

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

Findings of Fact

1. Respondent's address is 26454 Avenue 128, Porterville, California 93257-9718 (Tr. 19, 875; CX 1 at 1). Porterville is located in Tulare County, California (Tr. 856-57).

2. Pursuant to the licensing provisions of the PACA, License No. 184369 was issued to Respondent (CX 1). At the time of the hearing, this license had been renewed annually and was next subject to renewal on or before December 29, 1997 (CX 1 at 13).

3. Respondent is an agricultural cooperative association, formed under California law, that is composed of approximately 80 growers, which number varies (Tr. 19, 876). Respondent is a packer and marketer of the agricultural products of its members (RX 104 at 1). Respondent's current president is Harrison Smith, who is also one of the directors (Tr. 874; CX 1 at 14). Harrison Smith's grandfather was one of the founders of Respondent in 1916 (Tr. 19,

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[1]Section 1430.13(b)(1)-(5) was in effect at all times material to this proceeding. Section 1430.13(b) was amended, effective January 11, 1997, after the violations alleged in the Complaint, to add new paragraph (b)(6) (RX 126).

874-75).

4. Respondent has issued articles of incorporation and bylaws in conformity with the laws of California (Tr. 19; RX 104 at 1).

5. Respondent's growers produce several kinds of citrus fruit (Tr. 900). The fruit involved in this proceeding has been described variously as "hybrid grapefruit," "Oroblanco," or "Melogold" (CX 58; RX 100). The California Code of Regulations was amended, effective January 11, 1997, to require that varieties of Oroblanco be designated as "Oroblanco" or "Sweetie," to require that varieties of Melogold be designated as "Melogold," and to provide that the common name or identity of Oroblancos and Melogolds, and similar type hybrids, resulting from a cross between pummelo and grapefruit, is "grapefruit hybrid." (RX 126).[2]

6. Respondent is associated with a marketing cooperative, Sunkist Growers, Inc. [hereinafter Sunkist], and each grower that becomes a member of Respondent becomes a member of Sunkist (Tr. 903; RX 107). Sunkist is a cooperative of citrus growers and markets citrus for members in Arizona and California (Tr. 1000-01). Sunkist is the seller of hybrid grapefruit, as well as other produce, packed by Respondent (RX 110 at 2). Oroblancos and Melogolds are sold in domestic and Canadian markets, although the primary market is Japan (CX 24 at 61-67, 76-267; Tr. 1014). Sunkist, not Respondent, actually ships and sells the produce (Tr. 1038-39; RX 119 at 7 n.A1). A typical sale may involve the Tulare County Fruit Exchange, which is a local produce exchange which passes on Sunkist's requests for produce to those in the locality which have the produce ready to go to market (Tr. 1145-46). Sunkist allocates the amount of fruit to be sold and then arranges for delivery from its packers, such as Respondent, which Sunkist then exports (Tr. 1038-40). Respondent supplies fruit with which Sunkist fills the orders it has received (Tr. 1038-40). Sunkist would receive the proceeds of the sale and would deduct its assessments and other charges prior to the receipt by Respondent of the proceeds for the sale of the produce. If the Tulare County Fruit Exchange were involved, it would also deduct assessments or fees prior to the receipt by Respondent of the proceeds from the sale of the produce. (Tr. 1145-47.)

7. Generally, Respondent's growers executed an application for membership on a form. By executing the membership application, each member agreed to, and was bound by, Respondent's articles of incorporation and bylaws. (RX 103.) Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the

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[2]In view of the numerous references to "hybrid grapefruit" made both in the transcript and in Complainant's and Respondent's filings, the nomenclature of "hybrid grapefruit" is utilized in this Decision and Order.

same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

8. Respondent is owned by its members and it is "nonprofit," that is, any profits are returned to the members (Tr. 19-20; RX 104). The expenses, charges, and losses are to be paid by the members and may be assessed against the members according to Respondent's bylaws (RX 104 at 14-15, 21: §§ 6.2, 9.5). In contrast, a proprietary packinghouse is for profit and is owned by its principals, not the growers whose fruit is packed by the proprietary packinghouse. All profits from packing and marketing the fruit, and the burden of any loss, will fall upon the owners of the proprietary packinghouse, not the growers. Article sixth of Respondent's amended articles of incorporation provides:

> SIXTH: To provide funds for corporate purposes of Association, revolving funds and other allocated reserves may be established. Such revolving fund for allocated reserve credits shall not be deemed to evidence, create or establish any present property rights or interests, as such terms are herein used, but such credits shall be deemed to evidence an indebtedness of Association payable only as provided in the by-laws. In the event the membership of any member shall terminate for any reason whatsoever, such member shall not thereupon become entitled to demand or receive any interest in the property and assets of Association as herein defined, but shall be entitled only to receive payment of his revolving fund credits and his interest, if any, in other allocated reserves as and when same would have been paid had he remained a member.

RX 104 at 2. The amended articles of incorporation also sets forth Respondent's bylaws which were in effect in the 1994-1995 and 1995-1996 seasons (RX 104 at 5-25; Tr. 877).

9. Pursuant to the decision of its board of directors, Respondent generally assesses a packing charge on the fresh fruit at the time it is first packed. Fruit which is not suitable for packing as fresh fruit is either culled as rots or sent to juice (which can be after packing) to a by-products plant (Tr. 887).

10. Pursuant to the decision of the board of directors, Respondent assessed a contingency charge of 8 cents for each carton of hybrid grapefruit packed in the 1994-1995 season and 10 cents for each carton of hybrid grapefruit packed in the 1995-1996 season. Although Respondent advised its members of this contingency charge and it had been approved by Respondent's board of directors, Complainant alleged that Respondent failed to account to its members for this contingency charge because there was not an agreement, in writing, which was given to the

members prior to the season, expressly setting forth this charge. Although neither Respondent's articles of incorporation nor Respondent's bylaws reference a contingency charge to be imposed upon its members, the approval and ratification of the contingency charge each year by the board of directors and members was in accordance with the authority which the board of directors possesses pursuant to Respondent's bylaws.

11. Complainant also contends that only packing charges on cartons sold, as reflected by Sunkist's records, were in accordance with the PACA, notwithstanding the fact that Respondent did incur the cost to pack the fruit. In other words, despite Respondent's long-standing practice and the yearly approval by the board of directors and ratification by the members of that practice, Complainant would disallow Respondent's packing charge on certain cartons of fruit, which were packed, but not sold. Since Respondent incurred packing costs and there was nothing illegal about the practice of charging for packing, there is no valid basis for Complainant's contention that Respondent's packing charge for fruit not sold violated the PACA.

12. All actions of the board of directors in establishing and assessing charges to the members, as well as paying out juice proceeds, were ratified by Respondent's members for the 1994-1995 and 1995-1996 seasons at the annual meetings.

13. Respondent's fiscal year ends October 31st of each year. Respondent's expenses, during the period in question, exceeded its revenues. (RX 119, RX 120.) Under Respondent's bylaws, and, in particular, sections 6.1, 6.2, and 8.9, and article IX, the board of directors has the power, in its sole discretion, to assess members for Respondent's operating expenses and losses and to credit any losses against the revolving fund or any other reserve account.

14. Respondent properly made assessments or deductions to meet "the charges and expenses of the association," as provided in the bylaws, and also, pursuant to article IX of the bylaws, properly added the assessments or deductions to the revolving fund and/or other allocated reserve credits. Article IX of the bylaws provides that the method, amount, manner, and time of assessments or deduction for "charges and expenses of the association" shall be determined in the discretion of the board of directors. Accordingly, the bylaws permit assessment of a contingency charge by Respondent's board of directors in its sole discretion. Respondent's articles of incorporation and bylaws are in conformity with State of California law. Complainant does not contend that Respondent's bylaws or articles of incorporation are unlawful.

15. Respondent did not fail to "account promptly" and make "full payment promptly" to its members. As a cooperative, Respondent was only required to

account to its members and make payments to the members as required by its bylaws. Complainant presented no evidence that Respondent failed to comply with its bylaws and to account to its members, as required by the bylaws; Respondent demonstrated through a certified public accountant, a Sunkist auditor, and its own bookkeepers, that it did account to its members, as required by the bylaws. Respondent fully and correctly accounted to its members for all sums due them. Ms. Anthony, the Sunkist auditor, also established that Respondent's contingency charge is a charge customarily taken by other Sunkist packinghouses.

16. The board of directors established packing and contingency charges pursuant to sections 6.1(d), 6.2, 8.8, and 8.9, and article IX of the bylaws (RX 104) and acted in conformity with those provisions of the bylaws. The packing and contingency charges were necessary and usual business expenses. Respondent's deduction of packing and contingency charges from funds it remitted to its members was not a violation of the PACA.

17. Respondent is empowered to assess its members for the costs of continuing in business. In the instant case, even if Respondent "overcharged" its members or "failed to account properly" because of its assessment of charges, any such over assessment not necessary to pay the expenses and continue the operations of Respondent would be returned to the members. (RX 104 at 14-15, 18, 20-22: §§ 6.1(d), 6.2, and 8.9, and article IX.) The evidence supports Respondent's contention that there were no such "overcharges," as it appropriately assessed the charges pursuant to the discretion given it under the bylaws.

18. Paragraph VII of the Complaint alleges that Respondent failed to account, truly and correctly, to 20 of its members with respect to Melogolds and Oroblancos processed for juice, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The evidence shows that Respondent did account, truly and correctly, to 20 members with respect to Melogolds and Oroblancos processed for juice. Accordingly, paragraph VII of the Complaint is dismissed.

19. Paragraphs V and VI of the Complaint allege failure to account, truly and correctly, for $4,439.29 and $14,299.12, respectively, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These figures were subsequently amended. The evidence does not show that Respondent failed to truly and correctly account to its members for $4,269.16 (as amended) for the 1994-1995 season and $14,028.23 (as amended) for the 1995-1996 season. Accordingly, paragraphs V and VI of the Complaint are dismissed.

20. Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) in its accounting to members for the proceeds from the sale of hybrid grapefruit, or in any other manner.

21. As a result of cross-breeding, hybrid grapefruit, known as Oroblancos

and Melogolds, were developed (Tr. 78-81, 98-99; CX 58; RX 100). Oroblancos and Melogolds are a cross between a pummelo and a grapefruit, and both come from a common source, as a result of hybridization (Tr. 35, 38, 78-81, 98-99; CX 58; RX 100). Melogolds and Oroblancos are substantially similar, but there are differences between them (Tr. 38-50, 1363; CX 58). Melogolds and Oroblancos cannot be shipped as "grapefruit" because of insufficient yellow color (Tr. 860, 862, 864).

22. The differences between Melogold and Oroblanco from mature trees are more easily discerned than the differences between Melogold and Oroblanco from immature trees (Tr. 1352-67, 1376-78). The shape of Melogold is comparable to Oroblanco, but Melogold has a slight tendency for more stem-end taper than Oroblanco (Tr. 45, 54, 1356-58). Oroblanco tends to be smaller than Melogold (Tr. 45, 54). Under ideal conditions, and, from mature trees, the differences relate to Melogold being more pummelo-like than Oroblanco (Tr. 47, 1376-77). The average peel thickness of Melogold, as a percentage of fruit diameter, is thinner than Oroblanco; the interior color and texture of Melogold are the same as in Oroblanco; the juice percentage of Melogold is slightly higher than Oroblanco; and Melogold may have a slight bitterness, particularly early and late in the harvest season (Tr. 46-48, 50, 54; RX 100 at 3). To the untrained eye, and even as to those more knowledgeable, there is a substantial likeness between Melogolds and Oroblancos (Tr. 61-66, 1362-63).

23. The testimony of a number of witnesses establishes that they did not agree as to the means of distinguishing Melogolds from Oroblancos--there was the "taste" test; thickness of peel; color and texture; interior color; juice test; and appearance (Mr. Josephson: Tr. 791-93; Mr. Roger Smith: Tr. 1352-68). Although "experts," such as the one grower witness of Complainant (Mr. Josephson: Tr. 784, 791-93, 807-08), and those experienced in the area of distinguishing between Oroblancos and Melogolds (Mr. Roger Smith: Tr. 1358, 1380-81) would have less tendency than others to confuse Melogolds and Oroblancos, this reduced tendency to confuse Melogolds and Oroblancos would not necessarily apply to a packinghouse manager or worker who was confronted with fruit from immature trees (Tr. 1352-68, 1376-78). The trees from which fruit was packed in the instant case were immature trees (Tr. 811, 1353-67, 1380-81).

24. In the 1994-1995 and 1995-1996 seasons, neither the State of California nor the United States Department of Agriculture [hereinafter USDA] had established identity standards or required varietal designations for Oroblancos and Melogolds (Tr. 858-69, 944). Identity standards describing and establishing the varieties of Oroblanco and Melogold became effective in January 1997 (RX 126). Prior to the 1994-1995 season, Respondent received no advice or instructions from

any governmental agency as to how to label or represent the hybrid grapefruit, despite Respondent's request for advice (Tr. 944). The advice received from county inspector Gould was that Melogolds and Oroblancos could not be identified or labeled as grapefruit because they did not have the yellow color required for grapefruit (Tr. 860, 864, 944). County inspector Gould also advised Respondent there were no identity standards for Melogolds or Oroblancos (Tr. 859-62, 864-65, 944).

25. Sunkist began shipping more than pallet-sized amounts of Oroblancos and Melogolds to Japan in the 1992-1993 season (Tr. 1005-06). Sunkist began shipping significant quantities of hybrid grapefruit to Japan during the 1993-1994 season, when it shipped approximately 30,000 cartons (Tr. 1006-07). In the 1994-1995 season, Sunkist shipped to Japan approximately 41,000 cartons of Oroblancos and 17,000 cartons of Melogolds (Tr. 1007). In the 1995-1996 season, Sunkist shipped to Japan 52,212 cartons of Oroblancos and no cartons of Melogolds (Tr. 1007; RX 109). Sunkist is probably the biggest United States exporter of hybrid grapefruit to Japan (Tr. 1037).

26. Under patent rights obtained by the University of California (Tr. 50; CX 58; RX 100), the Israelis started growing Oroblancos, which they called "Sweeties." In the 1992-1993 season, growers in Israel began shipping to Japan significant quantities of Sweeties. The volume of Israeli exports of Sweeties to Japan increased substantially since the 1992-1993 season. (Tr. 1006.) The Israelis shipped approximately 544,944 cartons during the 1993-1994 season, 980,494 cartons during the 1994-1995 season, 1,268,408 cartons during the 1995-1996 season, and 1,369,796 cartons during the 1996-1997 season (RX 108). Although the record is not explicit, the Israeli Sweeties may have arrived in Japan as early as November 1995, in the 1995-1996 season, although there is some indication that they did not arrive until December 1995 (Tr. 950; RX 108).

27. In the 1995-1996 season, Japanese customers developed a preference for Israeli Sweeties to hybrid grapefruit grown elsewhere (Tr. 1009, 1014, 1035). The Japanese prefer fruit with a dark green color, a hard texture, and a sweet taste (Tr. 1009). In order for growers in Tulare County to ship hybrid grapefruit containing the characteristics desired by the Japanese, harvesting and shipment must take place either in late October or early November (Tr. 1008-09).

28. During the 1994-1995 season, Sunkist sent Respondent orders for quantities of hybrid grapefruit sought by Japanese importers (Tr. 949-50). Sunkist made the determination as to allocation and delivery of the fruit to specific buyers (Tr. 1038-40). Respondent's fruit was delivered to Sunkist for loading onto two ships in the 1994-1995 season: The American Fuji and the Swan Stream (CX 23 at 3, 5). In the 1995-1996 season, Respondent delivered its fruit to Sunkist for

shipment to Japan on three ships: The Ohyoh, sailing date October 20, 1995 (CX 23 at 12); Spring Delight, sailing date October 27, 1995 (CX 23 at 15); and Columbus Canada, sailing date November 3, 1995 (CX 23 at 19).

29. Franklin Carl Arcure is currently the manager and the secretary/treasurer of Respondent and has been the manager of Respondent for the past 12 years, including the 1994-1995 and 1995-1996 seasons (Tr. 937). As the manager, Mr. Arcure has responsibility to oversee the entire packinghouse (Tr. 1491). This responsibility includes oversight of the field men, the packinghouse foreman, all fruit receiving, packing, grading, and sales, and member relations (Tr. 946). During the 1995-1996 season, Mr. Arcure also acted as Respondent's field man (Tr. 939-40). Mr. Arcure is also a member of Respondent and on its board of directors (Tr. 964).

30. During the 1994-1995 and 1995-1996 seasons, once the hybrid grapefruit was picked, Respondent transported it from the field to the packinghouse in bins (Tr. 140-41, 943; CX 5). Respondent's receiver made out receiving tags for the bins indicating the grower's name, the variety, and how many bins Respondent received (Tr. 142, 1430). When the fruit went through the packing line, Respondent's employees noted the number of cartons of various sizes packed on a document issued by Respondent, called a "grower carton tally" (Tr. 142; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3). This information was then given to Respondent's secretary (Tr. 116-17).

31. The 1994-1995 season was the first time that Respondent had received Oroblancos and Melogolds in quantity, and Respondent did not know how to label, mark, represent, or identify the fruit (Tr. 858-65, 944; RX 126). Mr. Arcure and the board of directors regarded Melogolds and Oroblancos as the same, and they were treated as a single pool (Tr. 1138-40, 1143).

32. At times, Respondent found it necessary to repack hybrid grapefruit that had already been packed in cartons because some of the fruit had gone bad (Tr. 155-56, 980-81). On those occasions, in order to make the cartons saleable, Respondent removed the bad fruit and repacked the cartons (Tr. 156, 981). When this occurred, Respondent prepared repack slips, reflecting the repacking (Tr. 155-57). Respondent also prepared a repack summary sheet, reflecting the number of cartons repacked, the number of cartons left after repacking, and the number of cartons dumped (CX 8 at 1, CX 16 at 1).

33. For the 1994-1995 season, according to its own records, Respondent had 711 cartons of Oroblancos available for sale (788 cartons packed, less 77 cartons lost on repacking) (CX 8 at 1) and 11,253 cartons of Melogolds available for sale (11,308 cartons packed, less 55 cartons lost on repacking) (CX 16 at 1).

34. On the basis of records generated and produced by Sunkist and original

source documents (CX 9, CX 17), Respondent maintained in its records (but did not generate) shipment summary reports reflecting Sunkist's disposition of Oroblancos and Melogolds during the 1994-1995 season (Tr. 165-68). Information contained in the reports included the name of the buyer, the destination, the assignment number which Sunkist gave to the order, the exchange number, the ship date, and the quantity involved (Tr. 168-72).

35. Sunkist maintained a payment register covering the 1994-1995 and 1995-1996 seasons, indicating how much was paid by the buyers of Respondent's fruit, including Respondent's Oroblancos and Melogolds, the deductions made by Sunkist and the Tulare County Fruit Exchange, and the net payment to Respondent (Tr. 123-24, 183-87, 277-78; CX 20, CX 60).

36. All shipment summary reports were prepared by Sunkist which prepared all the sales documents concerning the sales of Oroblancos and Melogolds during the 1994-1995 season, and Respondent had copies of some of these records (Tr. 188-212, 225-53; CX 21, CX 23, CX 24).

37. During the 1994-1995 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 237-48; CX 22A).

38. During the 1994-1995 season, according to Respondent's records and the calculations made by Complainant, Respondent caused to be sold 8,429 cartons represented as Oroblancos, 7,718 more cartons of Oroblancos than it had available for sale, and 3,486 cartons of Melogolds (CX 18, CX 19A; Tr. 611-21, 636).

39. During the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60; CX 25). Respondent sent each of its Oroblanco and Melogold growers a pool statement for combined pool numbers 582 and 583, reflecting the disposition of each grower's product in the combined pool (Tr. 914; CX 25). Reference was made on the pool statements to "Mello Gold/Oro Blanco Pool" (CX 25 at 1). Thus, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had available for sale during the 1994-1995 season, because the fruit was treated as the same variety without need to distinguish.

40. In calculating what should be remitted to its members for the 1994-1995 season, Respondent deducted a packing charge of $2.85 for each carton packed, even if some of the cartons were later lost through repacking (RX 110 at 4). Respondent also deducted a contingency charge of 8 cents for each carton packed (Tr. 1259).

41. During the 1995-1996 season, Respondent differentiated between Melogolds and Oroblancos and accounted to its growers of hybrid grapefruit by

using separate pools for Oroblancos and for Melogolds (Tr. 315-16, 326-28; CX 42A, CX 43). Respondent also had a late season Melogold pool (Tr. 357-59; CX 51). Respondent sent each of its Oroblanco and Melogold growers a pool statement reflecting the disposition of each grower's products in either the Oroblanco pool or the Melogold pool (Tr. 330).

42. During the 1995-1996 season, Respondent received Oroblancos from 13 of its members (CX 26-CX 42). Respondent's records indicate that a total of 17,049 cartons were packed, 8,842 cartons went to juice, and 23 cartons were culls (CX 42A at 1).

43. During the 1995-1996 season, Respondent received Melogolds in two pools (Finding of Fact 41). The main pool contained Melogolds received from 10 of Respondent's members (CX 44A at 2-11). Respondent's records, as set forth in Complainant's calculations, indicate that a total of 10,001 cartons were packed, 20,652 cartons went to juice, and 494 cartons were culls (CX 44A at 1). The late season pool contained Melogolds received from only one member, Hal Campbell Revocable Living Trust (CX 51 at 2). Respondent's records indicate that a total of 299 cartons were packed, 2,101 cartons went to juice, and 6 cartons were culls (CX 51 at 1).

44. According to Complainant's calculations, the number of cartons of Melogolds which Respondent packed, sent to juice, or considered culls in the 1995-1996 season included, from Hillcroft Groves, 783 cartons packed, 410 cartons to juice, and 6 cartons considered culls (CX 44A at 5), and from Caliente Farms, 2,348 cartons packed, 2001 cartons to juice, and 13 cartons considered culls (CX 44A at 3).

45. For the 1995-1996 season, Respondent had available, as fresh fruit for sale, 17,049 cartons of Oroblancos and 10,300 cartons of Melogolds (CX 42A at 1, CX 44A at 1; RX 110 at 14).

46. In calculating what should be remitted to the members for the 1995-1996 season, Respondent deducted a packing charge of $3 per carton on all cartons of Oroblancos packed, even if some of the cartons were later lost through repacking (RX 110 at 14). Respondent did not charge its members a packing charge on any of the cartons of Melogolds that went to juice during the 1995-1996 season, even though some of the fruit was packed in cartons before it was decided that the fruit was going to go to juice (Tr. 1474-76, 1531-32; CX 63 at 1). Respondent also deducted a contingency charge of 10 cents for each carton packed (Tr. 1314-16). These charges were consistent with a decision by the board of directors which determined to assess a packing charge only on cartons of Melogolds actually purchased during the 1995-1996 season (Tr. 1532). The board of directors made this decision because Respondent had packed Melogolds anticipating a larger

shipment of fruit into Japan (Tr. 1532). However, due to the ability of the Israelis to cold treat their Sweeties in transit, tremendous volumes of Sweeties arrived in Japan earlier than anticipated, limiting the market for Melogolds (Tr. 1013, 1022-25, 1532).

47. Respondent delivered its fruit to Sunkist at Port Hueneme, which sold the fruit and remitted the net proceeds to Respondent (Tr. 1038-44). Respondent maintained internal records concerning its pool accounting (Tr. 1067-78; RX 110).

48. During the 1995-1996 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 621-29).

49. During the 1995-1996 season, Respondent, through its sales agent, Sunkist, sold 19,953 cartons represented as Oroblancos, 2,904 more cartons of Oroblancos than Respondent had available for sale (Tr. 643-44, 1413-14, 1429-32; CX 45, CX 46 at 3). Upon inspection of the fruit, the county inspector, Mr. Milner, determined that Respondent packed Melogolds from Hillcroft Groves and Caliente Farms in cartons labeled Oroblancos, and the labels were changed, as he requested, before the Melogolds were delivered to Sunkist (Tr. 1395-1401, 1413-21, 1433-34).

50. Although the California Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the 1994-1995 and 1995-1996 seasons (Finding of Fact 5), nevertheless, Sunkist (Tr. 1009-16), the Japanese purchasers (Tr. 1008-10; RX 109), and the county inspector (Tr. 1396-97) made a distinction between Melogolds and Oroblancos, particularly with respect to the 1995-1996 season, in which no Melogolds were shipped to Japan (RX 109). Sunkist's orders were for Oroblancos, and Respondent filled some of those orders with Melogolds. This finding is premised upon Respondent's own records, and Respondent has not refuted this finding.

51. Based upon the best evidence available, and without substantial evidence to rebut this evidence, I find that Sunkist, the sales agent of Respondent, during the 1994-1995 and 1995-1996 seasons, gave Respondent orders for Oroblancos, some of which orders Respondent filled with Melogolds (Findings of Fact 25, 38, and 49). Thus, Respondent misrepresented Melogolds as Oroblancos. At most, the number of cartons which Respondent misrepresented were 7,718 cartons in the 1994-1995 season and 2,904 in the 1995-1996 season, for a total of 10,622 cartons. However, because Melogolds and Oroblancos were treated as one pool in the 1994-1995 season, the precise number of cartons of Melogolds that were misrepresented as Oroblancos is not ascertainable.

52. During its long history of operation since 1916 (Tr. 19, 874-75), Respondent has had no prior violations of the PACA.

53. Respondent did not receive any complaints from the Japanese purchasers or from Sunkist with respect to the variety of fruit shipped during the 1994-1995 and 1995-1996 seasons (Tr. 962, 1031-32, 1465-66).

54. The evidence does not show that Respondent's misrepresentation of Melogolds as Oroblancos was for a fraudulent purpose, but rather the result of inadvertence, carelessness, or negligence on the part of Respondent's employees. There is a similarity of appearance between Melogolds and Oroblancos, especially when the fruit is from immature trees and one variety of fruit could be mistaken for the other, particularly by one not schooled in the differences (Tr. 61-66, 1352-67); the California Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the two seasons involved in this proceeding (RX 126); a purchase representative from Japan toured the Oroblanco and Melogold groves and did not seem to require differentiation (Tr. 942-43, 947-49, 953-54); and errors were committed as to which groves were being picked and packed (Tr. 1395-1413).

55. Respondent did not make, for fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which was received in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

56. As a result of inadvertence, carelessness, or negligence, Respondent misrepresented approximately 10,622 cartons of Melogolds to be Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

57. However, as Respondent intentionally committed prohibited acts, irrespective of evil intent or erroneous advice, and acted with careless disregard of statutory requirements, Respondent's violations of section 2(5) of the PACA were willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), and under USDA precedents.

Conclusions of Law

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

2. Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of a perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Discussion

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). Quantitatively, Complainant need only show a scintilla more than 50 percent of the evidence to prevail under the preponderance standard. Put another way, Complainant need only show that Complainant's version of the facts is more likely than not correct. I find that Complainant has not met the burden of proof by a preponderance of the evidence with respect to allegations in paragraphs V, VI, and VII of the Complaint.

Respondent's amended articles of incorporation (RX 104 at 1-4) and its bylaws (RX 104 at 5-25) reflect the rules which govern the rights and duties of Respondent and its members. Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

Also set forth in the bylaws are provisions relating to the election of directors (RX 104 at 11: § 5.2), including an enumeration of their general powers (RX 104 at 13-14: § 6.1). The bylaws provide "all corporate powers shall be exercised by or under the authority of, and the business and affairs of Association shall be controlled by, the board of directors" (RX 104 at 13: § 6.1). The board of directors' powers included the capacity to procure for, and furnish to, members such equipment and supplies and to render such services, as the board of directors might determine to be appropriate, for or in the production of fruit by members and the marketing of such fruit (RX 104 at 14: § 6.1(d)). The bylaws provide that tentative charges for such equipment, supplies, and services are to be assessed and collected in such amount and at such time as the board of directors may determine (RX 104 at 14: § 6.1(d)). Moreover, "[a]ny amount by which the total of such charges in any fiscal year may exceed cost, as determined by the board, shall be refunded ratably on a patronage basis, as of the close of the fiscal year, in such manner and at such time as the board may determine" (RX 104 at 14: § 6.1(d)).

Sections 6.2 and 8.9 of Respondent's bylaws provide that the method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors and that there was an obligation to return the net proceeds to the members after deducting all charges and operating expenses (RX 104 at 14-15: § 6.2). Such proceeds were to be returned to the members furnishing the fruit for marketing on the basis of the quantity or value of fruit furnished (RX 104 at 18: § 8.9).

In the instant case, the evidence shows that Respondent sustained a loss in the operative period, so no refund was due. Accordingly, the board of directors was

authorized to assess a contingency charge, packing charges, and/or other charges in an amount which was in the board's discretion. Under California law and the Regulations, these charges were lawful and did not violate the Regulations concerning the duty to account to growers. Article IX of Respondent's bylaws provides for the creation of a revolving fund and determinations with respect to the additions to the revolving fund, as well as the nature of revolving fund credits. The entire operation of the revolving fund, as more specifically set forth in the bylaws, was in the sole discretion of the board of directors. Article IX of the bylaws also indicates that there was to be no segregation of the revolving fund and that in the event Respondent sustained losses, such losses could be charged against current operating expenses, the revolving fund, or other allocated reserve credits.

Three reliable and very credible witnesses testified with respect to Respondent's financial operations and the maintenance of its books and records. Admittedly, they were unable to determine how Complainant arrived at its allegations that Respondent had not been remitting proper amounts to its members. Nevertheless, their testimony, combined with documentary evidence, such as RX 110 and RX 111, clearly establishes that there was nothing wrong with Respondent's records and that such records accurately and correctly reflected (except for two minor instances) the amounts of fruit received, the number of cartons shipped, and the disposition of the fruit that was not shipped. Although Sunkist could spot-check Respondent's records at any time, Respondent requested that Sunkist audit Respondent's books. This audit was conducted by Winnie Jo Anthony, who has been employed by Sunkist for 9 years and who, prior to that, worked for 14 years for the Lemon Administrative Committee. She was office manager, did all of the accounting, and was in charge of the Compliance Department, including fruit accountability and the auditing of records of the packinghouses, to assure that they were in compliance with regulatory requirements. She is field manager now, has two people working for her, and performs all of the packinghouse duties. She still performs field audits. (Tr. 1064-68.)

Ms. Anthony's audit report evidences that Respondent's books and records balance with those of Sunkist, with the exception of two minor bookkeeping errors, which are not of significance in this proceeding (RX 110). However, this report was maintained as a confidential document of Sunkist, was not given to Respondent, and was not available to Respondent until a *subpoena duces tecum* was issued in this proceeding. Accordingly, RX 110 first became available to Respondent at the hearing. During the course of her testimony, Ms. Anthony commented on Respondent's contingency fund, which was utilized principally to preclude back billings to Respondent's members and was not considered unusual by Ms. Anthony. Her testimony corroborated the testimony of other witnesses that

the contingency fund was a fund available for disbursement to meet unanticipated expenses. If it was not utilized, the proceeds ultimately would be returned to Respondent's members. Ms. Anthony found absolutely no lack of reporting with respect to the return of receipts to Respondent's members.

Also corroborating the accuracy of the business operations, as reflected in Respondent's records, was Virginia Hall who was Respondent's bookkeeper and manager and who has worked for Respondent for more than 15 years (Tr. 1231-32).

Ms. Hall's testimony descriptively sets forth the operations of Respondent's packinghouse, which operations do not involve the steady flow and disposition of inventory. Ms. Hall indicated, as did the testimony of other witnesses, that Respondent sold all of its fruit for the 1994-1995 season. However, for the 1995-1996 season, Respondent packed all of its fruit, but did not sell all of its fruit. It was estimated that 75 percent of the fruit which had been packed as Oroblancos were subsequently sent to juice. Thus, there was a large difference between the number of cartons packed and the number of cartons sold. Accordingly, packing charges during the 1995-1996 season were greater than packing charges for the 1994-1995 season because so many cartons had been packed prior to the fruit going to juice. Ms. Hall indicated that for the 1993-1994 season amounts were returned to Respondent's members and amounts had been returned to Respondent's members since then.

Mr. Paul Klippenstein, a certified public accountant licensed by the State of California, testified as to the accuracy of Respondent's books and records and correct procedures employed by Respondent with respect to its books and records. He testified that he had done work for Respondent for the last 5 years. He reviewed and audited Respondent's books and records and compiled monthly statements from the books and records. Mr. Klippenstein testified that his review of Respondent's books and records revealed proper accounting for all funds, that there was no underreporting of funds to Respondent's members, and that the books and records reflected Respondent's operations, including the maintenance of a contingency fund. Mr. Klippenstein testified that the contingency fund is necessary to prevent charge-backs to Respondent's members because Sunkist had an assessment which it could charge-back and the contingency fund is a vehicle to meet any additional charges made by Sunkist.

Complainant's allegations that Respondent withheld unreported amounts from its members and that there was lacking a specific written notice to the members of the charges attributable to their fruit, are unsubstantiated by the credible and reliable evidence of record.

Section 46.32(a) of the Regulations (7 C.F.R. § 46.32(a)) provides that written

agreements regarding accounting and settlement between a cooperative and its members are not necessary and that bylaws of a cooperative marketing association may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with its grower members. Respondent's members agreed to be bound by Respondent's and Sunkist's bylaws (RX 103, RX 107). It would seem, *ipso facto*, that Respondent's bylaws would then delineate the duties of Respondent to account to its members.

Other sections of the Regulations provide that the bylaws may be used to define the cooperative's duty to account to its members. For example, section 46.2(z) of the Regulations (7 C.F.R. § 46.2(z)), defining "account promptly," states that a cooperative may account to its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws. Similarly, section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) defining "full payment promptly," provides that a cooperative may settle with its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws.

Respondent was not required to itemize the actual expenses incurred because, under section 46.32(b) of the Regulations (7 C.F.R. § 46.32(b)), this requirement is not applicable to cooperatives that determine to pool their growers' produce.

Complainant's position is that Respondent violated its duty to account properly because neither Respondent's bylaws nor any written agreement between Respondent and its members make a specific reference to a contingency fund. The Regulations do not require that the bylaws of a cooperative specifically delineate the charges to be assessed. The Regulations defining "account promptly" (7 C.F.R. § 46.2(z)) and "full payment promptly" (7 C.F.R. § 46.2(aa)) both provide that the cooperatives need only account to their members on the basis of "seasonal pools or other arrangements provided by their regulations or bylaws." Further, section 46.32(a) of the Regulations provides that the bylaws of cooperatives may be used to "determine the methods of accounting and settlement with their grower members." 7 C.F.R. § 46.32(a). Respondent's bylaws clearly provide that charges and expenses of the association would be met by assessments or deductions upon Respondent's members (RX 104 at 14: § 6.2). Further, the bylaws clearly advise Respondent's members that the "method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors" (RX 104 at 14-15: § 6.2).

Complainant does not contend that Respondent violated its bylaws. Complainant simply argues Respondent's bylaws are inapplicable and Respondent must comply with the Regulations applicable to entities that are not cooperatives. However, the Regulations explicitly provide that the bylaws of cooperatives, such as Respondent, may be used in lieu of individual agreements or contracts to

determine methods of accounting and settlement with grower members.

Further, the various charges and assessments for the reserve account or allocated reserve credits had been assessed by the board of directors. The actions of Respondent's board of directors and the manager were ratified by Respondent's members at the annual meeting each year. Accordingly, Respondent did not fail to account truly and correctly to its members, in violation of the PACA, so long as it followed its bylaws, which it did.

Complainant's claim that Respondent failed to account truly and correctly to its members rests upon the fact that no written document was given to each member expressly advising each member, prior to the season, that the contingency charges would be assessed. However, as a cooperative, a written statement or agreement was not required. (7 C.F.R. § 46.32(a).) Further, a cooperative is free to pool its fruit and account to its members in the manner provided by its bylaws. The evidence shows that Respondent's members were in fact advised of the contingency charge. Mr. Arcure testified that Respondent's members were told that the contingency charge would be assessed and that the assessment of the contingency charge was discussed at the annual meetings of the members and at meetings of the board of directors. Accordingly, Complainant's claim that Respondent's members were not specifically advised as to the contingency charges is in error.

The allegations in paragraphs V and VI of the Complaint, which allege a failure to account truly and correctly to Respondent's growers for $4,439.29 and $14,299.12, respectively, have not been proven by Complainant. These amounts were amended during the oral hearing to $4,269.16 and 14,028.03, respectively. The claimed violations are premised upon Complainant's conclusion that Respondent must comply with regulations applicable to entities other than cooperative marketing associations. Complainant overlooks the fact that the Regulations only require that Respondent, as a nonprofit cooperative, account to its members, as required by Respondent's bylaws.

Complainant concedes that paragraph VII of the Complaint, relating to juice payments, should be withdrawn.

Paragraphs III and IV of the Complaint allege that Respondent, during the 1994-1995 growing season and the 1995-1996 growing season, misrepresented by word, act, mark, stencil, label, statement or deed, the character or kind of grapefruit that it shipped to its customers in Japan and the United States. Specifically, paragraphs III and IV of the Complaint allege that Respondent packed Melogolds in 7,718 cartons during the 1994-1995 season and 2,904 cartons during the 1995-1996 season and labeled or designated the cartons as containing Oroblancos and that Respondent then sold and shipped the Melogolds as Oroblancos to its customers in Japan and the United States. Complainant alleges in the Complaint

that, by reason of the facts alleged in paragraphs III and IV of the Complaint, Respondent had committed violations of section 2(4) and (5) of the PACA. However, on brief, Complainant asserts Respondent's actions were "in breach" of section 2(5) of the PACA, so that the misrepresentation allegation, *sub judice*, is now based solely upon section 2(5) of the PACA (7 U.S.C. § 499b(5)) (Complainant's Brief at 18).

Sunkist is an agricultural cooperative association (RX 107). Respondent is a member of Sunkist, which markets and sells Respondent's produce (Tr. 902-03, 1000-01). The Tulare County Fruit Exchange, an association of Sunkist growers located in Tulare County, where Respondent has its place of business, acts as an intermediary between growers, such as Respondent and Sunkist (Tr. 1145-46). Sunkist establishes a price for a particular commodity after consulting with the exchanges and packinghouses that have that commodity and that price is presented to the importers in Japan by Sunkist's subsidiary in Tokyo (Tr. 1002-04, 1038). The importers then place their orders, specifying a particular type or brand of fruit, to be loaded on a ship more than a week after the price is established (Tr. 1038). Sometimes, if there is an overwhelming demand, Sunkist asks its growers to deliver as much fruit as possible to Port Hueneme, California, where Sunkist loads the ships (Tr. 1039). Sunkist then allocates the fruit in transit to its customers (Tr. 1039). Orders are conveyed from Sunkist to Respondent and Sunkist's other packinghouses through a computer network called a Kirke system (Tr. 1039-40; CX 21). The orders for hybrid grapefruit specify Oroblanco or Melogold, and such information is on the order (Tr. 1053, 1062; CX 21). Therefore, Respondent's shipments of hybrid grapefruit to Sunkist during the 1994-1995 and 1995-1996 seasons were all in response to orders from Sunkist specifying the variety of hybrid grapefruit, Oroblancos or Melogolds, which was requested by purchasers from Sunkist.

During the 1994-1995 and 1995-1996 growing seasons, Oroblancos and Melogolds had not yet been designated as hybrid grapefruit by USDA or the State of California and the hybrid grapefruit was so new that there were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-70). In January 1997, a State of California regulation became effective, requiring that varieties of Oroblanco be designated as "Oroblanco" or "Sweetie," requiring that varieties of Melogold be designated as "Melogold," and providing that the common name or identity of Melogolds, Oroblancos, and similar type hybrids, resulting from a cross between a pummelo and a grapefruit, is "hybrid grapefruit" (RX 126).

Although the Oroblanco variety and the Melogold variety were patented by two scientists from the University of California at Riverside in 1981 and 1987,

respectively (CX 58), the rights to the fruit were obtained by firms in Israel (Tr. 1006).

Oroblancos and Melogolds, coming from a common source, possess certain similar characteristics (Tr. 35, 38, 78-81, 98-99; CX 58 at 1, 4; RX 100). Melogolds and Oroblancos from immature trees are harder to distinguish than Melogolds and Oroblancos from mature trees (Tr. 1356-58). The differences between Melogolds and Oroblancos become more apparent as the trees mature (Tr. 1359). It is more difficult to distinguish between Melogolds and Oroblancos prior to their maturity (Tr. 1356-62). There are differences between Melogolds and Oroblancos, both before and after they become ripe, as to size, shape, the thickness of the rind, and the color and texture of the rind (Tr. 45-46, 54). There is a deeper yellow color in Melogold than in Oroblanco; Oroblanco is greenish yellow. Melogold is juicier than Oroblanco (Tr. 46). There is a difference in the weight, as well as the taste (Tr. 47-48, 50). Oroblanco is sweeter than Melogold (Tr. 45-48, 54).

Sunkist made an effort in 1992 to develop a market for Oroblancos and Melogolds (Tr. 1005). The first time there was a shipment of pummelos, Melogolds, and Oroblancos of anything more than a pallet quantity, was in 1992 (Tr. 1005-06). With respect to Oroblancos and Melogolds, Sunkist is in direct competition with Israel (Tr. 1006). Israel has aggressively been marketing its Sweeties, which resemble and are of the same variety as Oroblancos (Tr. 1005-06, 1008). The first appreciable volume of exports of Sweeties from Israel to Japan was during the 1992-1993 season and, since 1993, the volume of exports has grown quickly (Tr. 1006). Israel has an exclusive agent in Japan who pursues that market with considerable determination (Tr. 1006). Sunkist's price policy is to let the price of its fruits fluctuate with the market; whereas Israel has entered into long-term contracts with a Japanese entity, commencing in the 1993-1994 season, for the delivery of specific volumes of specified varieties, together with a fixed price for a fixed output, for a specific time period (Tr. 1018-19). The Israeli delivery price for Sweeties is approximately $7 to $7.50 per carton and was a constant price for the 1994-1995, 1995-1996, and 1996-1997 seasons (Tr. 1019-20).

There is a limited time period when the Japanese market is open for Melogolds and Oroblancos (Tr. 1008). The Israeli fruit, preferred by the Japanese, arrives during the latter part of November and in the month of December (Tr. 1008-09). Melogolds and Oroblancos from the United States must be imported into Japan during part of October and November and the United States fruit must be sold within a short time period (Tr. 1008). The Japanese believe Sweeties are better than Oroblancos and Melogolds from California and prefer the dark-green color

and hard texture of Sweeties to California hybrid grapefruit (Tr. 1009). In addition, the Japanese believe that Sweeties are sweeter than Oroblancos (Tr. 1009-10). Oroblancos develop a yellowish color in November (Tr. 1010). Once the Sweeties arrive in Japan, there is no market for California Oroblancos (Tr. 1010).

Sweeties must be cold treated before they can be sold in Japan (Tr. 1012). During the 1994-1995 season, the Sweeties were cold treated at the warehouse prior to shipment from Israel to Japan. Thus, there was a delayed arrival and Sunkist had a week's advantage and tried to deliver its fruit during that week (Tr. 1012). In subsequent years, Sweeties were cold treated during transportation to Japan. Thus, the period during which Sunkist had a market in Japan for Melogolds and Oroblancos was narrowed further (Tr. 1013).

It is imperative that Oroblancos and Melogolds from California be shipped to Japan because the Japanese market is the principal market for Oroblancos and Melogolds (Tr. 1014). The aggressiveness of Israel in capturing this market has resulted in significant declines in prices for the Sunkist product. Between November 1993 and November 1996, there was an approximate $9.95 decline in price for each carton of Oroblancos and Melogolds (Tr. 1020-21). In addition, the Japanese importers asked for a retroactive decrease in price (Tr. 1022). Once Sweeties get on the market, there is a pronounced decline in the price of Melogolds and Oroblancos sold by Sunkist to Japan (Tr. 1022). For instance, in November of 1993, Sunkist's hybrid grapefruit cartons were selling for $21.93 and by December of 1993, they sold for $9 per carton (Tr. 1022). During the 1994-1995 season in November, Sunkist's hybrid grapefruit cartons were selling for $24 f.o.b. and in December they had decreased to $15.36 per carton (Tr. 1022-23). During the 1995-1996 season, Sunkist's hybrid grapefruit sold in October for $12.89 per carton and in November the price had decreased to $7 per carton (Tr. 1023).

Israel can flood the market with Sweeties, which has an eventual effect upon other citrus products (Tr. 1024). In any event, Israel exports more Sweeties to the Japanese market than the market can easily handle and, once that occurs, the price of the Melogolds and Oroblancos from California dramatically decreases (Tr. 1024-25). After Sweeties stop entering Japan, then the market for California Melogolds and Oroblancos improves (Tr. 1025). However, by that time the California fruit is not comparable to the Sweeties because of the lack of the dark-green color, which the Japanese prefer (Tr. 1009).

The Israelis shipped to Japan approximately 544,944 cartons of Sweeties during the 1993-1994 season, 980,494 cartons of Sweeties during the 1994-1995 season, 1,268,408 cartons of Sweeties during the 1995-1996 season, and 1,369,796 cartons of Sweeties during the 1996-1997 season (Tr. 1007; RX 108). Sunkist, probably the biggest United States exporter of hybrid grapefruit to Japan, shipped

approximately 30,000 cartons of hybrid grapefruit in the 1993-1994 season, as compared with 544,944 cartons by the Israelis; 58,000 cartons in the 1994-1995 season, as compared with 980,494 cartons by the Israelis; and 52,212 cartons in the 1995-1996 season, as compared with 1,268,408 cartons by the Israelis (Tr. 1007; RX 108).

The issue involved in this proceeding is whether or not Complainant has proven that Respondent misrepresented 7,718 cartons of Melogolds as Oroblancos during the 1994-1995 season and 2,904 cartons of Melogolds as Oroblancos during the 1995-1996 season, for a total of 10,622 cartons that were misrepresented, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). During the course of the hearing, Complainant amended its Complaint to change the number of cartons packed (Tr. 826; CX 62 at Ex. A, B). The number of cartons Complainant initially claimed was misrepresented is in Exhibits A and B attached to the Complaint (Compl. at Ex. A, B). Exhibit A, attached to the Complaint, alleges that, in the 1994-1995 season, Respondent received, and had available for sale, 11,253 cartons of Melogolds (Compl. at Ex. A). While this number remained constant in the various amendments, Complainant amended the total cartons of Melogolds reported and documented as sold, as well as the "Difference" between cartons of Melogolds received and cartons of Melogolds sold (Tr. 10, 507, 826; Compl. at Ex. A, B; CX 62). At the commencement of the hearing, Complainant announced amendments to the Complaint (Tr. 10). Much, later, Complainant actually presented amended Exhibits A and B, over objection (Tr. 505-06). The ALJ allowed Complainant to amend the Complaint (Tr. 507). The first amended exhibits claimed 3,486 cartons of Melogolds reported and documented as sold, not 3,242 as in the original Exhibit A (Tr. 505-06; CX 62 at Ex. A). Moreover, the claimed "Difference" was revised to 7,767 (Tr. 506; CX 62 at Ex. A).

In addition, Complainant amended the figures concerning Melogolds for the 1995-1996 season (Tr. 505-07; CX 62 at Ex. B). Exhibit B, attached to the Complaint, alleges that, in the 1995-1996 season, Respondent received, and had available for sale, 10,001 cartons of Melogolds, and the total cartons of Melogolds reported and documented as sold as 8,079, leaving a difference of 1,922 (Compl. at Ex. B).

Were it not for Respondent's own records (Tr. 165-72; CX 9A) and the protestation of the county inspector that Melogolds were packed as Oroblancos (Tr. 1389-90, 1395-1403, 1413-14), there would be scant, if any, proof of misrepresentation. The evidence does not include examples of the alleged mislabels, and the number of cartons which were shipped as Oroblancos when they were in fact Melogolds cannot be ascertained. Nevertheless, the record, as a whole, does show that Respondent packed some Melogolds and misrepresented them to

be Oroblancos. Sunkist's purchasers did make a distinction when they specified the variety of fruit they were ordering, and Respondent, through the Kirke computer system, did pack in response to the purchasers' orders (Tr. 1039-40). Respondent's designation of Melogolds as Oroblancos was not in accordance with the purchasers' orders and was a misrepresentation of the character or kind of the fruit packed.

Complainant argues that Respondent's misrepresentations of 10,622 cartons of Melogolds as Oroblancos during the 1994-1995 and 1995-1996 seasons were intentional (Complainant's Brief at 18) and that Respondent was well aware of the variety of hybrid grapefruit the Japanese customers were ordering. The orders were conveyed from Sunkist to Respondent through the Kirke computer system and specified Oroblancos or Melogolds. (Complainant's Brief at 36.) Complainant further contends that there was obvious motivation to misrepresent (Complainant's Brief at 18-19, 29); namely, to take advantage of the window of opportunity to supply Oroblancos before the Sweeties arrived in Japan (Complainant's Brief at 29). Thus, Complainant asserts that Respondent knew, or should have known, of the differences prior to the 1994-1995 and 1995-1996 seasons (Complainant's Brief at 36-37).

The record establishes that, during the 1994-1995 and 1995-1996 seasons, Respondent received Melogolds and Oroblancos from its growers (Tr. 140-43, 188-89, 306; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3, CX 21, CX 26-CX 42). Respondent treated these two varieties as the same for the 1994-1995 season (Tr. 1138-40, 1143). There were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-59, 944; RX 126). Because of the similarity in appearance of Melogolds and Oroblancos, it was difficult to distinguish between them (Tr. 61-66, 934-35, 1362-63), and at least some of Respondent's employees were not keenly aware of the differences so as to differentiate between the two (Tr. 1390).

In addition, the evidence concerning the "mislabeling" of cartons from Caliente Farms during the 1995-1996 season shows that Mr. Arcure and the owner of Caliente Farms had agreed the Oroblancos were to be picked before the Melogolds (Tr. 1404). However, the independent contractor picking crew did not skip over the Melogolds to pick Oroblancos after pummelos, as agreed, but picked the Melogolds second because they were the block adjacent to the pummelos and next in line (Tr. 1407-08). During a very hectic time of the season, and because the Oroblancos were supposed to be picked and delivered prior to Melogolds, Mr. Arcure believed the fruit arriving from Caliente Farms were Oroblancos (Tr. 1408-10). After they had been received as Oroblancos, Respondent advised Caliente Farms as to the number of field bins of Oroblancos received, and the owner called Mr. Arcure and told him the crew had picked the Melogolds second,

after the pummelos, instead of the Oroblancos (Tr. 1409-10). Due to the press of business, his double duty as both manager and field man, and the contemporaneous testing, picking, and shipping of large quantities of different varieties of fruit, e.g., pummelos, Oroblancos, Navel Oranges, Melogolds, Satsumas, and other varieties, Mr. Arcure forgot to advise the receiver to change the receiving tag on the fruit received from Caliente Farms (Tr. 1410-14). In addition, Mr. Arcure regarded Melogolds and Oroblancos as the same, since the California Department of Food and Agriculture had not designated Melogolds and Oroblancos as separate varieties (Tr. 1396, 1422).

The evidence supports a finding that Respondent's misrepresentations of Melogolds from Hillcroft Groves and Caliente Farms as Oroblancos were the result of inadvertence, carelessness, or negligence. If Mr. Arcure was intentionally packing Melogolds as Oroblancos, fruit from far more than two growers out of the many growers' fruit would have been packed in "mislabeled" cartons. However, county inspector Milner only found Melogolds from two growers packed in cartons labeled Oroblancos, and the record does not suggest that Respondent misrepresented fruit from any other grove during the 1995-1996 season (Tr. 1395-1422).

Complainant maintains that Respondent did know the difference between Melogolds and Oroblancos and that Respondent intentionally misrepresented Melogolds as Oroblancos (Complainant's Brief at 27-28). This allegation is not supported by the credible evidence. What happened were packing errors on the part of some of Respondent's employees (Tr. 1402-10). Further, the number of cartons of Melogolds which were actually misrepresented as cartons of Oroblancos has not been clearly established in the record. From Respondent's own books and records (Tr. 258-60, 313-15, 325-30, 357-60; CX 25, CX 42A, CX 43 at 1-2, CX 44A at 3, 6, CX 51), it appears, according to Complainant's calculations (Complainant's Brief at 14-18, 38), that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos.

Based upon my evaluation of the record as a whole and having given full credibility to Respondent's witnesses, I find that it is more likely Respondent's misrepresentations were the result of negligence, carelessness, or inadvertence.

Complainant argues that issuance of the patents for Oroblanco and Melogold establishes the existence of two kinds of fruit to determine whether the PACA was violated by Respondent by the designation of Melogolds as Oroblancos (Complainant's Brief at 30). However, the granting of the patents is not dispositive as to whether there are two "kinds" of fruit for purposes of determining whether the PACA was violated by the representation of Melogolds as Oroblancos.

The purpose of a patent is to grant to the patentee protection from the asexual

reproduction of the particular plant by others (Black's Law Dictionary 1125 (6th Ed. 1990); CX 58 at 2, 5). Complainant has not shown a by preponderance of the evidence that a patent is intended to define variety or "kind" for all purposes; further, the PACA nowhere adopts or incorporates plant patents as the standard for establishing different "kinds."

Therefore, the granting of separate patents for Oroblancos and Melogolds, denominating each fruit as a "variety," does not define "kind" under the PACA. The granting of the patents merely means the fruits are separate varieties for purposes of the patentee's right to exclude others from asexually producing Oroblancos and Melogolds.

The similarity of Melogolds and Oroblancos is clearly established by the record (Tr. 35, 38, 44-66, 78-81, 98-99, 860-64, 1352-67; CX 58; RX 100, RX 126). Melogolds and Oroblancos are not different species of fruit, but rather, they are the same species and have the same scientific name (Tr. 35-43, 863-70; CX 58; RX 100, RX 126). The two seeds, which were original sources of the seedlings planted and later named as Oroblancos and Melogolds, came from the same piece of fruit (Tr. 35-38; RX 100 at 2-3). Thus, these two varieties of hybrid grapefruit were a single species of sterile, seedless fruit coming from a common source with the same scientific name.

Complainant admits that Respondent's violations could have been the result of gross negligence (Complainant's Brief at 37). The intentional misrepresentations attributable to Respondent by Complainant are inferences and are not supported by the record evidence.

Respondent knew the variety of fruit Sunkist wanted for its purchasers (Tr. 948-50, 1038-40). By packing Melogolds as Oroblancos, Respondent misrepresented its fruit in response to a contractual request. Although Respondent's misrepresentations were the result of mere negligence, carelessness, or inadvertence, Respondent willfully did the prohibited acts.

Turning now to sanctions, the PACA Branch, through auditor, Ms. Joan M. Colson, recommended revocation of Respondent's PACA license (Tr. 666). Ms. Colson indicated that, because the alleged violations were of such serious nature, the PACA Branch was not recommending a civil penalty (Tr. 670). However, Ms. Colson testified that should a civil penalty be assessed, a civil penalty of $500,000 to $1,000,000 would be appropriate (Tr. 671).

As was explained by Ms. Colson, Complainant did not specifically identify 10,600 cartons (Tr. 677-78, 685-88, 735). In fact, no one was able to testify that certain cartons were shipped at a certain time, or to a certain destination, or on a certain common carrier. Instead Ms. Colson testified: "No, . . . we didn't tag specifically 10,600 cartons. What we did was we calculated how many cartons of

Melogolds and Oroblancos were received by [Respondent] over this two-year period and then how many were documented as sold and then the difference between the two on Oroblancos was 10,600" (Tr. 735). Complainant's calculations were not premised upon Respondent's own records as much as those obtained from Sunkist and other sources (Tr. 123-24, 183-212, 225-53, 277-78, 643-44, 1130-31; CX 20-CX 24, CX 47, CX 60; RX 110). Sunkist was the selling agent (Tr. 1000-05) and there were intermediaries, such as the Tulare County Fruit Exchange (Tr. 1145-46), as well as intermediaries in the Japanese market (Tr. 1002-04, 1038).

On brief, Complainant pursues its recommendation that a license revocation is the only appropriate sanction and for reason thereof relies heavily upon the testimony of Ms. Colson, as well as reference to *Potato Sales Co., Inc. v. Department of Agric.*, 92 F.3d 800 (9th Cir. 1996) (Complainant's Brief at 53-55).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that if the Secretary determines a commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the PACA license of the offender, or assess a civil penalty.

USDA'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, 479 (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 record does not justify the sanction sought by Complainant, namely, revocation, or, in the alternative, the imposition of a civil penalty of $500,000 to $1,000,000.

Complainant's sanction witness, Ms. Colson, indicated that it was the position of Complainant that Respondent's acts were willful, repeated, and flagrant (Tr. 665); that the violations were willful because there was an intentional scheme to misrepresent (Tr. 665); that the violations were repeated because of the large number of transactions involved in the approximately 10,622 cartons of Melogolds misrepresented as Oroblancos (Tr. 666); and that the violations were flagrant because there was false accounting to Respondent's growers, which was repeated because of the large number of transactions (Tr. 666). In addition, Ms. Colson was

concerned with the international aspects of this misrepresentation and, since some of the misrepresented cartons were believed to have been exported, there could be international ramifications as to whether or not foreign importers could rely upon the labeling of produce from the United States (Tr. 667-68).

Ms. Colson relied heavily in her recommendation upon *Potato Sales Co., supra,* which involved the mislabeling and export from the United States to Taiwan of New Zealand apples as Washington State apples (Tr. 666-67, 670, 682-83). Specifically, Ms. Colson testified that "the case here is similar to *Potato Sales [Co.]*, and even worse than *Potato Sales [Co.]*, because we do have the false accounting issue" (Tr. 670).

As pointed out by Respondent, the Judicial Officer has indicated in *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1570-72 (1981), that while intent is not an element of misrepresentation violations, nevertheless, good faith and the lack of fraudulent intent are mitigating circumstances, which should be taken into account when determining the severity of the penalty (Respondent's Objection to Claimant's [sic] Proposed Findings of Fact at 72-73). Other USDA decisions reinforce the conclusion that revocation of Respondent's PACA license is an unduly harsh sanction not called for in this case. For instance, the Judicial Officer stated in *In re Stemilt Growers, Inc.*, that failure to pay cases routinely draw a sanction of license revocation, whereas, it is not USDA policy to remove from the industry a firm that engages in misrepresentation; rather, it is the policy of USDA to impose a sanction sufficiently severe to deter not only the violator but other potential violators from such conduct in the future, as follows:

> [I]t is the policy of the Department to remove from the industry a firm that fails to pay for produce, notwithstanding the firm's inability to pay because of sudden or unexpected cash-flow problems.
>
> However, it is not the policy of the Department to remove from the industry a firm that engages in misbranding. Rather, it is the policy of the Department to impose a sanction sufficiently severe to deter not only the respondent but other potential violators from such conduct in the future. *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1569-73 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 793-99 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976).

In re Stemilt Growers, Inc., 49 Agric. Dec. 520, 528 (1990).

Also, in *Limeco, Inc.*, the Judicial Officer held that Limeco, Inc., sold 411

cartons of Mexican limes that it represented to be Florida produce; that Limeco, Inc., made false and misleading statements in connection with the 411 cartons of misrepresented limes; and that Limeco, Inc., maintained documents which incorrectly disclosed the country of origin of the limes. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11 (Aug. 18, 1998). Such misrepresentations were held to be a violation of section 2(5) of the PACA for which the administrative law judge imposed a 15-day suspension of Limeco, Inc.'s PACA license and for which the Judicial Officer increased the suspension to 45 days. *In re Limeco, Inc.*, *supra*, slip op. at 37.

The subject case relating to Respondent has a number of mitigating factors. Respondent had not received advice from an official that the produce it was packing was nonconforming prior to shipment of the produce. Respondent made efforts to secure information concerning standards for labeling the fruit, the result being that Respondent was advised that there were no identity standards (Tr. 858-59, 944; RX 126). The misrepresentations were the result of inadvertence, carelessness, or negligence on the part of Respondent, rather than intent to deceive Respondent's customers, and were, at least in part, the result of the similarity between Melogolds and Oroblancos. There were no complaints from either Sunkist or the Japanese purchasers of Respondent's fruit (Tr. 962, 1030-31, 1465-66). Since January 1997, there have been labeling requirements for Melogold and Oroblanco varieties (RX 126) and, with Respondent's long history of PACA compliance (Tr. 19, 874-75), the strong likelihood is that Respondent will continue its observance of the PACA requirements. Under these circumstances, revocation of Respondent's PACA license would not be appropriate.

Moreover, there is no purpose to be served under the PACA by an extended suspension. There have been extensive pleadings, a lengthy transcript, voluminous exhibits, and lengthy briefs relating to this matter. All of these have been carefully considered and are reflected in this Decision and Order. Accordingly, the sanction, which I believe would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future, is a 30-day suspension of Respondent's PACA license, or, in lieu thereof, a civil penalty of $120,000.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Complaint alleges that: (1) Respondent willfully, flagrantly, and repeatedly violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 and 1995-1996 growing seasons, by misrepresenting 10,622 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to

customers in Japan and the United States (Compl. ¶¶ III, IV, VIII); and (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to some of its growers for shipments of Melogolds and Oroblancos in the 1994-1995 and 1995-1996 growing seasons.

The ALJ found that Complainant failed to prove the allegations based upon section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 38). Therefore, the ALJ dismissed paragraphs V-VII and part of paragraph VIII of the Complaint (Initial Decision and Order at 47-48). Complainant did not appeal the dismissal of the violations of section 2(4) of the PACA alleged in paragraphs V-VII of the Complaint (Complainant's Appeal at 1). Moreover, I infer that Complainant abandons the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint, as well, since Complainant does not restrict abandonment of the alleged violations of section 2(4) of the PACA to particular paragraphs of the Complaint and mentions and argues only the alleged violations of section 2(5) of the PACA in Complainant's Appeal. Thus, there remains only the matter of the alleged violations of section 2(5) of the PACA in paragraphs III, IV, and VIII of the Complaint.

I find, except with respect to the number of violations of the PACA, that the factual situation of the proceeding, *sub judice*, differs in no material way from the factual situation in *Western Sierra Packers, Inc.*, in which I found that there were violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i), as alleged in the *Western Sierra Packers, Inc.*, complaint. *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Sept. 30, 1998). In summary, section 2(4) violations are dismissed from both cases, and, although section 9 was charged and found in *Western Sierra Packers, Inc.*, section 9 was not charged in the proceeding, *sub judice*, which leaves only section 2(5) of the PACA as material to both cases.

As originally enacted, section 2(5) of the PACA required that, in order to prove a violation of section 2(5) of the PACA, the misrepresentation had to have been made for a fraudulent purpose.[3] Section 2(5) of the PACA (7 U.S.C. § 499b(5))

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[3]Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 2(5), 46 Stat. 532-33, provides:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .

(continued...)

has been amended numerous times,[4] and the requirement that the misrepresentation be shown to have been made for a fraudulent purpose was deleted from section 2(5) of the PACA (7 U.S.C. § 499b(5)) in 1956.[5] The Senate Report and House of Representatives Report accompanying H.R. 5337, the bill that was enacted in 1956 and amended section 2(5) of the PACA to eliminate the fraudulent purpose requirement, describe the reason for deleting the fraudulent purpose requirement, as follows:

> Section 2(5) of the Perishable Agricultural Act—as it would be amended by H.R. 5337—would, by deleting the words "for a fraudulent purpose," dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act; evidence of bona fide misrepresentation relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct.

S. Rep. No. 84-2507 at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3702; H.R. Rep. No. 84-1196 at 3 (1955).

Further, USDA's views regarding the elimination of the words *for a fraudulent purpose* from section 2(5) of the PACA were incorporated into the Senate Report and the House of Representatives Report, as follows:

> DEPARTMENTAL VIEWS
>
> Following is the letter from the Department of Agriculture recommending enactment of the bill with certain amendments. The

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[3](...continued)

(5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or country in which such commodity was actually produced[.]

[4]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, § 2, 50 Stat. 725, 726; Act of June 29, 1940, Pub. L. No. 680, ch. 456, § 4, 54 Stat. 696; Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726; Act of Aug. 10, 1974, Pub. L. No. 93-369, 88 Stat. 423; Act of Oct. 18, 1982, Pub. L. No. 97-352, § 1, 96 Stat. 1667; Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 10, 109 Stat. 430.

[5]Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

amendments proposed by the Department were adopted.

May 25, 1955.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives.

DEAR CONGRESSMAN COOLEY: This is in reply to your letter of April 20, 1955, requesting a report on H.R. 5337, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930 relating to practices in the marketing of perishable agricultural commodities.

. . . .

Growers, shippers, and buyers are concerned about the existing extent of misbranding and misrepresentation of grade and origin of fresh fruits and vegetables. Although the proposed amendments to the Perishable Agricultural Commodities Act would not correct all malpractices in this field, they would provide significant help. Effective control of misbranding and misrepresentation of fruits and vegetables is difficult under the present statute because no authority is granted to inspect produce in the possession or control of a licensee to determine if it is misbranded unless the licensee requests or grants permission for such inspection. Also, substantial evidence must be produced that the misbranding was done deliberately with the definite intention of defrauding the buyer in order to prove that a fraudulent purpose is involved. The proposed amendments undoubtedly would expedite enforcement of the misbranding provisions of the act and provide for more effective action against licensees who violate these provisions.

. . . .

Sincerely yours,

TRUE D. MORSE,
Acting Secretary.

S. Rep. No. 84-2507 at 5-7 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3703-04; H.R. Rep. No. 84-1196 at 3-5 (1955).

During congressional hearings on H.R. 5337, held on May 26 and May 27,

1955, G.R. Grange, the Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified that the elimination of the *fraudulent purpose provision* would obviate the need to show that the alleged violator intended to mislead the produce buyer and would enable USDA to prove a misbranding violation, even if the buyer knew of, and did not object to, the misbranding, as follows:

MR. GRANGE. . . .

I have a rather brief prepared statement on the bill that has the indorsement of the Department of Agriculture, and with your permission I would like to read it.

MR. GRANT. Yes, you may proceed, sir.

MR. GRANGE. . . .

. . . .

One major purpose of the bill is to strengthen the provisions regarding misbranding or misrepresentation of grade and origin of fresh fruits and vegetables. This objective is accomplished by eliminating the necessity to prove fraudulent purpose for such actions and by authorizing the Secretary or his representatives to inspect produce held by licensees to determine if any misbranding or misrepresentation exists. Proving that a fraudulent purpose is involved in a misbranding case means that substantial evidence must be obtained to show the intent of the person committing the violation. On a practicable basis such evidence is usually exceedingly difficult to obtain because the person involved generally pleads that he acted in good faith and that the misbranding or misrepresentation was unintentional. Also, we have encountered the situation a number of times where the shipper or repacker has misbranded the produce as to grade or origin but claims that he was not defrauding the buyer since the latter knew of, and did not object to, the misbranding.

. . . .

The foregoing statement outlines briefly the Department's recommendations for passage of this legislation and gives its interpretation

of some of the major factors which would be involved in carrying out the provisions of these amendments.

That, gentlemen is a brief summary of the Department's viewpoint on these bills. We will be glad to give such further information or to answer such questions as you may have.

. . . .

MR. GRANT. . . .

. . . does not this [bill] in a way preclude legal action until the Department has failed to get the interested parties together?

. . . .

MR. GRANGE. My understanding of the misbranding provisions, referring solely to them, is that misbranding per se would be a violation of the PAC Act.

Of [sic] the moment with the necessity of proving fraudulent purpose we have to contact the second party concerned to determine how it was represented to him, did he buy it at that lower price, and was there actually an action on the part of the person doing the misbranding that would give us grounds to find that a fraudulent purpose was involved.

If it were no longer necessary to obtain evidence concerning the intent of the individual doing this misbranding, in my opinion then it would to a large extent remove the necessity of having to dig into the relationship between the two parties concerned.

Marketing of Perishable Agricultural Commodities: Hearings on H.R. 5337 and H.R. 5818 Before the Subcomm. on Domestic Marketing of the House Comm. on Agriculture, 84th Cong., 1st Sess. 6-8, 10 (1955) (statement of G.R. Grange, Deputy Director, Fruit and Vegetable Division, AMS, USDA).

The legislative history applicable to the Act of July 30, 1956, is discussed at great length in *In re Harrisburg Daily Market, Inc.*, as follows:

Respondents contend that the proscribed act of misrepresenting must be

willful or intentional. It is recognized that a licensee making an untrue representation may not possess guilty knowledge of wrongful intent. For example, a false or untrue representation may be made innocently, negligently, knowingly and intentionally or for a fraudulent purpose. Cf. *e.g., Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); *National Mfg. Co. v. United States*, 210 F.2d 263, 275-76 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954); *United States v. Jerome*, 115 F.Supp. 818, 822 (S.D.N.Y. 1953). See also, *e.g.*, Prosser on Torts § 87 (1941); Black's Law Dictionary (4th ed. 1951). Yet, no qualifications were legislated in section 2(5) with respect to the degree of knowledge or the intent of the commission merchant, dealer, or broker making a misrepresentation otherwise prohibited thereunder. Such omission is especially significant as the Congress, in the enactment of Public Law 842, was directly concerned with the question of the mental element required to constitute a violation of section 2(5). The purpose of the 1956 amendment was, in part, to eliminate the phrase, "for a fraudulent purpose" and, of necessity, the Congress was confronted with the effect of such delegation and the degree of culpability to be required in its stead. In interpreting section 2(5) of the act we are precluded from inserting words, such as "willfully" or "knowingly," which are not in the statute. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). It appears, therefore, that Congress did not intend to so qualify a misrepresentation defined in section 2(5) and that the act of misrepresenting by the means specified therein in connection with the subject matter there described constitutes a violation of such section irrespective of the intent of the licensee to misrepresent or even knowledge that the representation is untrue. . . .

This conclusion is clearly affirmed by examination of the legislative history of the 1956 amendment to section 2(5). Prior to such amendment and the elimination of the phrase "for a fraudulent purpose" it was necessary in order to find a violation of section 2(5) to present substantial evidence "that the misbranding was done deliberately with the definite intention of defrauding the buyer." H.R. Rep. No. 1196, 84th Cong., 1st Sess. 4 (1955). See *e.g., In re Flaten-Meberg*, 14 [Agric. Dec.] 952 (1955). It was the declared purpose, in part, of the amendment in issue to "dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act" and to substitute therefor merely "evidence of bona fide misrepresentations relative

to grade, quality, etc.," as an "adequate base for the declaration of illegal conduct." H.R. Rep. No. 1196, *supra*, at p. 3. See also S. Rep. No. 2507, 84th Cong. 2d Sess. 4 (1956). The committees obviously did not use the term "bona fide" in its literal sense. Otherwise, they would be saying that a good faith misrepresentation would be illegal conduct. They evidently used the term in the sense of real, actual, material, or a matter of substance. Cf. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384-85 (1935); *Middle Tennessee Electric Membership Corp. v. State ex rel. Adams*, 246 S.W.2d 958, 959-60 (Tenn. 1952). As thus construed, a "bona fide misrepresentation" consists of an actual representation of a material fact which representation is false.

That all subjective mental elements were removed from section 2(5) of the act is further apparent from the congressional hearings on the then proposed amendment. *Hearings before the Subcommittee on Domestic Marketing of the House Committee on Agriculture*, 84th Cong., 1st Sess. on H.R. 5337 and H.R. 5818 (1955). The principal witness and proponent of the bill so understood the effect and consequences of the change, as did other witnesses at the hearings. *Hearings, supra*, at pp. 10, 22, and 39. In addition, the reintroduction of the requirement of knowledge or intent into section 2(5) was proposed and considered. *Hearings, supra*, at pp. 19-20. It was not adopted. . . .

. . . .

. . . [C]ulpability does not depend on the licensee's lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally.

In re Harrisburg Daily Market, Inc., 20 Agric. Dec. 955, 969-73 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963) (footnotes omitted).

The United States Court of Appeals for the District of Columbia Circuit, in affirming the *Harrisburg* decision, stated, as follows:

The Perishable Agricultural Commodities Act, 1930, required proof of fraudulent purpose as an element of the misrepresentation violations. 46 Stat. 533 (1930). To achieve stricter enforcement as the legislative history discloses, the act was amended in 1956 to eliminate the need to show the

existence of fraudulent purpose. 70 Stat. 726 (1956), 7 U.S.C.A. § 499b(5). See H.R. Rep. No. 1196, 84th Cong., 1st Sess., 3-4; S. Rep. No. 2507, 84th Cong., 2d Sess. 4,6, U.S. Code Cong. & Adm. News 1956, p. 3699. See also, *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960).

Harrisburg Daily Market, Inc. v. Freeman, 309 F.2d 646, 647 (D.C. Cir. 1962) (per curiam), *cert. denied*, 372 U.S. 976 (1963).

The legislative history applicable to the Act of July 30, 1956, makes clear that any representation of the subject matter described in section 2(5) of the PACA, which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). Proof of a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)) is not dependent on a showing: (1) that the commission merchant, dealer, or broker defrauded, or intended to defraud, the recipient or buyer of the misrepresented produce; (2) that the commission merchant, dealer, or broker intended to benefit by the misrepresentation; (3) that the commission merchant, dealer, or broker knew or believed that the recipient or buyer of the produce would rely on the misrepresentation; (4) that the recipient or buyer of the misrepresented produce relied on, or was injured by, the misrepresentation; or (5) that the recipient or buyer of the misrepresented produce was aware of the misrepresented fact.[6] Thus, as a matter of law, proof of a violation of section 2(5) of the PACA does not require, *inter alia*, proof of fraud, intent, fraudulent intent, intent to benefit from fraud, knowledge, guilty knowledge, detrimental reliance, knowledge of detrimental reliance, actual reliance, knowledge of actual reliance, actual injury, or knowledge of actual injury.

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[6]*See In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 31 (Sept. 30, 1998) (stating that any representation of the subject matter described in 7 U.S.C. § 499b(5)) which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5)); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1564 (1981) (stating that respondent's contention that it did not intend to violate section 2(5) of the PACA is probably true; however, intent to defraud is irrelevant), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Robert J. Wilkinson*, 36 Agric. Dec. 454, 455-56 (1977) (stating that respondent's contention that he violated section 2(5) of the PACA, but that it was not a knowing violation, is not a defense); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 797 (1975) (stating that the record supports respondent's view that its violations of section 2(5) of the PACA were unintentional, but intent is not an element of the violations), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955, 973 (1961) (stating that culpability for a violation of section 2(5) of the PACA does not depend on lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Complainant raises five issues in Complainant's Appeal. First, Complainant contends:

> There is no question as to the number of cartons unlawfully misrepresented by Respondent, as Respondent's own records show that it misrepresented 10,622 cartons of Melogold as Oroblanco over a two year period.

Complainant's Appeal at 3. Respondent replies that the ALJ was correct that the precise number of misrepresented cartons was not determined and could not be determined from the record (Respondent's Reply at 5).

I disagree with Complainant's contention that Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos. Complainant's sanction witness, Joan M. Colson, admitted that the specific number of cartons of Melogolds misrepresented as Oroblancos was not specifically observed by her or any other USDA employee. Rather, a method of deduction was used, whereby Complainant determined the number of cartons of Melogolds and Oroblancos Respondent had on hand and used simple arithmetic to determine the number of cartons that were misrepresented. However, Complainant did not actually see any cartons labeled or designated Oroblanco, which contained Melogold (Tr. 676-78, 688). Further, during the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60, 914; CX 25). Thus, under these circumstances, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had for sale, because the fruit was treated as the same variety with no need to distinguish between the two varieties.

However, Complainant has shown by a preponderance of the evidence that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos. Under the circumstances in this proceeding, I impose the same sanction against Respondent based on Complainant's proof that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos, as I would have imposed had Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos.

Second, Complainant contends that:

> Melogold and Oroblanco are two different "kinds" of fruit, of which

> Respondent was aware or should have been aware, and misrepresenting the Melogold variety as the Oroblanco variety is a violation of section 2(5) of the PACA.

Complainant's Appeal at 13. Respondent replies that Oroblancos and Melogolds are not different kinds of fruit for inspection purposes; hence, Respondent did not misrepresent Melogolds as Oroblancos (Respondent's Reply at 13).

The ALJ found that Oroblancos and Melogolds were not two different "kinds" of fruit; yet, the ALJ, nonetheless, found that Respondent had violated section 2(5) of the PACA. Complainant argues that the ALJ "appears inconsistent" (Complainant's Appeal at 13) and that the ALJ's "finding that Oroblanco and Melogold are not different `kinds' of fruit was error." (Complainant's Appeal at 21.)

I agree with Complainant. The record establishes that, despite their similarities, Melogolds and Oroblancos are two different kinds of fruit. The PACA does not define the word "kind," as it is used in section 2(5) of the PACA, and the legislative history applicable to the Act of August 20, 1937,[7] that amended the PACA to make it unlawful to misrepresent the "kind" of a perishable agricultural commodity, does not explicate legislative intent with respect to the meaning of the word "kind" in section 2(5) of the PACA.

When not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.[8]

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[7]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, 50 Stat. 725.

[8]*See Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the

(continued...)

Webster's Collegiate Dictionary defines the word "kind" as "fundamental nature or quality"; "a group united by common traits or interests"; or "a specific or recognized variety" (Webster's Collegiate Dictionary 642 (10th ed. 1997)).[9]

The record clearly establishes that, despite their similarities, Melogolds and Oroblancos were recognized by growers and purchasers, during the 1994-1995 and 1995-1996 seasons, as different kinds of fruit. I find that Melogolds and

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[8](...continued)
absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 54-55 (July 31, 1998) (stating that when not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998). *See also In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

[9]*See also Alex J. Mandl, Inc. v. San Roman*, 170 F.2d 839, 841 (7th Cir. 1948) (stating that the word *kind*, when referring to merchandise, generally means "generic or specific quality or character of the article under consideration" or its "essential or distinguishing quality"); *International Minerals & Chemical Corp. v. Property Appraisal Dep't*, 492 P.2d 1265, 1268 (N.M. Ct. App. 1972) (stating that *kind* means "category" or "class"); *City of St. Louis v. James Braudis Coal Co.*, 137 S.W.2d 668, 670 (Mo. Ct. App. 1940) (stating that *kind* means "class, grade, sort").

Oroblancos are, and at all times relevant to this proceeding were, different kinds of fruit for purposes of the PACA and that the ALJ erred when she determined that they were not different kinds of fruit.

Third, Complainant contends that:

> ALJ Baker erroneously concluded that Respondent's misrepresentations were unintentional.

Complainant's Appeal at 21. Respondent replies that Respondent did not intentionally misrepresent any commodities (Respondent's Reply at 33-41).

Complainant correctly argues that "intent is not an element of misbranding violations under section 2(5) of the PACA," but incorrectly concludes that the ALJ's finding that Respondent's misrepresentations were unintentional "ignores the substantial evidence of intent in the record." (Complainant's Appeal at 21.) I disagree with Complainant's contention that the ALJ ignored the evidence of intent. The ALJ thoroughly discussed the evidence of intent in the record, but found that the evidence was not sufficient to find that Respondent intentionally violated section 2(5) of the PACA (7 U.S.C. § 499b(5)). Instead, the ALJ found that Respondent's violations of section 2(5) were the result of negligence, mistake, accident, or inadvertence (Initial Decision and Order at 62).

Fourth, Complainant contends that: "Respondent's violations of the PACA were willful, repeated, and flagrant" (Complainant's Appeal at 28). Respondent replies that the ALJ implicitly and correctly decided that Respondent's violations were not willful, repeated, or flagrant (Respondent's Reply at 41).

Violations of section 2(5) of the PACA do not require willfulness as a element of the offense. However, Complainant is correct that the ALJ failed to make findings as to whether Respondent's violations were willful, repeated, or flagrant.

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499(b)(5)).

Therefore, I agree with Complainant that the ALJ erroneously failed to find Respondent's violations of section 2(5) of the PACA willful (Complainant's Appeal at 28-29). 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.[10] Willfulness is reflected by

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[10]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d
(continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(5)) and the number of Respondent's violations. The variety of hybrid grapefruit ordered by purchasers from Respondent was specified. Respondent negligently, carelessly, or inadvertently filled orders for Oroblancos by providing Melogolds. Respondent knew, or should have known, that the hybrid grapefruit in question was the Melogold variety and could not lawfully be represented as the Oroblanco variety. For example, in the 1995-1996 season, around November 9, 1995, Mr. Milner, a county inspector, brought to Respondent's attention that Melogolds were in cartons erroneously labeled as Oroblancos (Tr. 1396-97, 1400-01). Respondent's manager and field man, Mr. Arcure, testified that he went to the packinghouse the weekend after county inspector Milner was there, to check the identity of the hybrid grapefruit, but "forgot" to correct the mistake (Tr. 1413-14). Thus, Mr. Arcure, who had experience with Melogolds and Oroblancos and was warned by the county inspector of probable violations, admitted that he "forgot" to

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[10](...continued)
1102, 1105 (8th Cir. 1991), *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 Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 33 (Sept. 30, 1998); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, No. 97-4224, 1998 WL 863340 (2d Cir. Oct. 29, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

change the labels on the cartons of the hybrid grapefruit that were packed from Caliente Farms and Hillcroft Groves (Tr. 1401, 1409-10, 1413).

Respondent's violations were also repeated. Respondent's violations are repeated because "repeated" means more than one.[11] Respondent misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).[12]

Regarding flagrant, Complainant argues that Respondent's violations are similar to those in *Potato Sales Co.*, *supra*, and therefore are to be found similarly flagrant. However, Complainant's sanction witness, Ms. Joan M. Colson, linked and emphasized Respondent's alleged violations of section 2(4) of the PACA for failure to truly and correctly account, to the found violations of failure to truly and correctly account in *Potato Sales Co.*, *supra*. However, the violations of section 2(4) of the PACA, at issue in this proceeding, are dismissed and are no pertinent part of the sanction inquiry. Thus, Complainant's emphasis on similarity to *Potato Sales Co.*, *supra*, for violations of section 2(4) of the PACA now militates against *Potato Sales Co.*, *supra*, as the paradigm case that Respondent's violations were flagrant.

Fifth, Complainant contends that the proper sanction is license revocation (Complainant's Appeal at 30). Respondent replies that revocation is not an appropriate sanction. Respondent requests that no sanction be imposed, but states, if a sanction is to be imposed, that it be limited to the 15 days that Respondent closed its business due to incorrect advice from the Office of the Hearing Clerk (Respondent's Reply at 6, 49).

I have carefully examined the circumstances surrounding Respondent's violations of section 2(5) of the PACA, and I do not find that Complainant has made a convincing showing for revocation.

Complainant on appeal still recommends revocation of Respondent's PACA

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[11] *See In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 35 (Sept. 30, 1998) (stating that respondent's misrepresentations of 2,319 cartons of grapefruit were repeated violations of section 2(5) of the PACA); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 18 (Aug. 18, 1998) (holding that respondent's misrepresentations of 411 cartons of limes in 3 shipments, to 3 different customers, on 3 separate occasions, constitute repeated violations of the PACA); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1402-04 (1995) (stating that the misrepresentations of the place of origin of 7,554 cartons of apples were repeated violations of the PACA), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

[12] *In re Western Sierra Packers, Inc.*, 57 Agric. Dec.___, slip op. at 35 (Sept. 30, 1998); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 35-36 (Aug. 18, 1998); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1404 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

license, even though a major part of Complainant's case was dismissed,[13] and Complainant did not appeal the dismissal. At the hearing, Complainant's sanction witness testified that Respondent's misrepresentations of one kind of fruit for another and failures to fully account were so serious that no civil penalty was recommended and only revocation was appropriate; but, if there had to be a civil penalty imposed as the appropriate remedy, the civil penalty would have to be $500,000 to $1,000,000.

This case is governed by USDA's sanction policy 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.

However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] I do not adopt the sanction of revocation recommended by the administrative

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[13]The ALJ dismissed paragraphs V-VII of the Complaint and the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint.

[14]*In re Western Sierra Packers, Inc.*, 57 Agric. Dec.___, slip op. at 36 (Sept. 30, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998), *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

officials because their sanction recommendation is based, in part, on the allegation that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), which allegation was dismissed by the ALJ and not appealed by Complainant.

Further, while Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) were willful in the sense that Respondent exhibited a careless disregard of statutory requirements, I do not find that Respondent engaged in the violations in order to deceive its customers. Rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between the Oroblanco variety and the Melogold variety at a time when no identity standards had been issued by the State of California (RX 126). Nonetheless, Respondent's violations were willful and repeated, involving approximately 10,622 cartons of hybrid grapefruit, and Respondent's violations risk undermining the confidence foreign importers have in representations relating to produce exported from the United States (Tr. 668-69). However, there is no evidence that Respondent's Japanese customers were not satisfied with Respondent's exported hybrid grapefruit (Tr. 908-11, 1029-32; CX 23 at 3).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that, if the Secretary determines that a commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the PACA license of the offender, or assess a civil penalty.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. III 1997)) provides that I may assess a civil penalty in lieu of the revocation or suspension of Respondent's PACA license for its violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)). In assessing the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. The seriousness, nature, and amount of Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) are discussed in this Decision and Order, *supra*. Further, I find that Respondent operates a large business.

Complainant's sanction analysis estimates Respondent's losses, if Respondent had a revoked license for 2 years, which Complainant explains is the time period required before a licensee whose PACA license has been revoked may re-apply for a license. Complainant's sanction witness, Ms. Joan M. Colson, computed Respondent's probable losses at $2.8 million over a 2-year hiatus, which Complainant and Ms. Colson "realized was an unrealistic figure to request" (Tr. 672; Complainant's Brief at 54).

Thereafter, Ms. Colson bases the computation of Respondent's probable losses on a 90-day suspension, estimating therefrom a probable loss figure of $360,000.

Complainant adds $20,000 to the $360,000, because Respondent allegedly failed to account, truly and correctly, to its growers for $20,000. Finally, Complainant adds an "additional sum" for the seriousness of the violations. Simple arithmetic reveals such an "additional sum" to be $120,000 to $620,000, in order to reach the recommended $500,000 to $1,000,000 civil penalty (Tr. 671-72; Complainant's Brief at 54).

Complainant originally sought only revocation and only reluctantly addressed the statutory issue of civil penalties (7 U.S.C. § 499h(e)). In the context of opposing any civil penalty, Complainant uses a 2-year time period, that a revoked licensee must wait to be eligible for a new license, to determine that Respondent would lose $2.8 million over the 2 years. Complainant argues that it "realized" that requesting a $2.8 million civil penalty was unrealistic, but Complainant gave no reasons as to how or why Complainant came to such a realization. Therefore, Complainant did not address the obvious question raised by the $2.8 million loss figure, to wit, if it is unrealistic to seek a $2.8 million civil penalty equal to revocation, then why is it realistic to cause Respondent virtually the same loss, the same $2.8 million, by revoking Respondent's license? I do not here decide that there are no salient arguments, only that Complainant did not make any.

Complainant thereafter calculates Respondent's losses from a 90-day suspension, but Complainant does not recommend a 90-day suspension. Significantly, Complainant gives no reasons, and no explanation, for choosing a hypothetical 90-day suspension, in lieu of revocation. Despite Complainant's ostensibly random choice of a hypothetical 90-day suspension, I infer that Complainant actually considers a 90-day suspension to be a more realistic sanction than revocation.

Complainant estimates Respondent's losses from the hypothetical 90-day suspension to be $360,000, to which Complainant adds $20,000 allegedly not truly and correctly accounted back to Respondent's growers, and an additional sum for the seriousness of the violations, which totals a civil penalty of $500,000 to $1,000,000, in lieu of a 90-day suspension. Losses of $360,000 seem reasonable for a 90-day period. However, the $20,000 figure is not useful because it is not described as a civil penalty, but is money apparently owed, or at least not paid, to growers by Respondent. Further, the alleged violations of section 2(4) of the PACA formed part of Complainant's theory of the serious violations for which Complainant adds an additional sum of $120,000 to $620,000 to the civil penalty. But, since Complainant does not break it down, there is no way to know what part Complainant meant the alleged violations of section 2(4) of the PACA to have in computing the civil penalty for serious violations.

Therefore, my analysis of Complainant's original sanction recommendation and

sanction witness' testimony is that Complainant unrealistically seeks revocation of Respondent's PACA license, when Complainant's own analysis points to a 90-day suspension. However, since Complainant only proved the violations of section 2(5) of the PACA, I impose only a 30-day suspension of Respondent's PACA license. Complainant estimates that Respondent's losses from a suspension of its PACA license would be approximately $4,000 for each day of suspension. Based upon Complainant's estimates, a $120,000 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 30-day suspension of Respondent's PACA license, would be appropriate.

Respondent contends that it "was affirmatively advised by the Hearing Office [on July 6, 1998, that] no appeal had been filed and, therefore, [Respondent] closed its packing house, laid off employees, and suspended operations on July 7, 1998[,] as required by the [Initial Decision and Order]" (Respondent's Reply at 5). Based on this contention, Respondent requests that no sanction be imposed on Respondent or, in the alternative, that the sanction "be limited to the closure incurred by Respondent when it was not timely advised of the appeal by the Complainant" (Respondent's Reply at 5).

The record reveals that Respondent was served with the Initial Decision and Order on June 8, 1998.[15] Section 1.142(c)(4) of the Rules of Practice provides that the administrative law judge's decision does not become effective until 35 days after the date of service of the decision on the respondent, unless there is an appeal to the Judicial Officer, as follows:

§ 1.142 Post-hearing procedure.

. . . .

(c) *Judge's decision.* . . .

. . . .

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided,*

[15]See Domestic Return Receipt for Article Number P 093 143 38.

> *however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

Further, the ALJ's Initial Decision and Order states that the Initial Decision will become effective 35 days after service, as follows:

> This Decision and Order shall become final thirty-five (35) days after service thereof upon the parties, unless there is an appeal to the Judicial Officer within thirty (30) days.

Initial Decision and Order at 70.

Thus, had no party appealed, the ALJ's Initial Decision and Order would have become effective on July 13, 1998, and Respondent's PACA license would have been suspended beginning July 13, 1998, not July 7, 1998, as Respondent contends. Under these circumstances, I find no basis for Respondent's belief that it was required to begin its PACA license suspension on July 7, 1998, pursuant to the Initial Decision and Order issued by the ALJ.

Moreover, the record reveals that Complainant filed a timely appeal on July 1, 1998. Hence, the ALJ's Initial Decision and Order never became effective. Further still, Respondent admits that it received a copy of Complainant's timely-filed appeal on July 10, 1998, three days prior to the date on which the ALJ's Initial Decision and Order would have become effective had no timely appeal been filed (Letter from Steven M. McClean to Office of the Hearing Clerk, filed July 20, 1998).

Finally, Respondent's reliance for its contention that no sanction should be imposed on it because of erroneous advice Respondent received from Ms. LaWuan Waring, Legal Technician, Office of the Hearing Clerk, is misplaced. It is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.[16] Therefore, even if Respondent was given erroneous advice by Ms. Waring, Respondent was bound by the Rules of Practice.

I infer that Respondent contends that the Secretary of Agriculture is estopped

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[16]*See FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 15, 27 (Nov. 18, 1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 227 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (1968); *In re Leslie E. Donley*, 22 Agric. Dec. 449, 452 (1963).

from imposing a sanction against Respondent because of Ms. Waring's statement to Respondent that Complainant had not filed an appeal, as of July 6, 1998. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.[17] One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.[18] Ms. Waring did nothing to lead Respondent to believe that the ALJ's Initial Decision and Order would become effective July 7, 1998, or that Respondent was required to cease business on July 7, 1998.

Further, even if Respondent had acted to its detriment based on Ms. Waring's statements, it is well settled that the government may not be estopped on the same terms as any other litigant.[19] It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.[20] Equitable estoppel does not generally apply to the government acting in its sovereign capacity,[21] as it was doing in this case,[22] and estoppel is only available

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[17]*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

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

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

[20]*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

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

[22]*See In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977). *Cf. In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 28 (Nov. 18, 1998) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the (continued...)

if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.[23] Respondent bears a heavy burden when asserting estoppel against the government, and it has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, I find no basis upon which to grant Respondent's request that no sanction be imposed because Respondent closed its packinghouse on July 7, 1998.

Finally, in formulating this sanction, I am relying a great deal on the credibility determinations of the ALJ, because the nature of this case turns on the believability of Respondent's witnesses. The ALJ gave "full credibility to Respondent's witnesses" (Initial Decision and Order at 57). The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[24] The ALJ explained in great detail,

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[22](...continued)
Animal Welfare Act); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982);

[23]*City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

[24]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales*
(continued...)

throughout the Initial Decision and Order, her reasons for concluding that Respondent's witnesses' testimony was fully credible. The record supports the ALJ's credibility determinations.

Therefore, based on the record, I find that a 30-day suspension of Respondent's PACA license or, in lieu of the 30-day suspension, the assessment of a $120,000 civil penalty would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future.

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

Order

1. Respondent is assessed a civil penalty of $120,000, which shall be paid by 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, D.C. 20250. The certified check or money order shall be received by Mr. Frazier within 65 days after service of this Order on Respondent, and Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-96-0532.

2. In the event that the PACA Branch does not receive a certified check or money order in accordance with paragraph 1 of this Order, Respondent's PACA license is suspended for 30 days, and the 30-day suspension shall take effect beginning on the 66th day after service of this Order on Respondent.

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[24](...continued)
Co., 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Decision and Order on Remand filed April 5, 1999.

Responsibly connected — Active involvement — Ministerial function — Retroactivity — Nominal officer and director — Alter ego.

The Judicial Officer, on remand, reversed the Chief of the PACA Branch's decision that Petitioner was *responsibly connected*, as that term is defined in the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), with The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. The Judicial Officer had previously affirmed the Chief of the PACA Branch, based on the Judicial Officer's conclusion that Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997). Petitioner filed a petition for review of the Judicial Officer's determination, and the United States Court of Appeals for the District of Columbia Circuit remanded the case instructing the Judicial Officer to articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (1998). The Judicial Officer held that a petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA. Applying this standard to Petitioner, the Judicial Officer found that Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA; however, Petitioner demonstrated by a preponderance of the evidence that he performed a ministerial function only and thus, was not actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order on Remand issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with The Norinsberg Corporation during the period that

The Norinsberg Corporation violated the PACA,[1] in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg Corporation and involved in the daily activities of The Norinsberg Corporation.

On January 2, 1997, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in New York, New York. Stephen P. McCarron, McCarron & Associates, Washington, D.C., represented Petitioner. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 10, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and a Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, and on February 11, 1997, Respondent filed Respondent's Brief. On February 19, 1997, Petitioner filed Petitioner's Reply Brief and Respondent filed Respondent's Reply Brief.

On May 6, 1997, the ALJ issued an Initial Decision and Order in which the ALJ found: (1) The Norinsberg Corporation was the alter ego of Robert Norinsberg; (2) Petitioner only nominally was a secretary, a treasurer, a director, and a stockholder of The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA; and (3) Petitioner was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA (Initial Decision and Order at 8-9). The ALJ concluded that "Michael Norinsberg was not responsibly connected to The Norinsberg Corporation at the time of the corporation's violations of the PACA" (Initial Decision and Order at 4) and reversed the "Order of the Chief, PACA Branch, Fruit and Vegetable Division, USDA, dated August 11, 1993, which found that Michael Norinsberg was `responsibly connected' to The Norinsberg Corporation" (Initial Decision and Order at 13).

On May 28, 1997, Respondent appealed to the Judicial Officer. On July 21, 1997, Petitioner filed Petitioner's Opposition to Respondent's Appeal Petition, and on July 23, 1997, the Hearing Clerk transmitted the case to the Judicial Officer for decision.

On October 21, 1997, I issued a Decision and Order: (1) concluding Petitioner

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[1]During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and its PACA license was revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

was only nominally an officer and director of The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding The Norinsberg Corporation was the alter ego of Robert M. Norinsberg and Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the period that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1851, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998).

On December 3, 1997, Petitioner filed Petition for Reconsideration contending that I erred by applying the definition of the term *responsibly connected* in the PACA, as amended by the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995],[2] to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period from April 1991 through February 1992. On January 9, 1998, Respondent filed Response to Petitioner's Petition for Reconsideration, and the Hearing Clerk transmitted the case to the Judicial Officer for reconsideration of the October 21, 1997, Decision and Order.

On January 26, 1998, I denied Petitioner's Petition for Reconsideration finding that until Petitioner filed his Petition for Reconsideration, Petitioner consistently took the position that the definition of *responsibly connected* in the PACA, as amended by the PACAA-1995, should be applied in the proceeding and concluding that Petitioner cannot raise a new argument for the first time on appeal and cannot argue a legal position on appeal that is contrary to the position Petitioner consistently argued in the proceeding, until he filed Petitioner's Petition for Reconsideration. *In re Michael Norinsberg*, 57 Agric. Dec. 791 (1998) (Order Denying Pet. for Recons.).

Petitioner filed a petition for review of my determination that he was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, and the United States Court of Appeals

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[2]Pub. L. No. 104-48, 109 Stat. 424 (1995).

for the District of Columbia Circuit granted Petitioner's petition for review and remanded the case stating that I inadequately articulated the factors relevant in interpreting the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). The Court instructed that, on remand, I articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA and, if necessary, address the issue of retroactive application of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997), in accordance with the holdings in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), and *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998).

Petitioner and Respondent each requested the opportunity to file a brief on the issues on remand, which requests I granted. On March 10, 1999, Petitioner filed Petitioner's Brief on Remand, and Respondent filed Respondent's Brief on Remand. On March 18, 1999, Petitioner filed Petitioner's Reply to Respondent's Brief on Remand, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision on remand.

Applicable Statutory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a

partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

7 U.S.C. § 499a(b)(9) (1994).

§ 499a. Short title and definitions

. . . .

(b) Definitions

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an 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) (Supp. III 1997).

Petitioner was an officer and director of The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA.[3] *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1848, 1851 (Finding of Fact Nos. 16, 27; Conclusion of Law No. 4). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with The Norinsberg Corporation. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) provides a two-pronged test which Petitioner must meet in order to demonstrate that he was not responsibly connected with The Norinsberg Corporation. First, a petitioner

[3]See note 1.

must demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

In the October 21, 1997, Decision and Order, I concluded that Petitioner failed to meet the first prong of the test, *viz.*, Petitioner failed to demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in the PACA violations committed by The Norinsberg Corporation. The basis for my conclusion is Petitioner's signing 14 checks drawn on two of The Norinsberg Corporation's accounts made payable to three individuals who were not produce sellers in amounts totaling $59,728.60. I found that Petitioner's signing the checks was active involvement in an activity resulting in violations of the PACA by The Norinsberg Corporation because Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of the resources available to The Norinsberg Corporation to make full payment promptly to produce sellers in accordance with the PACA. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857.[4]

The United States Court of Appeals for the District of Columbia Circuit admonished that I did not adequately articulate the factors relevant to the interpretation of the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) and remanded the case to me to articulate a standard that the Court can review in an informed manner. *Norinsberg v. United States Dep't of Agric., supra*, 162 F.3d at 1196, 1200.

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[4]While a petitioner's failure to meet the first prong of the test ends the inquiry, I found that Petitioner met the second prong of the two-pronged test. Specifically, Petitioner demonstrated by a preponderance of the evidence that he was only a nominal officer and director of The Norinsberg Corporation. Further, I noted that, although Petitioner demonstrated by a preponderance of the evidence that The Norinsberg Corporation was the alter ego of Robert M. Norinsberg, the alter ego defense was not available to Petitioner because he was an owner (Petitioner held 2.97914 per centum of the outstanding stock) of The Norinsberg Corporation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1859-65.

The Court states that, at oral argument, the United States Department of Agriculture suggested that, while Petitioner's act of signing checks made payable to persons who were not produce sellers was active involvement in an activity resulting in a violation of the PACA, the act of mailing the very same checks would not be active involvement in an activity resulting in a violation of the PACA. The Court further states that both actions, signing the checks and mailing the checks, could constitute active involvement in the activities resulting in a violation of the PACA, and the Judicial Officer provides no principled way to distinguish between the two. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d at 1200.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. The reason for my failure to articulate a standard for determining whether an individual was actively involved in the activities resulting in a violation of the PACA was my view that whether an individual was actively involved in activities resulting in a violation of the PACA requires a fact-specific determination and consideration of the totality of the circumstances.[5] For this same reason, I addressed the facts in *In re Michael Norinsberg, supra*, and I did not attempt to distinguish hypothetical situations, such as a nominal officer who merely mails a check to a person who is not a produce seller; thereby reducing the resources available to the PACA licensee to pay produce sellers in accordance with the PACA.

However, in accordance with the Court's instruction, I have reflected on an appropriate standard to be used to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA. The standard is based upon my review and consideration of *Norinsberg v. United States Dep't of Agric., supra*; the helpful briefs on remand filed by Petitioner and Respondent; and *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), a case that was decided after I issued the October 21, 1997, Decision and Order in *In re Michael Norinsberg, supra*.

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her

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[5]*Cf. United States v. Vertac Chemical Corp.*, 46 F.3d 803, 808 (8th Cir. 1995) (indicating that actual or substantial control requires at a minimum active involvement in activities and stating that determining whether an entity has exerted actual or substantial control requires a fact-intensive inquiry and consideration of the totality of the circumstances), *cert. denied sub nom. Hercules, Inc. v. United States*, 515 U.S. 1158 (1995); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843-45 (3rd Cir. 1994) (same).

participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

For example, mailing a check to a person who is not a produce seller enables the person who presents the check for payment to receive payment and results in the reduction of the resources available to a PACA licensee to pay produce sellers in accordance with the PACA. Thus, if the PACA licensee does not pay a produce seller in accordance with the PACA because the PACA licensee has mailed payment to an individual who is not a produce seller, the individual who mails the check participates in an activity resulting in a violation of the PACA. However, a petitioner who demonstrates by a preponderance of the evidence that he or she did not exercise any judgment, discretion, or control regarding which envelopes were mailed, would not have been actively involved in the activity that resulted in a violation of the PACA, even if the petitioner's act of mailing the payment resulted in the partnership's, corporation's, or association's failure to pay a produce seller in accordance with the PACA. Similarly, a supervisor of the mail room, who does not actually mail checks, but supervises the PACA licensee's mail room, participates in activities resulting in a violation of the PACA if a mail room employee mails a check to a person who is not a produce seller and that person presents the check for payment and payment of the check results in the reduction of the resources available to the PACA licensee such that the partnership, corporation, or association fails to pay a produce seller in accordance with the PACA. However, the mail room supervisor who demonstrates by a preponderance of the evidence that he or she did not exercise any judgment, discretion, or control regarding which envelopes were mailed, would not have been actively involved in the activity that resulted in a violation of the PACA, even if one of the payments mailed from the mail room is to a person who is not a produce seller and the mailing resulted in the partnership's, corporation's, or association's failure to pay a produce seller in accordance with the PACA.

On the other hand, if a petitioner, who exercises judgment or discretion regarding, or has control over, who should be paid, how much they should be paid, or when they should be paid, fails to pay a produce seller in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA. Similarly, if a petitioner, who exercises control over which payments to mail, fails to mail a payment to a produce seller so that the produce seller is paid

in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA.

This standard is consistent with my reading of *Maldonado* in which the United States Court of Appeals for the Ninth Circuit reversed the Secretary of Agriculture's determination that Ernest Maldonado, a nominal officer of a PACA violator, was actively involved in activities resulting in the PACA licensee's failure to pay produce sellers in accordance with the PACA. The Court in *Maldonado* appears to base its decision that Mr. Maldonado was not actively involved in activities resulting in a violation of the PACA on Mr. Maldonado's lack of control over the activities resulting in the failure of the PACA licensee to pay produce sellers and the ministerial nature of Mr. Maldonado's check signing, as follows:

> As to the first requirement in the statute, there is no evidence that Maldonado was "actively involved" in the transactions that resulted in the PACA violation. The violation in this case was W. Fay's failure to pay $19,590.75 for twelve shipments of mixed citrus from October 19, 1992 through February 26, 1993. Maldonado testified that he was not involved in that particular sale. Nor, according to Maldonado's testimony, did he generally make any of the decisions as to what bills got paid and when. Although Maldonado was authorized to co-sign checks, he did not participate in the fraudulent activities of the Dukesherers that resulted in money being siphoned from the firm to their pockets. He merely signed checks when he was asked to do so.

Maldonado v. Department of Agric., supra, 154 F.3d at 1087-88.

Moreover, in contexts other than the PACA, courts have indicated that control is a factor to be examined to determine who is actively involved with a particular activity.[6]

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[6]See, e.g., *LDL Research & Development II, Ltd. v. Commissioner*, 124 F.3d 1338, 1342 (10th Cir. 1997) (stating that research expenditures are made in connection with the partnership's trade or business if the taxpayer is actively involved in the research project as a trade or business and indicating that the degree of taxpayer control or regular and substantial participation is the primary determinant between active involvement and passive investment); *Nickeson v. Commissioner*, 962 F.2d 973, 978 (10th Cir. 1992) (citing with approval the holding in *Diamond v. Commissioner*, 930 F.2d 372 (4th Cir. 1991), that lack of control over activities indicates that taxpayers were passive investors and not actively engaged in a trade or business); *Diamond v. Commissioner*, 930 F.2d 372, 376 (4th Cir. 1991) (stating that an entity with no control over activities in which it invests is a passive investor and cannot be engaged in a trade or business in connection with those activities); *Zink v. United States*, 929 F.2d

(continued...)

Respondent contends that there are at least four factors that should be given strong consideration to determine whether a person has demonstrated that he or she was not actively involved in activities resulting in a violation of the PACA (Respondent's Brief on Remand at 4-10).

First, Respondent contends that "the nature of the person's actions with respect to the activities resulting in the PACA violations" should be examined to determine whether an individual was actively involved in an activity resulting in a violation of the PACA. "The more closely [a person] participated in the activities resulting in the violation, the less likely it is that he or she should be able to successfully show a lack of active involvement." (Respondent's Brief on Remand at 5.) Respondent provides the following as examples of situations in which a person would most likely be able to demonstrate that he or she was not actively involved in activities resulting in a violation of the PACA:

> If that person's job functions were mainly clerical, as in *Minotto v. United States*, 711 F.2d 406 (D.C. Cir. 1983), it would also be likely that the person would be able to show a lack of active involvement, unless his or her clerical functions were activities that resulted in the corporation's payment violations. Similarly, where the alleged responsibly connected person's duties were essentially to buy and sell produce, as in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), the connection between the nature of the person's involvement and the activities resulting in the violations would probably be too tenuous to support a finding of active involvement in the activities resulting in the corporation's failure to pay for produce.

Respondent's Brief on Remand at 5.

I agree with Respondent's contention that a person who demonstrates by a preponderance of the evidence that he or she performed mainly clerical duties was most likely not actively involved in activities that resulted in a violation of the

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[6](...continued)
1015, 1022-23 (5th Cir. 1991) (stating that the lack of control over activities in which taxpayers invested leads to the conclusion that taxpayers were passive investors and were not engaged in a trade or business); *Burns v. D. Oltmann Maritime PTE Ltd.*, 901 F. Supp. 203, 207 (E.D. Va. 1995) (stating that the *M/V Neptune Jade* was not actively involved with cargo activities when the longshoreman, who was under the direction and control of the stevedore company, was killed); *United States v. Conservation Chemical Co. of Ill.*, 733 F. Supp. 1215, 1221-22 (N.D. Ind. 1989) (indicating that active involvement in Resource Conservation and Recovery Act violations is shown by regular and significant activity and responsibility for environmental control).

PACA. My agreement with Respondent is based on my view that an individual who performs primarily clerical duties generally will not exercise judgment or discretion with respect to, or control over, activities resulting in a violation of the PACA. However, while the characterization of an individual's functions (e.g., clerical, technical, professional, sales, management, or policy) within a partnership, corporation, or association may be a general indicator of the judgment, discretion, or control exercised by that individual, such characterization would not be dispositive of the issue of active involvement in an activity resulting in a violation of the PACA.[7]

Thus, a nominal officer of a corporate PACA violator may show that his or her duties were primarily clerical, but if he or she exercised some judgment or discretion with respect to, or control over, an activity and that activity resulted in a violation of the PACA, the general nature of the individual's duties would not insulate the individual from being found to have been actively involved in the activity resulting in a violation of the PACA.

Second, Respondent contends that "the nature of a person's relationship to the violating company" should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA (Respondent's Brief on Remand at 6). Respondent asserts that using this factor:

> [a] corporate officer, director or major stockholder who exercised a great deal of authority over a corporation that committed PACA violations would have difficulty showing that he or she was not actively involved in the activities resulting in the violation. If an alleged responsibly connected person was found to have little authority over corporate affairs, such as the appellant in *Minotto*, a bookkeeper who was made a corporate director to satisfy quorum requirements and who engaged in very minor corporate functions, such as appearing at meetings and voting at the direction of her superiors, that factor would tend to support a showing of the absence of active involvement based on the limited nature of the person's authority.

Respondent's Brief on Remand at 6.

I agree with Respondent's contention that an officer, director, or major shareholder who exercises a great deal of authority over a corporate PACA violator

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[7]See *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857-58 (rejecting the ALJ's conclusion that an individual is not actively involved in activities resulting in a violation of the PACA unless the individual participated at a managerial level in decision making activities that resulted in the violation).

may have difficulty demonstrating by a preponderance of the evidence that he or she was not actively involved in activities that resulted in a violation of the PACA. This difficulty is merely a function of the fact that a person with general authority over a corporate PACA violator is more likely to have exercised judgment or discretion with respect to, or control over, the activities that resulted in a violation of the PACA, than a person who has limited corporate authority. However, I do not agree that an alleged responsibly connected individual's demonstration by a preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA. An individual who exercises authority over only one limited area of corporate activities could be responsibly connected due to his or her active involvement in activities resulting in a violation of the PACA.

For example, if an individual, whose only activity on behalf of the corporation and only authority within the corporation is the payment of accounts payable, fails to pay a produce seller in accordance with the PACA, the individual would be actively involved in an activity that resulted in a violation of the PACA, despite the individual's lack of control over any other corporate activity.

Third, Respondent contends that "how the individual is viewed by those doing business with the firm" should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA (Respondent's Brief on Remand at 6). Respondent explains the reasons for examination of this factor, as follows:

> If the alleged responsibly connected person indicates to those with whom the corporation conducts business that he or she has important decision making duties, or holds him [sic] or herself out as authoritative, that person should be considered actively involved. An even stronger indication of active involvement is when a person obtained the position of officer, director or greater than 10% shareholder because he or she was well known to and respected by the produce industry and that person's reputation was used to attract customers or get credit.

Respondent's Brief on Remand at 6.

Evidence provided by persons dealing with a PACA violator may be important with respect to the issue of a petitioner's active involvement in activities resulting in a violation of the PACA. However, the ultimate issue is not the petitioner's reputation in the produce industry, the petitioner's representations regarding his or

her responsibilities in a partnership, corporation, or association, or how well known the petitioner is to those who deal with the partnership, corporation, or association. Instead, at least for the first prong of the responsibly connected test, the ultimate issue is the petitioner's active involvement in the activities resulting in a violation of the PACA.

For example, a petitioner, who exercises discretion over who to pay and when to make payment, may demonstrate by a preponderance of the evidence that he or she has never made any representations to persons dealing with the partnership, corporation, or association regarding his or her responsibilities and no person dealing with the partnership, corporation, or association knows of the petitioner's responsibilities. Despite this proof, a petitioner who decides not to pay a produce seller in accordance with the PACA would be actively involved in an activity resulting in a violation of the PACA.

Fourth, Respondent contends that scienter should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA. Respondent explains the reasons for an examination of this factor, as follows:

> If an officer, director or greater than 10% shareholder knew that his or her activities resulted in PACA violations, this is a significant indication of active involvement. However, a person may still be actively involved even in the absence of such knowledge if he or she should have known that these activities resulted in PACA violations. In the highly regulated arena of perishable agricultural commodities, corporate officers, directors and greater than 10% shareholders may not defeat their responsibly connected status by actively seeking ignorance. In *Minotto, supra*, at 408, the court noted that absence from the record was any "suggestion that Minotto knew **or should have known** of the Company's misdeeds [emphasis added]." The court's recognition that a corporate director may be responsibly connected without actual knowledge of the corporation's violations as long as the director should have known of the violations is consistent with the long-recognized principle that a corporate officer and director are fiduciaries, and "in the discharge of his responsibilities must use at least that degree of diligence that an `ordinarily prudent' person under similar circumstances must use." *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264 (2d Cir. 1986). If a corporate officer signs checks, he or she should be considered actively involved even without actual knowledge of the corporation's payment problems, as long as a prudent person under

similar circumstances would know that the check signing would result in PACA violations.

Respondent's Brief on Remand at 6-7.

I disagree with Respondent's contention that scienter is a factor that should be examined to determine if an individual was actively involved with activities that resulted in a violation of the PACA. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) does not provide that active involvement is dependent upon whether the individual knew or should have known that activities in which he or she participated would result in a violation of the PACA.[8]

Thus, if a petitioner buys produce from a seller who is not paid by the partnership, corporation, or association, in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA, even if the petitioner does not know, or have reason to know, that the partnership, corporation, or association cannot pay the produce seller.

I have reviewed my October 21, 1997, Decision and Order in *In re Michael Norinsberg, supra*, in light of the standard articulated, *supra*. I find, applying the standard, that I erred. Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA; however, Petitioner demonstrated by a preponderance of the evidence that he performed a ministerial function only. Therefore, I now find that, while Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA, Petitioner was not actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA.

Specifically, Petitioner signed 14 checks drawn on The Norinsberg Corporation's checking accounts at Chase Manhattan Bank and Republic National Bank of New York, payable to three persons who were not produce creditors of The Norinsberg Corporation. Petitioner's activities (signing checks) enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of resources available to The Norinsberg Corporation to pay produce sellers in accordance with the PACA. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857. Thus, Petitioner participated in activities that resulted in The Norinsberg Corporation's violations of the PACA.

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[8]I found in *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1850, that, at the time Petitioner signed checks payable to individuals who were not produce sellers, Petitioner knew that The Norinsberg Corporation was not paying produce sellers in accordance with the PACA. However, I did not intend to indicate that a petitioner must knowingly participate in a PACA violation or must know that his or her activities will result in a PACA violation, to be responsibly connected.

However, I find that my conclusion in *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857, that "Petitioner was therefore actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA and the fact that Petitioner engaged in these activities at the direction of another does not negate Petitioner's active involvement," is error. Petitioner demonstrated by a preponderance of the evidence that his signing of the checks was a ministerial function only. The checks were presented to Petitioner for signature with the checks already made out as to payee and amount. Petitioner signed the checks presented to him when the president of The Norinsberg Corporation was not available and at the direction of the president of The Norinsberg Corporation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1849, 1858. I find, under these circumstances, that Petitioner did not exercise judgment or discretion with respect to, or control over, the check signing and that Petitioner performed only a ministerial function.

The United States Court of Appeals for the District of Columbia Circuit also instructs that I address the issue of retroactivity, as follows:

> While retroactivity issues may arise depending on whether, and how, the enunciated standard may differ from our precedent, any retroactivity analysis is premature because we do not know now what standard Agriculture will adopt. This issue is properly addressed, if at all, on remand in accordance with the holdings in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

Norinsberg v. United States Dep't of Agric., 162 F.3d at 1200.

Until Petitioner filed his Petition for Reconsideration, Petitioner consistently took the position in this proceeding that the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) should be applied in this proceeding. In his Petition for Reconsideration, Petitioner changed this position, as follows:

> [T]he amended definition of the term `responsibly connected' [in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997))], as interpreted by the Judicial Officer, imposes new and detrimental legal consequences on [P]etitioner so that it cannot be applied retroactively to his conduct which occurred before the amendment.

Petition for Reconsideration at 1 (footnote omitted).

I rejected Petitioner's claim of error on the grounds that Petitioner could not raise a new argument for the first time on appeal to the Judicial Officer and a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding. *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795-96 (1998) (Order Denying Pet. for Recons.)

While the standard which I have applied in this Decision and Order on Remand differs from the United States Court of Appeals for the District of Columbia Circuit precedent applicable to the definition of the term *responsibly connected* prior to its amendment by the PACAA-1995, Petitioner has not suffered a "detrimental legal consequence"; therefore, it is not necessary to address the issue of retroactivity in this Decision and Order on Remand.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, is reversed.

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Order Denying Petition for Reconsideration on Remand filed May 25, 1999.

Responsibly connected — Active involvement — Nominal officer and director.

The Judicial Officer denied Respondent's petition for reconsideration on remand. The Judicial Officer held that the standard in *In re Michael Norinsberg*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Decision and Order on Remand), to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, does not conflict with the two-pronged test in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) or render the determination of whether a person was actively involved in the activities resulting in a violation of the PACA, superfluous. The Judicial Officer also rejected Respondent's contention that Petitioner exercised informed judgment when he participated in activities (signing checks made payable to persons who were not produce sellers) resulting in violations of the PACA by The Norinsberg Corporation.

Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order on Remand issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA,[1] in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg Corporation and involved in the daily activities of The Norinsberg Corporation.

On October 21, 1997, I issued a Decision and Order: (1) concluding Petitioner was only nominally an officer and director of The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding The Norinsberg Corporation was the alter ego of Robert M. Norinsberg and Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the period that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected

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[1]During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the Judicial Officer revoked The Norinsberg Corporation's PACA license pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1851, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998).

Petitioner filed a petition for review of my determination that he was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, and the United States Court of Appeals for the District of Columbia Circuit granted Petitioner's petition for review and remanded the case stating that I inadequately articulated the factors relevant in interpreting the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). The Court instructed that, on remand, I articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998).

On April 5, 1999, I issued a Decision and Order on Remand adopting the following standard to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

In re Michael Norinsberg, 58 Agric. Dec. ___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Applying this standard to Petitioner, I found that Petitioner was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 18-19 (Apr. 5, 1999) (Decision and Order on Remand).

On April 26, 1999, Respondent filed Respondent's Petition to Reconsider; on May 19, 1999, Petitioner filed Petitioner's Opposition to Respondent's Petition to Reconsider; and on May 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the April 5, 1999, Decision

and Order on Remand.

Applicable Statutory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an 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) (Supp. III 1997).

Respondent raises two issues in Respondent's Petition to Reconsider. First, Respondent contends that the standard in *In re Michael Norinsberg*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Decision and Order on Remand), to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, conflicts with the two-pronged test in 7 U.S.C. § 499a(b)(9) (Supp. III

1997) because the standard is essentially the same as the standard to determine whether a petitioner was only nominally a partner in a partnership that violated the PACA or only nominally an officer, director, or shareholder of a corporation or association that violated the PACA (Respondent's Pet. to Recons. at 3). Respondent asserts that the application of essentially the same standard, to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA and to determine the nature of a person's relationship to a partnership, corporation, or association that has violated the PACA, renders the determination of whether a person was actively involved in the activities resulting in a violation of the PACA, superfluous.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) provides a two-pronged test which a partner in a partnership that has violated the PACA or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association that has violated the PACA must meet in order to demonstrate that he or she was not responsibly connected with the PACA violator. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

The standard, which I adopted in the Decision and Order on Remand, to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, does not render the first prong of the two-pronged test superfluous. The standard requires a petitioner who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association to prove by a preponderance of the evidence that he or she meets both prongs of the two-pronged test. Moreover, proof that a petitioner's participation in the activities resulting in a violation of the PACA was limited to the performance of ministerial functions does not, by itself, also constitute proof that the petitioner meets the second prong of the two-pronged test. Likewise, proof that a petitioner was only a nominal partner in a partnership or only a nominal officer, director, or shareholder of a corporation or association does

not, by itself, also constitute proof that the petitioner's participation in the activities resulting in a violation of the PACA was limited to ministerial functions.

I indirectly addressed this issue in the Decision and Order on Remand in response to Respondent's contention that one of the factors that should be examined to determine whether an individual was actively involved in the activities resulting in a violation of the PACA is "the nature of a person's relationship to the violating company" (Respondent's Brief on Remand at 6). Respondent asserted that using this factor:

> [a] corporate officer, director or major stockholder who exercised a great deal of authority over a corporation that committed PACA violations would have difficulty showing that he or she was not actively involved in the activities resulting in the violation. If an alleged responsibly connected person was found to have little authority over corporate affairs, such as the appellant in *Minotto*, a bookkeeper who was made a corporate director to satisfy quorum requirements and who engaged in very minor corporate functions, such as appearing at meetings and voting at the direction of her superiors, that factor would tend to support a showing of the absence of active involvement based on the limited nature of the person's authority.

Respondent's Brief on Remand at 6.

Thus, Respondent contends in Respondent's Brief on Remand that proof of a person's limited authority in an organization would also tend to prove that the person was not actively involved in the activities resulting in a violation of the PACA. I rejected Respondent's contention that proof of a petitioner's limited authority would also demonstrate that the petitioner was not actively involved in the activities resulting in a violation of the PACA, as follows:

> I agree with Respondent's contention that an officer, director, or major shareholder who exercises a great deal of authority over a corporate PACA violator may have difficulty demonstrating by a preponderance of the evidence that he or she was not actively involved in activities that resulted in a violation of the PACA. This difficulty is merely a function of the fact that a person with general authority over a corporate PACA violator is more likely to have exercised judgment or discretion with respect to, or control over, the activities that resulted in a violation of the PACA, than a person who has limited corporate authority. However, I do not agree that an alleged responsibly connected individual's demonstration by a

preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA.

In re Michael Norinsberg, 58 Agric. Dec. ___, slip op. at 15 (Apr. 5, 1999) (Decision and Order on Remand).

Second, Respondent contends that even under the standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA, which is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand), Petitioner was actively involved in the activities resulting in a violation of the PACA (Respondent's Pet. to Recons. at 9). Specifically, Respondent contends that Petitioner exercised his own informed judgment when he signed checks made payable to persons who were not produce sellers. Therefore, under the standard in *In re Michael Norinsberg*, 58 Agric. ___ (Apr. 5, 1999) (Decision and Order on Remand), Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. (Respondent's Pet. to Recons. at 10-11.)

For the reasons set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 19-20 (Apr. 5, 1999) (Decision and Order on Remand), I disagree with Respondent's contention that Respondent exercised his own informed judgment when he signed checks made payable to persons who were not produce sellers.

For the foregoing reasons and the reasons set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Decision and Order on Remand), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[2]

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[2]*In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael*
(continued...)

Respondent's Petition to Reconsider was timely filed and automatically stayed the April 5, 1999, Decision and Order on Remand. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in the Decision and Order on Remand filed April 5, 1999, is reinstated, with allowance for time passed.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, is reversed.

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[2](...continued)
Norinsberg, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

EL RANCHO FARMS v. IM EX TRADING COMPANY.
PACA Docket No. R-97-0149.
Decision and Order filed February 10, 1999.

Inspections - Timeliness.

Where foreign inspection was conducted seven days after receipt by the customer, and eleven days after arrival in Santos, Brazil, buyer was found to have failed to prove condition of grapes on arrival. Buyer showed by a preponderance of the evidence that this was the normal time for securing inspections in Brazil, but failed to show that seller knew at time of entering the contract that a Brazilian survey would take such an extraordinary length of time to secure.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Jerome R. Aiken, Yakima, WA, 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 $24,912.50 in connection with a transaction in interstate commerce involving table grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer included a counterclaim in the amount of $38,133.52 arising out of the same transaction as that which formed the basis of the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal counterclaim exceeds $30,000.00, 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

[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).

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, El Rancho Farms, is a partnership comprised of Jessie Kirkorian, Lynn B. Kirkorian, and Roy Kirkorian. Complainant's address is P. O. Box 596, Arvin, California. At the time of the transaction involved herein Complainant was licensed under the Act.

2. Respondent, Im Ex Trading Company, is a corporation whose address is 117 N. 50th Avenue, Yakima, Washington. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about July 24, 1995, the parties entered into a contract calling for the sale of 1,530 lugs of U. S. No. 1 Thompson Seedless Grapes, LBK brand, at $15.00 per lug, plus $.75 per lug for pallets, $.75 per lug for pre-cooling, $50.00 for a Deltatrack temperature recorder, and $.25 per lug for brokerage, or $24,912.50, f.o.b. Arvin, California, with a contract destination of Santos, Brasil, S. A.

4. The grapes were federally inspected at shipping point on July 27 and 28, 1995, and graded U.S. No. 1, Table. On July 29, 1995, at 9:35 a.m., the loading of the container was completed, and the grapes were billed to Respondent. The grapes were then sent to a controlled atmosphere facility for treatment with tectrol, and then shipped to the Maersk Line, Port of Long Beach, Long Beach, California. From the Port of Long Beach the grapes were shipped by rail to Charleston, South Carolina. At Charleston, South Carolina they were shipped by ocean freight to Santos, Brasil, S. A., where they arrived on September 2, 1995. On September 8, 1995, Respondent notified Complainant that the grapes did not arrive in good condition.

5. On September 13, 1995, 1,260 lugs of grapes were subjected to a survey performed by SGS do Brasil, S.A. This survey stated in relevant part as follows:

Certificado Nº 4401/0001E/00041
Certificate VISUAL INSPECTION REPORT - Agridiv -100041

Parcel : Described as " 1.787 boxes of Fresh Table Grapes"

Marks : a) LBK / THOMPSON SEEDLESS TABLE GRAPES NET WT 23 LBS 10,4 KG / PRODUCE OF U. S. A. / EL

RANCHO FARMS / CALIFORNIA TABLE GRAPES (Said to be 1.530 boxes)

a) GRAPE KING / PREMIUM CALIFORNIA TABLE GRAPES GUIMARRA VINGARDS (sic)/ GV PRODUCE OF U.S.A. / EXOTIC / NET WT 28 LBS (Said to be 90 boxes)

b) CASTLE ROCK / CALIFORNIA TABLE GRAPES / FANTASY SEEDLESS NET WT 23 LBS / PRODUCE OF U.S.A. (Said to be 90 boxes)

c) CARDINAL TABLE GRAPES NET WT 23 LBS 10,4 KG / TABLE GRAPES / PRODUCE3 (sic) OF U.S.A. / HEMPHILL AND WILSON ENTERPRISES (Said to be 77 boxes)

Reference
Docts (copies): - Phytosanitary certificate FPC 959531
- B/L n. SEA 309345 dd. 21.08.95
- Invoice n. 3280419-1 dd. 29.07.95

Supplier: LA COLINA EXPORTADORA, IMPORTADORA e REPRESENTACõES LTDA

. . .

We hereby certify that by order and for account of Messrs. La Colina Exportadora, Importadora E Representacões Ltda we verified the visual quality of the aforementioned parcel, and have to report the following:

PACKING : Goods were packed into new boxes duly marked and identified, being variety Cardinal and variety Exotic packed into isopor boxes and the variety Thompson Seedless and the variety Fantasy Seedless packed into cardboard boxes.

TEMPERATURE: Average temperature of chamber = + 0,2.C.

SAMPLING : At the moment of inspection we found 1.260 boxes of Thompson Seedless, 90 boxes of Exotic, 55 boxes of Fantasy Seedless and 62 boxes of Cardinal. Of these lots, 60 boxes of Thompson + 9 boxes of Exotic + 6 boxes of Fantasy Seedless + 7 boxes of Cardinal duly marked and identified were chosen at random, were opened and submitted to visual inspection.

VISUAL INSPECTION REPORT

VISUAL
QUALITY: * Product : Fresh grapes "in nature" - Vitis vinifera
* Crop / Preparation : New current, gathered and prepared on 1995
* Origin : USA

Our expert effected goods inspection and based ou (sic) visual examination it was verified that:
VARIETY THOMPSON SEEDLESS AND VARIETY FANTASY SEEDLESS: In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruissing (sic), shouwing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.
VARIETY EXOTIC: 100 % of goods seemingly free from foreign matters, impurities, with fruits well grown up, with uniform colour and conformation. Taste and flavor are proper and characteristic of the specie and variety. Fruits maturation degree allows handling, transportation and conservation if goods are kept under proper storage conditions.
VARIETY CARDINAL: About 35,00 % of fruits / clusters showing presence of fungi on the surface, with your storage life being diminished, and unfit for human consumption.
Also it probably will be sent to a secuundary (sic) marketplace;

Place and date
of inspection : Effected at Frigorifo Dunivan - Rua da Mooca, 1736 São Paulo - SP (1.260 boxes of Thompson Seedless), and at CEAGESP - Rua Gastão Vidigal , Pav. HFE box 106 on September 13th, 1995.
. . .
São Paulo, September 14th, 1995.

6. Respondent has not paid any part of the purchase price of the grapes to Complainant.

7. The informal complaint was filed on November 25, 1995, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 1,530 lugs of grapes sold to Respondent on an f.o.b. basis in the course of foreign commerce, and accepted by Respondent in Brasil. Respondent seeks to recover, by its counterclaim, damages resulting from an alleged breach of the warranty of suitable shipping condition by Complainant in reference to the same shipment.

The major issue argued between the parties relates to the amount of time the grapes were in transit between the shipping point in California, and the destination in Brasil, and the length of time between arrival of the shipment in Brasil and the survey that took place in that country. In addition the parties dispute whether the terms of the f.o.b. contract contemplated acceptance by Respondent at the port of Long Beach, and whether the parties explicitly contracted for the transportation route, and the length of time the grapes were in transit.

Complainant contends that "[a]s the shipment was sold under f.o.b. terms, suitable shipping conditions (sic) warranted only to the Port of Long Beach, California." However, Complainant's invoice and the truck bill of lading clearly list the destination as "Santos, Brazil," and no documentation relative to the shipment supports this contention by Complainant. We find that the contract was f.o.b. with a contract destination of Santos, Brazil.

Respondent contends that the normal method of transit for refrigerated freight from the West Coast to Brazil, at the time in question, was for the produce to be shipped to the East Coast by rail, and from thence, by steamship to Brazil. Respondent alleges that the normal transit time was 30 to 40 days, and that Complainant was notified orally before the contract was agreed to that this was the normal time. Complainant's general manager, Mervin (Boom) Houston, who handled negotiations on Complainant's behalf, denied that he was notified that the grapes would be shipped by rail to the East Coast, or that normal transit time was 30 to 40 days. There is nothing in the documentation relative to the contract to support Respondent's assertion that Complainant was given notice of the circumstances of transit, and we find that Respondent has failed to prove its assertions in this regard by a preponderance of the evidence. However, Respondent's evidence preponderates as to the method of transit chosen, and that the normal time was 30 to 40 days, and we find on the basis of the evidence of

record that a 40 day transit period was within the limits of normality for a shipment from the West Coast to Brazil at the time in question.

Respondent's chief buyer, McKinley Williams, who handled negotiations on Respondent's behalf, asserted that the grapes were shipped by Complainant on July 29, to the Port of Long Beach. This accords with the truck bill of lading. According to Williams the grapes were treated with Tectrol at "Transfresh" on July 31, and shipped by rail to Charleston, S.C. on August 1, 1995.[2] Williams states that the grapes were loaded on the ocean vessel Maersk Miami V9513 which sailed on August 14, 1995, that they arrived at Santos, Brazil on September 2, 1995, and were transported inland to Respondent's Brazilian customer in Sao Paulo on September 6, 1995. Williams also states that Respondent was notified on the evening of September 7, that the arrival was unsatisfactory, and that he informed Complainant's office of this, verbally and by fax, on the morning of September 8. This is not denied by Complainant. Mr. Williams asserts that the container was sent back to the Port of Santos from Sao Paulo on September 8, and that a surveyor's report was scheduled for the earliest possible time, which turned out to be September 13, 1995. However, the survey report states that the survey was performed at Sao Paulo, not at the Port of Santos.

The surveyor sampled 60 boxes out of 1,260 boxes of Thompson Seedless. No explanation was given by Respondent as to what became of the remaining 270 boxes that were a part of the shipment. The surveyor also sampled 6 boxes out of 55 boxes of Fantasy Seedless grapes that are not a part of this proceeding, and then lumped these samples together with those from the Thompson Seedless lot for reporting purposes. The sample size for the Thompson Seedless grapes was slightly less than one half of one percent of the total.[3] The rule of thumb for U.S. inspections is one percent. However, a sample size of one half of one percent would be permissible if the inspector saw during the course of drawing and inspecting the randomly drawn samples that the samples were all showing

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[2]Mr. Williams asserted that the Maersk Bill of Lading #SEA309345 confirms that the container was shipped on August 1, 1995, from the Port of Long Beach by rail. However, Respondent did not place this bill of lading in evidence. Mr. Williams' statement that the vessel sailed from Charleston, S.C. on August 14, 1995, was also not supported by a copy of the ocean bill of lading. The survey done in Sao Paulo refers to a copy of bill of lading SEA 309345 seen by the surveyor, and states that it is dated August 21, 1995. No attempt at explaining these apparent discrepancies was made by Respondent.

[3]In *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992), a Mexican government inspector took a sample of 100 boxes out of a 2,756 box load, and then looked at 10 randomly drawn samples from the 100 boxes. We held that the sample was inadequate.

approximately the same percentage of the same defects. Here there is no way to ascertain that this was the case. The surveyor made the following statement as to the samples drawn:

> In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruissing (sic), shouwing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.

This sounds very much like only a visual inspection was done.[4] U. S. inspections, and competent foreign surveys, are performed by removing the damaged berries and weighing or counting the berries affected by each type of condition factor.[5] The description of the berries given by the surveyor does not state a percentage for any of the damaged grapes in any of the samples. Although the description, taken as a whole, certainly sounds like the grapes were in very poor condition, there is no way to be certain as to the exact condition of the grapes. It is possible, for instance, that the described conditions in the samples applied to only 3 percent of the grapes in the samples. If this were the case there would be no indication of a breach even had the survey been performed immediately. We have refused to use surveys that do not state a percentage of condition defects.[6]

Respondent asserted that the eleven days that elapsed between the arrival of the vessel at Sao Paulo and the survey was normal, and supported this assertion with the testimony of an independent expert with an impressive curriculum vita.

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[4]Apparently the surveyor only opened the sample boxes and looked at the general appearance of the grapes in each box.

[5]Of course, there is no way to know that a foreign survey uses the same standard as to what constitutes damage from a condition defect as that used by U.S. inspections. For instance, instructions for a U. S. inspection may specify, for a given commodity, that a particular defect is not scoreable as damage unless its manifestation exceeds a certain aggregate surface area. See for example Market Inspection Instructions: Lettuce, Fruit and Vegetable Division, Fresh Products Standardization and Inspection Branch, Agricultural Marketing Service, United States Department of Agriculture, ¶ 144 (March, 1976). In the absence of international standards, and in the interest of the promotion of trade, we assume that defects reported on foreign surveys are of sufficient severity to affect marketability. In fact, we commonly do our best to utilize foreign inspections. See for example *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969 (1997).

[6]*Ontario International, Inc. v. The Nunes Company*, 52 Agric. Dec. 1661 (1993).

However, none of this expert's listed experience relates to Brazil, and there is no foundation for the specific testimony that the time period was normal. The assertion was also supported by Respondent's receiver in Brazil, but this can hardly be termed disinterested testimony. Complainant made no effort to submit evidence on the point. However, the question is not whether the eleven day period was normal, which we doubt (in spite of Respondent's preponderant evidence), but whether an inspection eleven days after arrival can be used to disclose the condition of perishables on arrival.[7] In no circumstances have we ever extended our use of arrival inspections so far. In an important case[8] involving the shipment of grapefruit from the West coast to England it was found that transit time was normal, but a survey of the fruit made seven days after arrival, and four days after the consignee's receipt, could not be used to show the condition of the fruit on arrival.[9] In this case the grapes were surveyed seven days after receipt by the customer in Brazil, and eleven days after arrival. We find that Respondent has not shown the condition of the grapes on arrival, and therefore has not shown a breach of contract by Complainant.

Since Respondent accepted the grapes, and did not prove a breach by Complainant, it became liable to Complainant for the full contract price, or $24,912.50. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act. Respondent's counterclaim arose out of the same transaction and was based on the allegation of breach of contract by Complainant. Accordingly, 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

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[7]It should be noted that there was no showing, nor effort to show, that Complainant knew that a Brazilian survey would take such an extraordinary length of time to secure.

[8]*Trans-West Fruit Co., Inc. v. Americal*, 42 Agric. Dec. 1955 (1983).

[9]*Id.*, at 2013-14. Compare the following cases involving domestic shipments where too much time was found to have expired between arrival and subsequent inspection: *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992) [four days after arrival of pears]; *Dan R. Dodds v. Produce Products, Inc.*, 48 Agric. Dec. 682 (1989) [eight days after arrival of potatoes, citing case where seven days held too long]; *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975) [six days after arrival of potatoes]; *D.L. Piazza Co. v. Stacy Distributing Co.*, 18 Agric. Dec. 307 (1959) [four days after arrival of carrots]; *Vaughn-Griffin Packing Co. v. Thomas Aeozzo & Son*, 17 Agric. Dec. 1035 (1958) [five to six days after arrival of oranges]; *P. F. Likins Co. v. Walter Holm & Co.*, 10 Agric. Dec. 593 (1951) [extensive defects in tomatoes five days after arrival].

consequence of such violations." Such damages include interest.[10] 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.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $24,912.50, with interest thereon at the rate of 10% per annum from September 1, 1995, until paid, plus the amount of $300.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

PEAK VEGETABLE SALES v. NORTHWEST CHOICE, INC.
PACA Docket No. R-98-0129.
Decision and Order filed February 25, 1999.

Damages – Failure to establish.
Interest – Award for amount previously paid.

Respondent failed to establish damages because it did not submit an accounting of the resale of the commodity. No alternative method of assessing damages was found.
It was determined that Respondent owed Complainant $5,398.75 of the original $25,601.50 purchase price, since it already paid Complainant $19,617.25 when it filed its answer. Complainant's claim for interest on the $19,617.25 for the period between the original date on which it was due, and the date on which it was paid was granted. It was stated that the award of such interest is similar to the award of interest in connection with undisputed amount orders, and is in accord with precedent which views

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[10] *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).

[11] 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).

the authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."

George S. Whitten, Presiding Officer
Complainant, Pro se.
Respondent, Pro se.
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 $25,601.50 in connection with six transactions in interstate and foreign commerce involving potatoes.

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 in the amount claimed, but admitting liability for $19,617.25, and including a check to Complainant for that amount.

The amount claimed in the formal complaint does not exceed $30,000.00, 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. Neither party filed a brief.

Findings of Fact

1. Complainant, Peak Vegetable Sales, is a cooperative whose address is 1200 King Edward Street, Winnipeg, Manitoba, Canada.

2. Respondent, Northwest Choice, Inc., is a corporation whose address is 2513 LeMister Avenue, Wenatchee, Washington. At the time of the transactions involved herein Respondent was licensed under the Act.

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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).

3. On or about October 10, 1996, Trademark Produce, Inc., a broker, issued a confirmation of sale covering potatoes sold by Complainant to Respondent. The confirmation stated that the potatoes were to be shipped from "Man. Canada" on a delivered basis by truck, and further provided in relevant part as follows:

QUANTITY	DESCRIPTION	PRICE
30 (thirty) truck loads Potatoes each containing —		
850 ±	Canadian #1 50# ctn size A	$7.00/Ctn
	Potatoes - 2" to 3" - 2¼" 60% ↑	US Funds
	Russetted Variety	
Pricing included all fees to Calexico, CA		
	Protecting 25¢/ctn	

Shipping to begin at N.W. Choice instruction

NWChoice Reserves option for additional 60 loads - same terms

. . .

Peak to bill NWChoice Directly -

4. On October 11, 1996, Roy Vinke, Sales and Marketing Manager of Complainant, sent a letter to Dick Dehlinger of Trademark Produce, Inc., Bend, Oregon, the broker who negotiated the contract between Complainant and Respondent, memorializing the terms of the contract between the parties herein. The letter stated, in relevant part, as follows:

Please find listed below details regarding the sale of #1 A size 60% 21/4" up russets packed in 50# ctns.

- All transactions will be in U.S. funds.

- Pricing is as follows: $7.00 50# ctn delivered to Calexico, California and Nogales, Arizona.

- Brokerage of .25 per 50# ctn will be paid to Trademark Produce Inc.

- Trademark Produce Inc. will be required to invoice Peak of the Market brokerage on a per load basis stating bill of lading # for cross referencing. If you wish you can invoice more than one load per invoice provided each load is accompanied with our bill of lading #.

- All product will be federally inspected.

- Any potential claims must be filed within 48 hours from date of receipt.

- Claims filed must have a U.S. federal inspection to substantiate claim.

- Customs, duty, phyto certificates, Canadian inspection will be paid by Peak of the Market.

- Delivery dates of product will be upon mutual agreement.

5. On October 21, 1996, Respondent's Jeff Sutton wrote to Complainant's Roy Vinke confirming the contract. The letter stated, in relevant part, as follows:

. . .

As per our agreement the following terms shall be agreed upon by Northwest Choice Inc. and Peak Vegetable Sales.

1). Product is purchased based upon 50lb carton. Each carton containing Burbank or Norkotah Russets ranging in size from 90ct to 120ct with even blend of each size.

2). Product is purchased based upon a delivered price of $7.00 U.S. to San Diego, CA, Calexico, CA, Yuma, AZ. Customs, Duty, Phytosanitary, Canadian Inspection, and In Bond costs will be included in the delivered price.

3). All product will be accompanied with a Federal Inspection

4). Any potential claims must be filed within 48 hours from date of receipt with notification to Shipper. Claims must be accompanied with a USDA Federal inspection to substantiate claim. Shipper will authorize permission to call USDA Federal Inspection.

5). Delivery dates of product shall be mutually agreed upon between Shipper and Receiver on a load to load basis.

6). Payment Terms shall be established at 15 days from date of shipment unless otherwise agreed upon by Shipper and Receiver on a load to load basis.

. . .

6. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1389 [Inv. No. 18564], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 840 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/24/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant $4,536.00 of the original $5,880.00 invoice price.

7. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1390 [Inv. No. 18640], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/25/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant $4,483.00 of the original $5,810.00 invoice price.

8. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1392 [Inv. No. 18643], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at $7.00. The shipping date was stated to be 10/22/96. Complainant shipped 815 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/31/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 11/05/96. Respondent has paid Complainant $4,224.75 of the original $5,705.00 invoice price.

9. On October 26, 1996, Respondent issued a purchase order to Complainant, No. 1402 [Inv. No. 18641], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 10/28/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/28/96. The load arrived at the

U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 10/31/96. Respondent has paid Complainant $2,623.50 of the original invoice price of $5,810.00.

10. Following unloading, the potatoes covered by purchase order 1402 [Inv. No. 18641] were federally inspected at the place of business of California Pacific Fruit Co. on 10/31/96, at 1:40 p.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 50 °F	Potatoes	"Peak of the Market" Russet 50lbs	M B	18641	830 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	02	%	00	%		%	Quality (mechanical damage)	
	05	%	05	%		%	Soft Rot (3 to 6%)	Soft Rot is in early stages
	07	%	05	%		%	CHECKSUM	4 oz. To 14 oz., 2½ inch min dia.

GRADE: Fails to grade U.S. No 1 4oz or 2½ inch minimum only account condition

11. On November 19, 1996, Respondent issued a purchase order to Complainant, No. 1407 [Inv. No. 18718], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 11/21/96. Complainant shipped 600 cartons of size A, 60% 2¼" and larger, and 170 cartons of 110 count, Canadian No. 1 Russet potatoes on 11/20/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 11/22/96. Respondent has paid Complainant the entire original invoice price of $5,390.00.

12. On November 17, 1996, Respondent issued a purchase order to Complainant, No. 1412 [Inv. No. 19690], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at $7.00. The shipping date was stated to be 11/29/96. Complainant shipped 850 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 11/29/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, CA, on or about 12/03/96. Respondent has paid Complainant $2,897.00 of the original invoice price of $5,950.00.

13. Following unloading, the potatoes covered by purchase order 1412 [Inv. No. 19690] were federally inspected at the place of business of California Pacific Fruit Co. on 12/03/96, at 11:20 a.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 48 °F	Potatoes	"Peak of the Market" Russet Canada No. 1	C N	BL 19690	850 50lb Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	04	%	00	%		%	Quality (misshapen, mechanical damage)	4 oz. to 14 oz., 2½ inch min diameter.
	04	%	00	%		%	Fusarium Tuber Rot (Dry Type) (2 to 6%)	
	05	%	05	%		%	Soft Rot (2 to 8%)	Soft Rot is in early stages
	13	%	05	%		%	CHECKSUM	

GRADE: Fails to grade U.S. No 1, 4oz or 2½ inch min. diameter only account condition

14. The formal complaint was filed on May 27, 1997, which was within nine months after the causes of action herein accrued.

Conclusions

Respondent included a check for $19,617.25 with its answer. This leaves a total of $5,984.00, divided between five of the six loads, still in dispute between the parties. Basically, Respondent claims that Complainant failed to send correct paperwork as to some of the loads causing a delay in the loads crossing from the California destinations into Mexico, that sizing was incorrect for all the loads, and that, as to two of the loads, there was a breach in regard to condition on arrival in California. Respondent also claims that there was an agreement between the parties for adjustments on all of the loads.

Letters and memorandums were faxed by the parties to each other, and we have presumed receipt on the same day that such were dated. Both the October 10, broker's memorandum, and the October 11, letter from Complainant to Respondent, recite a size of A, 60 percent 2¼" and up. However the confirming

letter from Respondent to Complainant dated October 21, states that each carton is to contain 90ct to 120ct, with an even blend of each size. Respondent's purchase orders, the first three of which were dated October 21, simply stated that the pack was to be "50lb 90-120ct."[2] Respondent's November 7, and 8, letters to Complainant, in regard to the first four loads, all complain about the sizing of the potatoes. The size A, 60 percent 2¼" and up designation gives latitude for the shipments to have contained a mix that might have included potatoes that were both larger and smaller than the 90ct to 120ct designation. That they did contain such a mix was tacitly admitted by Complainant in a letter dated November 12, quoted below in part:

> A) Upon discussion with Dick Dehlinger of Trademark Produce Inc. he indicated that the product requested for sale to Mexico was #1 A size cartons. Based on Agriculture Canada specifications the product would be sized as 60% 2¼" and up. We found out that this was not the case at all well after the fact. We had already packed and shipped product when we were told that the product should be sized as a 120 - 90 count. This information was found out by contacting you direct rather than working through Trademark who is our representative for this deal.
>
> B) I also addressed on numerous occasions to both you and Dick that we were long on baker count russets. Both parties indicated that you would try to move the product for us. Both you and Dick indicated that there was no market for this product. I later found out on a three way call with your agent at the Mexican border and yourself that the bakers offered to you earlier were exactly what they wanted.

Complainant later characterized this as a verbal agreement between the parties that Complainant should continue to ship the size A, 60 percent 2¼" and up potatoes because Respondent's end user indicated that the product shipped was exactly what they wanted. However, we think it falls short of a verbal agreement. As the second paragraph of the letter quoted above says, Respondent and the broker were telling Complainant all along that there was no market for the "bakers." If, as Complainant represents, an end receiver in Mexico stated that the bakers were exactly what was

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[2]It is unlikely that Respondent meant what is literally stated in the October 11, letter, because the mixing of the 90 to 120ct sizes in each box would be both very unusual and difficult to accomplish. In any event, the parties do not raise or dispute this point, and we assume that Respondent's meaning was that there would be an even distribution of 90 to 120ct cartons of potatoes.

wanted, this does not change Respondent's demand that a different size be shipped. The dispute between Complainant and Respondent as to the size called for by the contract presents difficult and interesting issues of law, especially in light of the provisions of section 2–207 of the Uniform Commercial Code. However, in view of our conclusions hereafter in regard to Respondent's failure to substantiate damages it is not necessary that we decide these issues.

In regard to the loads covered by Findings of Fact 6 and 7, Respondent's invoices 1389 and 1390, Respondent claims that the parties agreed to an adjustment in the price at time of arrival consisting of a $1.00 per carton allowance, $.35 per carton storage fee, and a $.25 per carton brokerage fee. Respondent cites letters which it sent to Complainant on November 7, 1996, as documenting these adjustments to the invoice price. However, an examination of these letters shows that Respondent did not speak in terms of an agreement having been reached as to these charges, but rather as though it was unilaterally claiming the charges. We conclude that Respondent has failed to prove its contention that the adjustments claimed were agreed to by Complainant.

Complainant admits that incorrect paper work was sent to Respondent which caused delay in these loads crossing the border, however Complainant contends that this was caused by incorrect information being sent to Complainant by Respondent on the purchase orders. However, Complainant also admits that the correct information was at the bottom of the purchase orders, but was unnoticed by Complainant. Our examination of the purchase orders discloses that the pertinent information was in large print and clearly delineated. Complainant also claimed that incorrect import permit numbers were sent by Respondent as to these loads, but that Complainant kept no copy of the incorrect documents. We conclude that Complainant has failed to prove its contentions that the delay was caused by incorrect information being supplied by Respondent, and that Complainant caused the delay in these loads crossing the border into Mexico. Respondent has claimed that charges of $.35 per carton were incurred for storage at the border due to Complainant's failure to supply the correct paper work. This charge was not documented by Respondent, but Complainant, though it objected to paying the fee, did not contest its accuracy. The fee is modest and reasonable, and accordingly we will allow it.

Respondent has claimed the $1.00 per carton, not only as an agreed adjustment, but also as damages for Complainant's breach in causing untimely delivery into Mexico, and its alleged breach as to size. However, Respondent failed to establish this amount, or any other amount as damages since it failed to submit an accounting

of the resale of the potatoes.[3] Respondent only states that "[d]ue to the condition, sizing problem, delay in time which caused lost business to the end receiver in Mexicali, the end receiver has agreed to return $6.00 per carton." This totally fails to establish damages, and we know of no way to make any reasonable estimate of damages for these breaches, or alleged breaches.[4] Accordingly, the $1.00 claim is disallowed.

Respondent also claimed a $.25 per carton brokerage fee. Respondent admits that this was the "profit" which it negotiated in its sale of the loads to the end receiver. A profit can potentially be recovered in a proper calculation of damages, but this depends upon the applicable market price at time of arrival. There is no basis for Respondent to recover this claimed brokerage fee.

The invoice price of these two loads totaled $11,690.00. The $.35 per carton storage fee which we have allowed on these two loads amounts to $584.50. Respondent has already paid Complainant $9,019.00 on these two loads. This leaves $2,086.50 still due and owing as to the first two loads.

Respondent claims that the third load, covered by Finding of Fact 8, Respondent's purchase order 1392, was adjusted to $5.50. Complainant states that the adjustment was to $6.00. Respondent's letter of November 7, 1996, relative to this load confirms the $5.50 adjustment as having been granted orally at the time of arrival of the load in Mexico. Complainant replied on November 12, 1996, in a letter to Respondent, that it did not agree to a $5.50 adjustment, but to a $6.00 adjustment. We conclude that Respondent has failed to prove that a $5.50 adjustment was agreed to. For the same reasons as recited above relative to the

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[3]It is our policy, especially where parties are not represented by attorneys, as here, to consult applicable market reports in an attempt to assess damages. To this end we consulted the Los Angeles Wholesale Market Reports for October 28, 31, November 5, and December 3, 1996. These reports do not show sales of any potatoes from Canada, nor do they show any sales of U.S. size A potatoes (which must include 40% 2½" and larger instead of the Canadian requirement of 60% 2¼" and larger). They do show sales of 90, 100, and 120 count U.S. No. 1 Norkotahs from Nevada, Oregon, and Washington. The f.o.b. prices shown for these sizes average lower than the $7.00 per 50lb. carton delivered prices of the subject potatoes. This evidence would seem to indicate that Respondent was not harmed by the substitution of sizes. In any event, we have exhausted our ability to show damages assuming a breach by Complainant as to size.

[4]The usual measure of damages for accepted goods is the difference between the value of the goods accepted as shown by a prompt and proper resale of the goods, and the value the goods would have had if they had been as warranted. This latter figure is usually shown by applicable market reports. See UCC § 2-714(2) and *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric Dec 1643 (1979). We were also unable to show damages by a market price differential between the sizes. See note 3 *supra*.

first two loads Respondent is not entitled to a $.25 brokerage fee as to this load. Respondent's liability as to this load is $6.00 per carton, or $4,890.00. Respondent has already paid Complainant $4,224.75 of this amount which leaves $665.25 still due and owing as to this load.

As to the load covered by Findings of Fact 9 and 10, Respondent's purchase order 1402, Respondent in a letter dated November 8, 1996, memorialized a modification of the contract calling for the load to be purchased on an open basis with an accounting of sales to be provided by California Pacific Fruit Co. to Respondent, and by Respondent to Complainant. In its November 12, 1996, letter Complainant did not deny the agreement to sell this load on an open basis, but simply said: "[w]e are prepared to credit $1.00 per carton for this load." We conclude that the contract was modified to call for a sale on an open basis, with the promised accountings to be the basis for a future agreement as to the price. However, Respondent has not furnished an accounting from California Pacific Fruit Co., and the claimed accounting from Respondent is not an accounting. It does not break down the sales as to lots, nor does it disclose the dates on which the sales took place. It simply lists 830 cartons sold at $3.50, and deducts $74.00 for the inspection and $.25 per carton for brokerage. The inspection as to this load shows a breach of contract for a delivered sale of Canadian No. 1 product.[5] We could, therefore, use the inspection as a basis for computing damages.[6] However, the adjustment allowed by Complainant of $1.00 per package will be more favorable to Respondent. We find that Respondent's liability to Complainant as to this load is $4,980.00. Respondent has already paid Complainant $2,623.50, which leaves $2,356.50 still due from Respondent to Complainant on this load.

The parties agree that nothing remains due on the fifth load. As to the sixth load, covered by Findings of Fact 12 and 13, Respondent's purchase order 1412, Complainant granted Respondent a credit of $2,762.50. Complainant has been paid the remaining amount by Respondent except for a deduction of $.25 per carton for brokerage. This deduction is unwarranted for the reasons already stated as to the first two loads. Respondent still owes Complainant $290.50 as to this load.

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[5]Canadian standards allow a 2% maximum tolerance at destination for soft rot.

[6]See *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *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 total that we have found due and owing from Respondent to Complainant is $5,398.75. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Damages have been held to 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] However, Complainant contends that Respondent should be required to pay interest, not just on the $5,398.75 we have found due, but also on the $19,617.25 which it paid with its answer. Complainant contemplates that this interest would run for the period for which such amount was withheld. We agree. If Respondent had admitted in its answer that the $19,617.25 was due, but had not tendered the check for that amount, we would have issued an award in Complainant's favor for the $19,617.25 as an undisputed amount.[9] Such an award would have included interest. What Complainant asks us to do in this case does not differ greatly from the award of interest in an undisputed amount order. The award would be in keeping with our precedent which views our authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."[10] Also, the award of interest in this situation will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued. Of course, a Respondent will not be prohibited from negotiating an early payment which, by specific written agreement with the Complainant, could be made not subject to an interest award. Complainant, in this case, claims interest at the rate of 24 percent. However, we have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

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[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).

[9] See 7 U.S.C. 499g(a), and 7 C.F.R. § 47.8(b).

[10] 7 U.S.C. 499e(a).

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, $5,398.75, with interest thereon at the rate of 10% per annum from December 1, 1996, until paid, plus the amount of $300.

Within 30 days from the date of this Order Respondent shall also pay to Complainant interest at the rate of 10% per annum on the sum of $19,617.25 for the period from December 1, 1996, to September 1, 1997.

Copies of this order shall be served upon the parties.

Ta-De DISTRIBUTING COMPANY, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0052.
Decision and Order filed June 1, 1999.

Contracts - Intent of the Parties.

Where the parties to a contract covering tomatoes imported from Mexico agreed, following their arrival at destination, to the tomatoes being handled pursuant to the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico (termed the "Commerce Dept. Rules"), it was held that, although such rules used portions of the accustomed terminology of the Uniform Commercial Code, this Department's Regulations, and decisions under the Act in a way that is foreign to the usual meaning accorded those terms, the Secretary would seek to give effect to the intent of the parties as evidenced by their agreement to abide by such rules. Accordingly the "Commerce Dept. Rules" were interpreted in a manner deemed to be consistent with the intended meaning of such rules rather than in accord with the meaning usually accorded to the terms used therein.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
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 $41,364.50 in connection with four transactions in interstate commerce involving tomatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint exceeds $30,000.00, 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. 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, Ta-De Distributing Company, Inc., is a corporation whose address is P. O. Box 1486, Nogales, Arizona.

2. Respondent, R. S. Hanline & Co., Inc., is a corporation whose address is P. O. Box 494, Shelby, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about March 9, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number TFL-6673 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04244; Purchase Order No. 61125

616 ctns.	4x5 Western Pride brand vine ripe	at $7.00 per ctn.	$ 4,312.00
264 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,320.00
880 ctns.	5x5 Western Pride brand vine ripe	at 6.00 per ctn.	5,280.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	440.00
1,760 ctns.			$11,375.50

4. On March 12, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TLF-6673 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268485 - 0

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" tade-Dist. 5x6	MX	Arizona 11 20 309	264 Cartons	Y
B	52 to 60 °F	TOMATOES	"Western" tade-Dist. 4x5	MX	Arizona 11 20 309 or 7300 104	616 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	12 %	04 %	01 %	quality defects (10 to 15%) scars, insects, misshapen.	Average 15% turning and pink, 80% light red to red,
	01 %	01 %	00 %	internal discoloration.	Size average 2 9/32 to 2 20/32 inches in diameter
	02 %	00 %	00 %	sunburn	
	05 %	02 %	00 %	bruising	
	09 %	03 %	01 %	sunken discolored areas (7 to 12%)	
	00 %	00 %	00 %	soft	
	03 %	03 %	03 %	Decay	
	32 %	13 %	05 %	CHECKSUM	
B	14 %	06 %	02 %	quality defects (10 to 20%) scars, insects, misshapen.	Average 20% turning to pink; 75% light red to red.
	02 %	02 %	00 %	internal discoloration	Size average 2 24/32 to 3 12/32 inches in diameter.
	03 %	00 %	00 %	sunburn	
	06 %	01 %	00 %	bruising	
	09 %	04 %	01 %	sunken discolored areas (5 to 13%).	
	00 %	00 %	00 %	soft	

04	%	04	%	04	%	Decay	Each lot decay mostly advanced, some in early to moderate stages.
38	%	17	%	07	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on another lot of tomatoes also in load see Certificate K268486.

K-268486 - 8

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" dist. by tade-dist. Nogales, Arizona stamped (5x5)	MX	Arizona 11 20 309 or 3230 309 or 9230307	880 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
	14	%	06	%	02	%	quality defects (8 to 20%) scars, insects, misshapen	
	01	%	01	%	00	%	internal discoloration	
	01	%	00	%	00	%	sunburn	Average 40% turning to pink; 55% light red to red.
	06	%	02	%	00	%	bruising (4 to 10%)	
	10	%	04	%	02	%	sunken discolored areas (8 to 14%)	
	00	%	00	%	00	%	soft	
	04	%	04	%	04	%	Decay (0 to 6%) mostly advanced, some in early to moderate stages.	Size ranges 2 14/32 to 3 inches in diameter Practically no undersize.
	36	%	17	%	08	%	CHECKSUM	

GRADE: Fails to grade US No 1 only account of grade defects.

REMARKS: For inspection on remainder of load see certificate K 268 485

5. On March 19, 1998, 80 cartons of the size 5x6 tomatoes, stated to be from truck license TLF 6673 OH, were federally inspected at the place of business of Respondent and found to contain 4 percent serious damage by sunburn, 5 percent damage, including 3 percent serious damage by bruising, 33 percent damage, including 25 percent serious damage, including 18 percent very serious damage by sunken discolored areas (ranging from 17 to 42 percent), 5 percent soft, and 48 percent decay (range 33 to 67 percent, stated to be mostly early to moderate stages, many advanced). On the same day 297 cartons of the size 4x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 13 percent), 8 percent damage, including 3 percent serious damage by bruising (range 0 to 13 percent), 26 percent damage, including 21 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 18 to 38 percent), 4 percent soft, and 33 percent decay (range 20 to 50 percent). On the same day 298 cartons of the size 5x5 tomatoes, said to be from the same truck, were found to contain 5 percent serious damage by sunburn, 8 percent damage, including 6 percent serious damage by bruising (range 0 to 14 percent), 14 percent damage, including 13 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 30 percent), 6 percent soft, and 62 percent decay.

6. On or about March 11 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P05784 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04330; Purchase Order No. 61134

528 ctns.	4x5 Azteca brand vine ripe	at $7.00 per ctn.	$ 3,695.00
880 ctns.	5x5 Azteca brand vine ripe	at 7.00 per ctn.	6,160.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	352.00
1,408 ctns.			$10,231.50

7. On March 13, 1998, at 12:45 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 05784 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. A certificate of the inspection revealed, in relevant part, as follows:

K - 268490 - 0

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	50 to 54 °F	TOMATOES	"AZTECA" TA-DE-Dist. Co.	MX	4x5-40 Count	528 Cartons	Y

B	49 to 58 °F	TOMATOES	"AZTECA" TA-DE-Dist. Co.	MX	5x5-50 Count	880 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	11	%	05	%	01	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% green to breakers, 30% turning to pink, 55% light red to red.
	02	%	02	%	00	%	internal discoloration.	Size ranges 3 to 3½ inches in diameter. No undersize
	04	%	00	%	00	%	sunburn	
	11	%	04	%	02	%	sunken discolored areas (8 to 18%)	
	08	%	02	%	00	%	bruising (3 to 13%)	
	01	%	01	%	01	%	soft	
	06	%	06	%	06	%	Decay (3 to 15%)	
	43	%	20	%	10	%	CHECKSUM	
B	10	%	04	%	01	%	quality defects (6 to 14%) scars, growth cracks, misshapen.	
	04	%	00	%	00	%	sunburn	
	07	%	03	%	01	%	sunken discolored areas (4 to 10%).	
	10	%	02	%	00	%	bruising (2 to 20%)	
	02	%	02	%	02	%	soft	
	04	%	04	%	04	%	Decay	
	37	%	15	%	08	%	CHECKSUM	

GRADE: A lot fails to grade U.S. No. 1 account of grade defects. B lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection of 5x6's also in load see Certificate K268491.

8. On March 23, 1998, 294 cartons of the size 4x5 tomatoes, stated to be from truck license P 05784 IN, were federally inspected at the place of business of Respondent and found to contain 9 percent serious damage by bruising (range 5 to 13 percent), 32 percent damage, including 29 percent serious damage, including 20 percent very serious damage by sunken discolored areas (range 20 to 45 percent), and 53 percent decay. On the same day 245 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 6 percent serious damage by bruising (range 0 to 10 percent), 30 percent damage, including 25 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 0 to 60 percent), and 58 percent decay.

9. On or about March 11, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P10807 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04331; Purchase Order No. 61135

352 ctns.	4x5 Western Pride brand vine ripe	at $7.00 per ctn.	$ 2,464.00
880 ctns.	5x5 Western Pride brand vine ripe	at 5.00 per ctn.	4,400.00
352 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,760.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	396.00
1,584 ctns.			$9,043.50

10. On March 16, 1998, at 10:50 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 10807 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268494 - 2

LOT	TEMPERATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	53 to 54 °F	TOMATOES	"Western" tade-dist. 5x5	MX	ARIZONA	880 Cartons	Y
B	53 to 55 °F	TOMATOES	"Western" tade-dist. 4x5	MX	INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	08	%	03	%	01	%	quality defects (6 to 14%) scars, misshapen, insect damage.	Average 55% turning to pink, 45% light red to red,

	01	% 00	% 00	%	sunburn	Size ranges 2½ to 3 inches in diameter
	01	% 01	% 01	%	internal discoloration	
	06	% 01	% 00	%	bruising (4 to 8%)	
	11	% 05	% 02	%	sunken discolored areas (6 to 14%)	
	00	% 00	% 00	%	soft	
	02	% 02	% 02	%	Decay	
	29	% 12	% 06	%	CHECKSUM	
B	10	% 05	% 02	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% turning to pink; 85 % light red to red.
	03	% 03	% 03	%	internal discoloration	Size range 2¾ to 3¼ inches in diameter
	10	% 03	% 00	%	bruising (5 to 18%)	
	14	% 05	% 03	%	sunken discolored areas (8 to 25%)	
	00	% 00	% 00	%	soft	
	07	% 07	% 07	%	Decay (3 to 13%) mostly early to moderate stages, some advanced	
	44	% 23	% 12	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection on 5x6's also in load see Certificate K268495.

K-268495 - 9

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	52 to 54 °F	TOMATOES	"Western" tade dist.5x6	MX	ARIZONA INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
	08	%	04	%	02	%	quality defects (7 to 10%) scars, misshapen	Average 5% turning to pink; 95% light red to red.
	02	%	00	%	00	%	sunburn	
	03	%	03	%	03	%	internal discoloration	Size ranges 2 4/32 to 2¾ inches in diameter
	06	%	02	%	00	%	bruising (3 to 8%)	
	14	%	06	%	02	%	sunken discolored areas (10 to 20%)	
	00	%	00	%	00	%	soft	
	02	%	02	%	02	%	Decay	
	35	%	17	%	09	%	CHECKSUM	

GRADE: Fails to grade US No 1 only account of condition.

REMARKS: For inspection on 4x5's and 5x5's also in load see certificate K 268 494

11. On March 23, 1998, 147 cartons of the size 4x5 tomatoes, stated to be from truck license PI 10807 IN, were federally inspected at the place of business of Respondent and found to contain 5 percent damage, including 4 percent serious damage by bruising, 17 percent damage, including 13 percent serious damage, including 9 percent very serious damage by sunken discolored areas (ranging from 0 to 35 percent), and 75 percent decay (range 50 to 100 percent). On the same day 306 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 7 percent serious damage by bruising (range 4 to 10 percent), 6 percent damage, including 4 percent serious damage by sunburn (range 2 to 10 percent), 37 percent damage, including 32 percent serious damage, including 24 percent very serious damage by sunken discolored areas (range 3 to 48 percent), and 47 percent decay (range 40 to 60 percent). On the same day 171 cartons of the size 5x6 tomatoes, said to be from the same truck, were found to contain 12 percent damage, including 10 percent serious damage by bruising (range 0 to 20 percent), 23 percent damage, including 20 percent serious damage, including 14 percent very serious damage by sunken discolored areas (range 0 to 40 percent), and 55 percent decay (range 30 to 100 percent).

12. On or about March 12, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck

with license number TIR 1243 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04392; Purchase Order No. 61153

264 ctns.	4x5 Azteca brand vine ripe	at	$7.00 per ctn.	$ 1,848.00
704 ctns.	5x5 Azteca brand vine ripe	at	5.00 per ctn.	3,520.00
704 ctns.	4x5 Western Pride brand vine ripe	at	7.00 per ctn.	4,928.00
	Buying Brokerage		.25 per ctn.	418.00
1,672 ctns.				$10,714.00

13. On March 16, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TIR-1243 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268493 - 4

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"AZTECA" tade-dist. 5x5	MX		704 Cartons	Y
B	47 to 50 °F	TOMATOES	"Western" tade-dist. 4x5	MX	Arizona 595-0311 on many top layer cartons	704 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	13	%	06	%	03	%	quality defects (10 to 16%) growth cracks, scars, misshapen.	Average 5% green to breakers 35% turning to pink, 55% light red to red,
	04	%	00	%	00	%	sunburn	Size ranges 2¾ to 3 inches in diameter
	06	%	02	%	00	%	bruising (4 to 8%)	
	09	%	04	%	01	%	sunken discolored areas (6 to 12%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	
	35	%	15	%	07	%	CHECKSUM	

B	11	%	05	%	02	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 15% turning to pink; 80 % light red to red.
	01	%	01	%	00	%	internal discoloration	Size average 3 to 3½ inches in diameter
	08	%	02	%	00	%	bruising (3 to 13%)	
	16	%	07	%	03	%	sunken discolored areas (8 to 25%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	
	39	%	18	%	08	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on remaining lots also in load see Certificate K268492.

K - 268492 - 6

LOT	TEMPER-ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"SUN" [?] Sales 4x5	MX		88 Cartons	Y
B	48 to 50 °F	TOMATOES	"AZTECA" TA-De-Dist. 4x5	MX		264 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	08	%	03	%	00	%	quality defects (5 to 10%) scars, growth cracks.	Average 35% turning to pink, 60% light red to red,
	10	%	00	%	00	%	sunburn (8 to 13%)	Each lot size ranges 3 to 3¼ inches in diameter. No undersize.
	08	%	08	%	04	%	internal discoloration (0 to 15%)	
	12	%	04	%	02	%	sunken discolored areas (8 to 15%)	
	12	%	03	%	00	%	bruising (10 to 15%)	
	00	%	00	%	00	%	soft	
	03	%	03	%	03	%	Decay	

	53	% 21	% 09	%	CHECKSUM	
B	09	% 04	% 02	%	quality defects (5 to 10%) scars, growth cracks.	Average 15% green to breakers; 15% turning to pink; 55 % light red to red.
	02	% 00	% 00	%	sunburn	Size each lot ranges 3 to 3¼ inches in diameter. No undersize.
	09	% 04	% 01	%	sunken discolored areas (8 to 13%)	
	09	% 03	% 00	%	bruising (0 to 13%)	
	02	% 02	% 02	%	soft	
	14	% 14	% 14	%	Decay	
	45	% 27	% 19	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of condition.

REMARKS: For inspection on other lots also in load see Certificate K268493.

14. On March 25, 1998, 80 cartons of the size 4x5 Azteca brand tomatoes, stated to be from truck license TIR 1243 OH, were federally inspected at the place of business of Respondent and found to contain 9 percent damage, including 7 percent serious damage by sunburn (range 5 to 13 percent), 9 percent damage, including 7 percent serious damage by bruising (range 5 to 13percent), 25 percent damage, including 21 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 20 to 30 percent), 10 soft (range 5 to 13 percent), and 45 percent decay (range 38 to 50 percent). On the same day 29 cartons of the size 4x5 "Sun I" tomatoes, stated to be from the same truck, were found to contain 93 percent decay (range 83 to 100 percent). On the same day 331 cartons of the size 4x5 "Western" brand tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 10 percent), 6 percent damage, including 5 percent serious damage by bruising (range 0 to 10 percent), 20 percent damage, including 17 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 33 percent), 8 percent soft (range 3 to 10 percent), and 57 percent decay (range 40 to 83 percent). On the same day 154 cartons of the size 5x5 "Azteca" brand tomatoes, said to be from the same truck, were found to contain 6 percent damage, including 4 percent serious damage by sunburn (range

0 to 10percent), 11 percent damage, including 8 percent serious damage by bruising (range 8 to 15 percent), 28 percent damage, including 24 percent serious damage, including 17 percent very serious damage by sunken discolored areas (range 15 to 38 percent), and 55 percent decay (range 38 to 75 percent).

15. The formal complaint was filed on July 27, 1998, which was within nine months after the causes of action therein accrued.

Conclusions

The contract between Complainant and Respondent was negotiated by Donna Allender of Nikademos Distributing Co., Inc. Ms. Allender maintained that following arrival of the tomatoes, and notice to Complainant of the inspection results, Complainant's Robert Bennen, Jr. agreed to the tomatoes being handled according to Commerce Department rules.[1] There has been no allegation in this proceeding that adherence to Commerce Department rules was a part of the terms of the original contract between Complainant and Respondent. However, this is not the issue raised by Ms. Allender. Rather, Ms. Allender alleges a modification of the original contract, following acceptance of the tomatoes by Respondent, that allowed Respondent to handle the tomatoes under the rules of the suspension agreement.

Complainant denied that there was any such agreement, and submitted the affidavit of Robert L. Bennen, Jr. in support of this denial. Mr. Bennen stated:

> Due to the slight condition problems upon arrival, I advised the broker, Donna Allender, of Nikademos Distributing Company, Inc., to tell R. S. Hanline & Co., Inc. to do the best they could with the tomatoes. At no time did I grant authorization for consignment handling or to have the tomatoes reworked.

In a letter to this Department which is a part of the Report of Investigation Ms. Allender strongly contended that Mr. Bennen, Jr. did agree to the handling of the tomatoes, and, in support of her allegation, pointed to corrected memorandums of

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[1]The reference is to the October 28, 1996 Suspension Agreement signed by Mexican growers/exporters of tomatoes [Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, Federal Register: November 1, 1996 (Volume 61, Number 213], as clarified May 2, 1997. Under the suspension agreement the Mexican growers/exporters agreed that certain terms and conditions would apply to the first sale of tomatoes exported to the U.S., through the first handler (importer/broker), and to the first purchaser.

sale which she issued as to each load of tomatoes. These corrected memorandums were dated on the same day as the first inspection of each of the loads, and contained words identical to or similar to the following: "Will handle as to Commerce Dept. Rules." Complainant never denied receipt of these corrected memorandums, and did not object to them until March 24, 1998, or twelve days after the issuance of the first corrected memorandum. We conclude on the basis of all the evidence of record that the parties agreed to the four loads being handled according to Commerce Department rules.

The relevant Commerce Department rules are those contained in the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico. The pertinent portion of the Clarification states as follows:

> If the USDA inspection indicates that the lot has: 1) over 8% soft/decay condition defects, or 2) over 15% of any one condition defect, or 3) greater than 20% total condition defects, the receiver may reject the lot or may accept a portion of the lot and reject the quantity of tomatoes lost during the salvaging process. In those instances, price adjustments will be calculated as described below. For these purposes, a condition defect is defined as any defect cited by USDA on an inspection certificate that is not specifically identified as a quality defect. When a lot of tomatoes has condition defects in excess of those outlined above as documented on an inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes.
>
> A USDA inspection certificate must be provided to support claims for rejection of all or part of a lot.
>
> . . .
>
> In calculating the transaction price for lots subject to an adjustment claim for condition defects, as defined above, the tomatoes classified as DEFECTIVE will be treated as rejected and as not having been sold.
>
> . . .
>
> The price invoiced to and paid by the receiver for the accepted tomatoes must not fall below the reference price.

The shipper may reimburse the receiver for actual destruction costs associated with the DEFECTIVE tomatoes. These expenses will not be considered in the calculation of the price for the accepted tomatoes.

The shipper may reimburse the receiver for the expenses, associated directly with salvaging and reconditioning the lot (e.g., inspection fees and repacking charges) calculated as follows:

If the salvaging and reconditioning activity is performed by a party unaffiliated with the receiver, the inspection fee and the fee charged for the service may be reimbursed.

If the salvaging and reconditioning activity is performed by the receiver or a party affiliated with the receiver, the inspection fee and either the direct labor costs or, in lieu thereof, one-half of the ordinary and customary repacking charges may be reimbursed.

Any reimbursements from, by, or on behalf of the shipper which are not specifically excepted above will be factored into the calculation of the price for the accepted tomatoes by the Department.

The receiver may not resell the DEFECTIVE tomatoes. The receiver may choose to have the DEFECTIVE tomatoes destroyed, donated to non-profit food banks, or returned to the shipper. The DEFECTIVE tomatoes may not be sold to a processor.

. . .

It is evident that this Commerce Department document uses the term "reject," and its variants, in a way that is foreign to the Uniform Commercial Code, this Department's Regulations, and to our decisions under the Perishable Agricultural Commodities Act.[2] Nevertheless, we must attempt to give effect to the intent of the

[2]In the usual sense of the word a rejection entails a reversion of title back to the seller. UCC § 2-401(4). Following a rejection a buyer has no duties relative to the rejected goods (except to hold them for a sufficient time for the seller to remove them) unless the seller has no agent or place of business at the market of rejection, and if such agent or place of business does not exist, then the obligation of the buyer is to follow whatever reasonable instructions for the disposition of the goods may be given (continued...)

parties herein as evidenced by their agreement to abide by the "rules" expressed in this document.[3] The "rules" appear to us to contemplate that the receiver may take possession of a load, have the tomatoes promptly inspected, rework the tomatoes if they do not conform to the condition standards stated in the "rules," and dump the tomatoes lost in reworking. It appears that a separate inspection must be made of the actual tomatoes that are candidates for dumping. As to the term "reject" as used in the "rules," we interpret the meaning, in most instances, to be to give notice of a breach.

The first load of tomatoes contained three lots consisting of 616 cartons of size 4x5's, 264 cartons of size 5x6's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 24 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty,[4] and also exceeds the amount of condition defects allowed under the

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[2](...continued)
by the owner of the goods (the seller), or in the absence of such instructions to make a reasonable effort to sell perishables for the seller's account. Following rejection, the buyer is held only to good faith standards in dealing with the seller's goods. UCC § 2-602 and 603. A request by the seller that the goods be salvaged by reworking would be unreasonable, unless the buyer's business were set up to do reworking, and if it were not, it would clearly be only within the province of the seller to arrange for a reworking of what, by rejection, would now be the seller's goods. Also, for the buyer to rework the goods without the seller's permission would, itself, be an act of acceptance. UCC § 2-606. Once goods are rejected the burden of proof is on the seller to show that the goods were conforming, and not upon the buyer to show that the rejection was justified. *Daniel P. Crowley, et al. v. Calflo Produce, Inc.*, 55 Agric. Dec. 674 (1996) and UCC § 2-607(4). Furthermore, under the UCC, a commercial unit must be accepted or rejected in its entirety (UCC 2-606(2)), and this Department's Regulations have defined "commercial unit" for the produce industry as, generally speaking, truckload and carlot quantities. 7 C.F.R. §46.43(ii). See also *Primary Export International v. Blue Anchor, Inc.*, PACA Docket R-95-037, decided Feb. 11, 1997, 56 Agric. Dec. ____ (1997). However, under UCC § 1-102(3), the effect of the provisions of the Code may, for the most part, be varied by the parties.

[3]See *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, at note 18 (1997).

[4]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) 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 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 rule is based upon case law predating the adoption of the Regulations. See Williston, (continued...)

May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 297 cartons of the original 616 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 319 cartons not dumped, or $2,312.75.

The 264 cartons of 5x6 tomatoes were found to have only 20 percent condition defects which does not constitute a breach of contract under the "rules." Therefore the entire original contract price of $5.25 per carton, or $1,386.00 is due as to this lot of tomatoes.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 298 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $6.25 contract price for the 582 cartons not dumped, or $3,637.50. The total we have found due for the three lots is $7,336.25. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $7,359.25. Respondent is

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[4](...continued)
Sales § 245 (rev. ed. 1948). 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 make good delivery. 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). 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. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 595 cartons that were dumped, or $714.00 plus the cost of the two inspections or $316.00, for total deductions of $1030.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,615.25.

The second load of tomatoes contained two lots consisting of 528 cartons of size 4x5's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 32 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 294 cartons of the original 528 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 234 cartons not dumped, or $1,696.50.

The size 5x5 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 245 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 635 cartons not dumped, or $4,603.75. The total we have found due for the two lots is $6,300.25. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $6,323.25. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 539 cartons that were dumped, or $646.80, plus the cost of two inspections, or $386.50, for a total deduction of $1033.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,289.95.

The third load of tomatoes contained three lots consisting of 352 cartons of size 4x5's, 880 cartons of size 5x5's, and 352 cartons of size 5x6's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 34 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the

tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 147 cartons of the original 352 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 205 cartons not dumped, or $1,486.25.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 21 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 306 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 574 cartons not dumped, or $3,013.50.

The size 5x6 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 171 cartons of the original 352 cartons of 5x6 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 181 cartons not dumped, or $950.25. The total we have found due for the three lots is $5,450.00. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $5,473.00. Respondent is entitled to a deduction from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 624 cartons that were dumped, or $748.80 plus the cost of two inspections or $305.50, for a total deduction of $1054.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $4,395.70.

The fourth load of tomatoes contained three lots consisting of 264 cartons of size 4x5 Azteca brand, 704 cartons of size 5x5's, and 704 cartons of size 4x5 Western Pride brand. The size 264 cartons of 4x5 Azteca brand tomatoes were found by a prompt inspection to have a total of 36 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 80 cartons of the original 264 cartons of 4x5 Azteca brand tomatoes.

Under the "rules" Complainant is entitled to the $7.25 contract price for the 184 cartons not dumped, or $1,334.00.

The 704 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 154 cartons of the original 704 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the $5.25 contract price for the 550 cartons not dumped, or $2,887.50.

The 704 cartons of size 4x5 Western Pride brand tomatoes were found by a prompt inspection to have a total of 28 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 331 cartons of the original 704 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the $7.25 contract price for the 373 cartons not dumped, or $2,704.25. The total we have found due for the three lots is $6,925.75. Complainant is also entitled to the $23.00 cost of the Cox temperature recorder, for a total of $6,948.75. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of $1.20 per carton, applicable to the 565 cartons that were dumped, or $678.00 plus the cost of two inspections or $309.00, for a total deduction of $987.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is $5,961.75.

The total we have found due and owing from Respondent to Complainant is $21,262.65. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty,

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[5] *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).

where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $23,316.65, with interest thereon at the rate of 10% per annum from April 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

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[6]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).

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Decision and Order filed May 17, 1999.

Motion to withdraw complaint — With prejudice — Without prejudice — Federal Rules of Civil Procedure.

The Judicial Officer affirmed the dismissal without prejudice by Administrative Law Judge Dorothea A. Baker. The Judicial Officer rejected Respondent's and Petitioners' contention that an administrative law judge who grants a litigant's motion to withdraw a complaint without prejudice allows the movant to control the hearing date; rejected Respondent's and Petitioners' contention that dismissal of the Complaint without prejudice will necessarily deprive them of an adjudication on the merits; and rejected Respondent's and Petitioners' contention that they will suffer legal prejudice if Complainant is allowed to re-file the Complaint.

Kimberly D. Hart, for Complainant.
Stephen P. McCarron, Washington, D.C., for Fresh Prep, Inc., and Mary Lech.
Richard G. Tarlow, Calabasas, California, for Michael Raab.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 20, 1998.

The Complaint: (1) alleges that Fresh Prep, Inc. [hereinafter Respondent], engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995 (Compl. ¶ III); and (2) requests a finding that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order revoking Respondent's PACA license (Compl. at 4).

Respondent filed Answer to Complaint on March 18, 1998, in which it denied the material allegations of the Complaint and asserted affirmative defenses. On July 20, 1998, Complainant filed a Motion to Assign a Date for Oral Hearing, and on July 31, 1998, Respondent filed a Motion for In-Person Oral Hearing and a Memorandum in Support of Motion for In-Person Oral Hearing.

On August 25, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a pre-hearing conference with Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., who represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., who represented Respondent. Complainant and Respondent agreed that the hearing would commence January 26, 1999 (Notification to Parties of Certification and Summary, filed February 26, 1999 [hereinafter Certification and Summary], at 2), and on August 26, 1998, the ALJ issued an order scheduling the hearing to commence January 26, 1999 (Designation of Oral Hearing Date). On December 2, 1998, the ALJ, "with agreement of the parties," changed the date of hearing to commence February 9, 1999 (Change in Oral Hearing Date From January 26, 1999 to February 9, 1999).

On January 20, 1999, pursuant to section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)), the ALJ consolidated *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, with *In re Mary Lech*, PACA-APP Docket No. 99-0001, and *In re Michael Raab*, PACA-APP Docket No. 99-0002. The ALJ's order consolidating the three proceedings provides that the hearing for the consolidated proceeding would commence February 9, 1999 (Notification to the Parties).

On February 5, 1999, Complainant requested a continuance arguing that Respondent's counsel had raised an "alternative defense theory" in a meeting held with Complainant's counsel on January 15, 1999, and Complainant was unable to investigate the merits of Respondent's "alternative defense theory" prior to the date of the scheduled hearing. The ALJ denied Complainant's request for a continuance. (Certification and Summary at 5.)

On February 5, 1999, after the ALJ denied Complainant's request for a continuance, Complainant filed Complainant's Request for a Voluntary Dismissal Without Prejudice of the Administrative Complaint [hereinafter Motion to Withdraw Complaint]. On February 8, 1999, the ALJ canceled the hearing scheduled for February 9, 1999 (Cancellation of Oral Hearing), and gave the parties until February 17, 1999, to respond to Complainant's Motion to Withdraw Complaint (Response Time as to Motion to Dismiss Without Prejudice).

On February 17, 1999: (1) Complainant filed Complainant's Brief in Support of Voluntary Dismissal Without Prejudice of the Administrative Complaint; and (2) Respondent and Petitioner Lech filed a Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice and Affidavit of Stephen P. McCarron, seeking dismissal of the Complaint with prejudice.

On February 18, 1999, the ALJ gave the parties an opportunity to file responses to the February 17, 1999, filings (Additional Filing Time). On February 25, 1999:

(1) Respondent and Petitioner Lech filed (a) Reply to Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice, and (b) Limited Objection to Complainant's Request for Dismissal Without Prejudice and Request for Dismissal With Prejudice; (2) Petitioner Raab filed Notice of Objection to Dismissal Without Prejudice; and (3) Complainant filed (a) Complainant's Reply to Memoranda Filed by Respondent and Petitioner Michael Raab Regarding Complainant's Motion for Voluntary Dismissal Without Prejudice, and (b) Affidavit of Kimberly D. Hart.

On February 26, 1999, pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)), the ALJ certified Complainant's Motion to Withdraw Complaint to the Judicial Officer (Certification to Judicial Officer), stating that the question for determination and certification is whether the Complaint should be dismissed with prejudice or dismissed without prejudice. On March 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's Certification to Judicial Officer.

On March 11, 1999, I issued a ruling stating that Complainant's Motion to Withdraw Complaint, filed February 5, 1999, should be granted, and the Complaint, filed February 20, 1998, should be dismissed without prejudice. *In re Fresh, Prep, Inc.*, 58 Agric. Dec. ___, slip op. at 12 (Ruling on Certified Question).

On March 11, 1999, the ALJ issued a Dismissal of Complaint, which states in its entirety, as follows:

> In accordance with the Judicial Officer's "Ruling on Certified Question," the Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted and the Complaint filed in *In re: Fresh Prep[,] Inc.*, PACA Docket No. D-98-0014, is dismissed without prejudice.

On April 12, 1999, Respondent and Petitioner Lech and Petitioner Raab [hereinafter Petitioners] appealed to the Judicial Officer; on May 3, 1999, Complainant filed Complainant's Response to Appeal Petition of Respondent, Petitioners Mary Lech and Michael Raab [hereinafter Complainant's Response]; and on May 4, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's Dismissal of Complaint. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Dismissal of Complaint as the final Decision and Order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent and Petitioners raise four issues in Appeal Petition of Respondent and Petitioner Mary Lech [hereinafter Appeal Petition] and Notice of Joinder of Petitioner Michael Raab in Respondent Fresh Prep's Appeal Petition. First, Respondent and Petitioners contend that the ALJ's Dismissal of Complaint violates the Administrative Procedure Act (5 U.S.C. § 554), the Rules of Practice, and the Due Process Clause of the Fifth Amendment to the United States Constitution because the ALJ's Dismissal of Complaint unlawfully allows Complainant to control the hearing date (Appeal Pet. at 1-8).

I disagree with Respondent's and Petitioners' contention that an administrative law judge, who grants a litigant's motion to withdraw a complaint without prejudice, allows the movant to control the hearing date.

The Administrative Procedure Act provides that employees presiding at hearings may regulate the course of the hearing, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—
>
> . . . .
>
> (5) regulate the course of the hearing[.]

5 U.S.C. § 556(c)(5).

Sections 1.141(b)(1) and 1.144(c)(2) of the Rules of Practice provide that the administrative law judge assigned to a proceeding shall have the power to set the time of the hearing, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (b) *Time, place, and manner.* (1) If any material issue of fact is joined

by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing. . . . [Footnote omitted.] If any change in the time, place, and manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

. . . .

§ 1.144 Judges.

. . . .

(c) *Powers.* Subject to review as provided elsewhere in this part, the Judge, in any assigned proceeding, shall have power to:

. . . .

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing[.]

7 C.F.R. §§ 1.141(b)(1), .144(c)(2).

The record establishes that the ALJ set the time of the hearing in this proceeding. While the ALJ's Dismissal of the Complaint resulted in the cancellation of the scheduled hearing, Complainant had no control over the ruling that the ALJ would issue and, if the ALJ had denied Complainant's Motion to Withdraw Complaint, the hearing would have been held as scheduled, barring any change in the time of the hearing by the ALJ. Moreover, if Complainant re-files the Complaint in the future, the administrative law judge assigned to the new proceeding will set the time for any hearing.

Second, Respondent and Petitioners disagree with the policy reasons which I identified in *In re Fresh Prep, Inc.*, 58 Agric. Dec. ___ (Mar. 11, 1999) (Ruling on Certified Question), as the basis for my view that generally a complainant in a proceeding under the Rules of Practice should be allowed to withdraw the complaint without prejudice (Appeal Pet. at 5-7).

I identified three policy reasons for my view, as follows:

The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstitute the proceeding should be preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to complainant issued by an administrative law judge after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally res judicata of the merits, even if the merits have not been considered. In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based on a complainant's motion to dismiss the complaint without prejudice.

Second, generally, the party instituting a proceeding pursuant to the Rules of Practice is an administrative official representing the government acting in its sovereign capacity and having the responsibility for achieving the congressional purpose of a statute which has allegedly been violated. Under such circumstances, which are applicable to the proceeding, *sub judice*, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious case based solely upon the complainant's request to withdraw the complaint without prejudice. Moreover, the Secretary of Agriculture is charged with administering a large number of statutes that are adjudicated pursuant to the Rules of Practice. Barring a complainant from presenting the complainant's case thwarts the Secretary of Agriculture's proper administration of the statute that is the subject of the dismissed case.

Third, if administrative law judges were, as a general matter, to dispose of motions to withdraw complaints without prejudice by dismissing the complaints with prejudice, complainants may become reluctant to file motions to withdraw complaints, even when such motions are appropriate. A case that is prosecuted by a complainant only because the complainant fears that a motion to withdraw the complaint will result in the complaint being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a complaint is dismissed with prejudice should forestall any reluctance on the part of a complainant to file a motion to withdraw a complaint, if the complainant is not certain that it should proceed against the respondent.

In re Fresh Prep, Inc., 58 Agric. Dec. ___, slip op. at 8-10 (Mar. 11, 1999) (Ruling on Certified Question) (footnotes omitted).

Respondent and Petitioners contend that the first policy reason is subverted by a decision that allows Complainant to withdraw the Complaint without prejudice, as follows:

> . . . [R]espondent and [P]etitioners opposed the [Complainant's] motion for a continuance because, after over two and one-half years, they wanted and were entitled to a decision on the merits. The ALJ agreed by correctly denying the [Complainant's] request for a continuance for lack of good cause. Thus, there is no adjudication on the merits because the [Complainant] is allowed to dismiss without prejudice at will.

Appeal Pet. at 6.

I disagree with Respondent's and Petitioners' contention that dismissal of the Complaint without prejudice will necessarily deprive them of an adjudication on the merits. Complainant contends, and I agree, that there are two possible scenarios that could result from the Complaint being dismissed without prejudice (Complainant's Response at 9). First, Complainant could re-file essentially the same complaint as the Complaint which Complainant filed on February 20, 1998, which would result in an adjudication on the merits. Second, Complainant could decide not to re-file the Complaint, which would render adjudication moot.

Respondent and Petitioners contend that the second policy reason gives Complainant an advantage over the other litigants because it allows Complainant to "overrule" the ALJ's orders as to the time of the hearing; whereas the other litigants have no similar right to postpone a hearing (Appeal Pet. at 6-7).[1]

I disagree with Respondent's and Petitioners' contention that the second policy reason enables a complainant to "overrule" an administrative law judge's order setting the time of the hearing. Dismissal of a complaint filed in a proceeding in

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[1]I noted in the Ruling on Certified Question that an administrative law judge should be reluctant to bar future prosection of a potentially meritorious responsibly connected proceeding, based upon the petitioner's request to withdraw the petition without prejudice. *In re Fresh Prep, Inc.*, 58 Agric. Dec. ___, slip op. at 9 n.6 (Mar. 11, 1999) (Ruling on Certified Question). Respondent and Petitioners correctly note that a petitioner in a responsibly connected case must file a petition for review of a determination of the Chief of the PACA Branch within 30 days of receipt of the notification of the Chief's responsibly connected determination. (See 7 C.F.R. § 47.49(d).) Thus, a dismissal of a petition without prejudice in a responsibly connected proceeding may not preserve a petitioner's right to re-file a petition.

which an administrative law judge has previously set a time for a hearing results in cancellation of the hearing. This result follows even if the complaint is dismissed without prejudice because, while dismissal without prejudice does not bar a subsequent proceeding, a dismissal without prejudice is a final disposition of the proceeding in which the hearing is scheduled. However, the power to grant or deny a complainant's motion to withdraw a complaint without prejudice (and, consequently, to affect the time of the hearing) rests with the administrative law judge. Pursuant to section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)), a complainant may file a motion to withdraw a complaint without prejudice, but the complainant's filing does not guarantee that the motion will be granted and does not in any way affect the administrative law judge's order setting the time for hearing.

Respondent and Petitioners contend that the third policy reason sets up a "straw man" and is bad policy because it encourages the Secretary of Agriculture to keep unsubstantiated cases brewing (Appeal Pet. at 7). Respondent and Petitioners state that, generally, a motion to withdraw a complaint is granted without prejudice and that they never argued that generally a complaint should be dismissed with prejudice (Appeal Pet. at 7). Instead, Respondent and Petitioners contend that the circumstances in this case require dismissal with prejudice because Complainant's Motion to Withdraw Complaint was for the purpose of "subverting" a valid ruling, which Complainant, like the other parties to the proceeding, is obliged to obey (Appeal Pet. at 7).

Complainant's Motion to Withdraw Complaint did not "subvert" the ALJ's order setting the time for hearing. Pursuant to section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)), Complainant may file Complainant's Motion to Withdraw the Complaint, but Complainant's filing does not guarantee that Complainant's motion will be granted and does not in any way affect the ALJ's order setting the time for hearing.

Third, Respondent and Petitioners state that they agree with the circumstances which I identified in *In re Fresh Prep, Inc.*, 58 Agric. Dec. ___ (Mar. 11, 1999) (Ruling on Certified Question), as bases for dismissing a complaint with prejudice, but state that "the facts and circumstances of this case are not addressed" (Appeal Pet. at 7-8).

I identified the circumstances in which a complainant's motion to withdraw a complaint should result in dismissal with prejudice, as follows:

> . . . [T]here are circumstances in which an administrative law judge should dismiss a complaint with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to

> withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

In re Fresh Prep, Inc., 58 Agric. Dec. ___, slip op. at 10 (Mar. 11, 1999) (Ruling on Certified Question) (footnote omitted).

Contrary to Respondent's and Petitioners' contention, I addressed the circumstances in this proceeding, as follows:

> Complainant has not moved to withdraw the Complaint with prejudice, Complainant's February 5, 1999, Motion to Withdraw Complaint is the first such motion filed by Complainant in this proceeding, and I do not find, and there is no allegation, that error is apparent on the face of the Complaint. However, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab each contend that allowing Complainant to reinstitute the proceeding would legally prejudice them. I have carefully considered Respondent's and Petitioner Mary Lech's February 17, 1999, and February 25, 1999, filings, and Petitioner Michael Raab's February 25, 1999, filing, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to any of these parties. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab will have the same legal position they would have had, if Complainant had proceeded to hearing on February 9, 1999.

In re Fresh Prep, Inc., 58 Agric. Dec. ___, slip op. at 11 (Mar. 11, 1999) (Ruling on Certified Question) (footnote omitted).

Fourth, Respondent and Petitioners contend that they will suffer legal prejudice if Complainant is allowed to re-file the Complaint (Appeal Pet. at 8-9). Respondent and Petitioners, relying on *D'Alto v. Dahon California, Inc.*, 100 F.3d 281 (2d Cir. 1996) and *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354 (10th

Cir. 1996), contend that the factors that must be considered to determine if a litigant will suffer legal prejudice by an administrative law judge's granting of a motion to withdraw a complaint without prejudice are: (1) the opposing party's effort and expense in preparing for trial; (2) excessive delay and lack of diligence by the moving party; (3) insufficiency of the explanation of the need for dismissal; and (4) the present stage of the litigation (Appeal Pet. at 9; Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice at 5). The cases cited by Respondent and Petitioners concern voluntary dismissal of an action by order of a court under Rule 41(a)(2) of the Federal Rules of Civil Procedure.

However, Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

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

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the PACA, in accordance with the Rules of Practice.[2]

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[2]*See generally Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 23 (Jan. 6, 1999) (stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 348 (1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify

(continued...)

I have carefully considered Respondent's and Petitioners' filings, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to Respondent or Petitioners. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent and Petitioners will be in the same legal position they would have had, if Complainant had
proceeded to hearing on February 9, 1999.[3]

For the foregoing reasons, the following Order is issued.

Order

Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted, and the Complaint, filed February 20, 1998, is dismissed without prejudice.

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[2](...continued)
or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding that the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture).

[3]While Respondent will face the threat of a second proceeding, I do not find that the threat of a second proceeding constitutes substantial legal prejudice.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Order Lifting Stay filed January 20, 1999.

Eric Paul, for Complainant.
Mark A. Amendola, Cleveland, Ohio, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On September 12, 1996, I issued a Decision and Order: (1) concluding that Andershock Fruitland, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA]; (2) concluding that James A. Andershock, d/b/a AAA Recovery, is not entitled to a PACA license; (3) revoking Andershock Fruitland, Inc.'s PACA license; (4) denying the application for a license filed by James A. Andershock, d/b/a AAA Recovery; and (5) ordering the publication of the facts and circumstances of the decision. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1212-13, 1233 (1996). On September 26, 1996, Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery [hereinafter Respondents], filed a petition for reconsideration, which I denied. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On January 22, 1997, Respondents filed a Motion for Stay pending disposition of Respondents' petition for review filed with the United States Court of Appeals for the Seventh Circuit. On March 4, 1997, I granted Respondents' Motion for Stay. *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order).

On December 7, 1998, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Request for Order Lifting Stay Order which states, as follows:

> The final Order of the Secretary having been upheld by the United States Court of Appeals for the Seventh Circuit and the time for further judicial review having run, Complainant requests that the attached Order Lifting Stay Order be issued.

Complainant's Request for Order Lifting Stay Order and Complainant's proposed Order Lifting Stay Order were served on Respondents on December 17, 1998.[1] Respondents failed to file a response to Complainant's Request for Order Lifting Stay Order within 20 days after service, as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)).

On January 15, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Request for Order Lifting Stay Order.

The United States Court of Appeals for the Seventh Circuit denied Respondents' petition for review on August 10, 1998. *Andershock's Fruitland, Inc. v. United States Dep't of Agric.*, 151 F.3d 735 (7th Cir. 1998), and the time for further judicial review has run.

For the forgoing reasons, Complainant's Request for Order Lifting Stay Order is granted. The Stay Order issued March 4, 1997, *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order), is lifted, and the Order issued in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), is effective as follows:

Order

1. Andershock Fruitland, Inc.'s PACA license is revoked, effective 30 days after service of this Order on Andershock Fruitland, Inc.

2. The application for a PACA license filed by James A. Andershock, d/b/a AAA Recovery, is denied, effective upon service of this Order on James A. Andershock, d/b/a AAA Recovery.

3. The facts and circumstances set forth in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), shall be published.

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[1]Domestic Return Receipt for Article Number P 368 428 508.

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Stay Order filed January 28, 1999.

Eric Paul, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On November 10, 1998, I issued a Decision and Order: (1) concluding that Michael J. Mendenhall [hereinafter Petitioner] was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)). *In re Michael J. Mendenhall*, 57 Agric. Dec. ___, slip op. at 65 (Nov. 10, 1998). The Hearing Clerk served Petitioner with the Decision and Order on November 13, 1998,[1] and the Order subjecting Petitioner to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) became effective on January 17, 1999.

On January 28, 1999, the Acting Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service [hereinafter Respondent], filed Respondent's Request for a Stay Order, requesting a stay of the November 10, 1998, Order pending the outcome of proceedings for judicial review. Petitioner's counsel, Stephen P. McCarron, informed me, in a telephone call, conducted on January 28, 1999, that Petitioner does not oppose Respondent's Request for a Stay Order.

On January 28, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Request for a Stay Order.

Respondent's Request for a Stay Order is granted. The Order issued in this proceeding on November 10, 1998, *In re Michael J. Mendenhall*, 57 Agric. Dec. ___ (Nov. 10, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order is issued *nunc pro tunc* and is effective January 17, 1999. This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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[1]Domestic Return Receipt for Article Number P 093 174 724.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Order Lifting Stay filed February 22, 1999.

Andrew Y. Stanton, for Complainant.
J. Randolph Liebler, Miami, Florida, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 18, 1998, I issued a Decision and Order: (1) concluding that Limeco, Inc. [hereinafter Respondent], willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499b(4), (5), 499i); and (2) suspending Respondent's Perishable Agricultural Commodities Act license for 45 days, effective 60 days after service of the Order on Respondent. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11, 37 (Aug. 18, 1998).

On October 16, 1998, Respondent filed Motion to Stay Decision and Order [hereinafter Motion for a Stay], requesting a stay of the August 18, 1998, Order pending the outcome of proceedings for judicial review. On October 26, 1998, I granted Respondent's Motion for a Stay. *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order).

On February 19, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order stating that "[o]n January 28, 1999, Respondent's appeal was dismissed by the United States Court of Appeals for the Eleventh Circuit for want of prosecution." See *Limeco, Inc. v. United States Dep't of Agric.*, No. 98-5571 (Jan. 28, 1999) (Entry of Dismissal). On February 19, 1999, I telephoned J. Randolph Liebler, counsel for Respondent, who informed me that Respondent does not intend to seek further judicial review of *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), and that Respondent does not oppose Complainant's Motion to Lift Stay Order.

For the foregoing reasons, Complainant's Motion to Lift Stay Order is granted. The Stay Order issued October 26, 1998, *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order), is lifted and the Order issued in *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), is effective, as follows:

Order

Respondent's PACA license is suspended for a period of 45 days, effective 14 days after service of this Order on Respondent.

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Ruling on Certified Question filed March 11, 1999.

Motion to withdraw complaint — With prejudice — Without prejudice — Federal Rules of Civil Procedure.

The Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Complainant's motion to withdraw its complaint without prejudice should be granted. The Judicial Officer stated that while reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

Kimberly D. Hart, for Complainant.
Stephen P. McCarron, Washington, D.C., for Fresh Prep, Inc., and Mary Lech.
Richard G. Tarlow, Calabasas, California, for Michael Raab.
Ruling issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on February 20, 1998.

The Complaint: (1) alleges that Fresh Prep, Inc., engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995 (Compl. ¶ III); and (2) requests a finding that Fresh Prep, Inc., willfully, flagrantly,

and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Fresh Prep, Inc.'s PACA license (Compl. at 4).

Fresh Prep, Inc., filed Answer to Complaint on March 18, 1998, in which it denied the material allegations of the Complaint and asserted affirmative defenses. On July 20, 1998, Complainant filed a Motion to Assign a Date for Oral Hearing, and on July 31, 1998, Fresh Prep, Inc., filed a Motion for In-Person Oral Hearing and a Memorandum In Support of Motion for In-Person Oral Hearing.

On August 25, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a pre-hearing conference with Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., who represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., who represented Fresh Prep, Inc. The parties agreed that the hearing would commence January 26, 1999, and that they would exchange copies of anticipated exhibits and a list of anticipated witnesses on or before November 18, 1998. The parties informed the ALJ that they expected that the hearing would require 3 or 4 days. (Notification to Parties of Certification and Summary, filed February 26, 1999 [hereinafter Certification and Summary], at 2.) On August 26, 1998, the ALJ issued an order scheduling the hearing to commence January 26, 1999 (Designation of Oral Hearing Date).

Subsequent to the ALJ's August 26, 1998, Designation of Oral Hearing Date, the ALJ was informed that the hearing could take up to 9 days and that Complainant did not wish to have the hearing fragmented. On December 2, 1998, the ALJ, "with agreement of the parties," changed the date of hearing to commence February 9, 1999 (Change in Oral Hearing Date From January 26, 1999 to February 9, 1999).

On January 20, 1999, pursuant to section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)), the ALJ consolidated *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, with *In re Mary Lech*, PACA-APP Docket No. 99-0001, and *In re Michael Raab*, PACA-APP Docket No. 99-0002. *In re Mary Lech, supra*, and *In re Michael Raab, supra*, were each instituted by a petition for review of a determination by the Chief of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, that an individual was responsibly connected with Fresh Prep, Inc., during the period that Fresh Prep, Inc., is alleged in the Complaint to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The ALJ's order consolidating the three proceedings provides that the hearing for the consolidated proceeding would commence February 9, 1999 (Notification to the Parties).

On January 20, 1999, Petitioner Michael Raab requested a continuance of the hearing stating that "I have previously discussed this [request for a continuance] with Ms. Hart who has indicated that she is not opposed to . . . a continuance" (Letter from Richard G. Tarlow, counsel for Petitioner Michael Raab, to the ALJ, filed January 20, 1999). The ALJ telephoned Ms. Hart who indicated that she had not agreed to a continuance (Certification and Summary at 4). The ALJ then issued an order giving all parties an opportunity to file responses to Petitioner Michael Raab's request for a continuance on or before January 25, 1999 (Relative to Request for Continuance). On January 25, 1999, Fresh Prep, Inc., and Petitioner Mary Lech jointly filed Opposition of Fresh Prep, Inc. and Mary Lech to the Request for Continuance of the Responsibly Connected Case Against Michael Raab. Complainant filed no response to Petitioner Michael Raab's request for a continuance. On January 26, 1999, the ALJ denied Petitioner Michael Raab's request for a continuance. (Continuance Denied.)[1]

On February 5, 1999, Complainant orally requested a continuance of the hearing on the ground that Fresh Prep, Inc.'s counsel had raised an "alternative defense theory" in a meeting held with Complainant's counsel on January 15, 1999, and that Complainant was unable to investigate the merits of Fresh Prep, Inc.'s "alternative defense theory" prior to the date of the scheduled hearing. The ALJ orally denied Complainant's oral request for a continuance. (Certification and Summary at 5.)

On February 5, 1999, after the ALJ denied Complainant's request for a continuance, Complainant filed Complainant's Request for a Voluntary Dismissal Without Prejudice of the Administrative Complaint [hereinafter Motion to Withdraw Complaint].[2] On February 8, 1999, the ALJ canceled the hearing scheduled for February 9, 1999 (Cancellation of Oral Hearing), and gave the parties

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[1]Complainant contends that it has not been served with Petitioner Michael Raab's request for a continuance, and Complainant did not become aware of Petitioner Michael Raab's request for a continuance until January 28, 1999, after the ALJ denied Petitioner Michael Raab's request for a continuance (Complainant's Response to Judge Baker's Order Issued Relative to Request for Continuance).

[2]The ALJ states that Complainant's Motion to Withdraw Complaint was filed "literally minutes after the denial of [Complainant's] request for a continuance" (Certification and Summary at 6). Complainant admits that the Motion to Withdraw Complaint resulted from the ALJ's denial of Complainant's February 5, 1999, request for a continuance and Complainant's need for additional time to assure itself of the persuasiveness of its case and its support by a preponderance of the evidence (Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice of Administrative Complaint at 5).

until February 17, 1999, to respond to Complainant's Motion to Withdraw Complaint (Response Time as to Motion to Dismiss Without Prejudice).

On February 17, 1999: (1) Complainant filed Complainant's Brief in Support of Voluntary Dismissal Without Prejudice of the Administrative Complaint; and (2) Fresh Prep, Inc., and Petitioner Mary Lech filed a Memorandum In Support of Denial of Complainant's Request for Dismissal Without Prejudice and Affidavit of Stephen P. McCarron, seeking dismissal of the Complaint with prejudice.

On February 18, 1999, the ALJ granted a request that the parties be given an opportunity to file responses to the February 17, 1999, filings (Additional Filing Time). On February 25, 1999: (1) Fresh Prep, Inc., and Petitioner Mary Lech jointly filed (a) Reply to Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice, and (b) Limited Objection to Complainant's Request for Dismissal Without Prejudice and Request for Dismissal With Prejudice; (2) Petitioner Michael Raab filed Notice of Objection to Dismissal Without Prejudice; and (3) Complainant filed (a) Complainant's Reply to Memoranda Filed by Respondent and Petitioner Michael Raab Regarding Complainant's Motion for Voluntary Dismissal Without Prejudice, and (b) Affidavit of Kimberly D. Hart.

On February 26, 1999, pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)), the ALJ certified Complainant's Motion to Withdraw Complaint to the Judicial Officer (Certification to Judicial Officer), and on March 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's Certification to Judicial Officer.

The ALJ states that the question for determination and certification is whether the Complaint should be dismissed with prejudice or dismissed without prejudice.

As an initial matter, I note that in her February 8, 1999, order giving the parties time to respond to Complainant's Motion to Withdraw Complaint, the ALJ directed the attention of the parties to Rule 41 of the Federal Rules of Civil Procedure, as follows:

> . . . [B]efore ruling on whether the Complaint in Fresh Prep[,] Inc., should be dismissed without prejudice, the parties hereto are granted until February 17, 1999, within which to file a response to said Motion to Dismiss Without Prejudice.
>
> Although the F.R.C.P. are not necessarily applicable in administrative proceedings, nevertheless, guidance can be achieved by reference to Rule 41, relating to dismissal of actions and the circumstances and conditions

under which Complaints are dismissed with prejudice and without prejudice.

Response Time as to Motion to Dismiss Without Prejudice.

While I agree with the ALJ that reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice.[3]

The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstitute the proceeding should be

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[3]*See generally Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 23 (Jan. 6, 1999) (stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 348 (1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding that the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture).

preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to complainant issued by an administrative law judge after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally res judicata of the merits, even if the merits have not been considered.[4] In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based on a complainant's motion to dismiss the complaint without prejudice.

Second, generally, the party instituting a proceeding pursuant to the Rules of Practice is an administrative official representing the government acting in its sovereign capacity and having the responsibility for achieving the congressional purpose of a statute which has allegedly been violated. Under such circumstances, which are applicable to the proceeding, *sub judice*, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious case based solely upon the complainant's request to withdraw the complaint without prejudice. Moreover, the Secretary of Agriculture is charged with administering a large

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[4]See, e.g., *Aungst v. Continental Machines, Inc.*, 90 F.R.D. 348, 350 (M.D. Pa. 1981) (stating that dismissal with prejudice acts as a bar to further action upon the same claims); *Hicks v. Allstate Ins. Co.*, 799 S.W.2d 809, 810 (Ark. 1990) (stating that dismissal of an action with prejudice is as conclusive of the rights of the parties as if there were an adverse judgment as to the plaintiff after trial); *People v. Creek*, 447 N.E.2d 330, 333 (Ill. 1983) (stating that dismissal of an information with prejudice has the same effect as a final adjudication on the merits and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action); *Schuster v. Northern Co.*, 257 P.2d 249, 252 (Mont. 1953) (stating that the term *with prejudice*, as used in a judgment of dismissal is the converse of the term *without prejudice*, and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff; the terms *with prejudice* and *without prejudice* have been recognized as having reference to, and being determinative of, the right to bring a future action); *Harris v. Moye's Estate*, 202 S.W.2d 360, 362 (Ark. 1947) (stating that the words *with prejudice*, when used in an order of dismissal, indicate that the controversy is thereby concluded); *Bryant v. Ryburn*, 174 S.W.2d 938, 939 (Ark. 1943) (stating that the "suit having been dismissed with prejudice by the plaintiffs therein, such action was as conclusive of the rights of the parties as would an adverse judgment after trial"); *Fenton v. Thompson*, 176 S.W.2d 456, 460 (Mo. 1943) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff); *Union Indemnity Co. v. Benton County Lumber Co.*, 18 S.W.2d 327, 330 (Ark. 1929) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the plaintiff).

number of statutes that are adjudicated pursuant to the Rules of Practice.[5] Barring a complainant from presenting the complainant's case thwarts the Secretary of Agriculture's proper administration of the statute that is the subject of the dismissed case.[6]

Third, if administrative law judges were, as a general matter, to dispose of motions to withdraw complaints without prejudice by dismissing the complaints with prejudice, complainants may become reluctant to file motions to withdraw complaints, even when such motions are appropriate. A case that is prosecuted by a complainant only because the complainant fears that a motion to withdraw the complaint will result in the complaint being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a complaint is dismissed with prejudice should forestall any reluctance on the part of a complainant to file a motion to withdraw a complaint, if the complainant is not certain that it should proceed against the respondent.

Nonetheless, there are circumstances in which an administrative law judge should dismiss a complaint with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint;[7] (3) allowing the complainant to reinstitute the same proceeding would

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[5]The Rules of Practice are applicable to all adjudicatory proceedings under the statutory provisions listed in 7 C.F.R. § 1.131(a) and the proceedings described in 7 C.F.R. § 1.131(b).

[6]While the same reasoning would not apply in a proceeding instituted by a petitioner in a responsibly connected case, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious responsibly connected case, based upon the petitioner's request to withdraw the petition without prejudice. A petitioner faces licensing and employment restrictions (7 U.S.C. §§ 499d(b), 499h(b)) and barring a petitioner from presenting his or her case, based solely upon the petitioner's motion to withdraw the petition without prejudice, would subject a petitioner to licensing and employment restrictions without an examination of the merits of the petitioner's case.

[7]*Cf. In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114 (1997) (dismissing with prejudice a petition filed in a proceeding instituted under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); concluding that the petition, which

(continued...)

result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

Complainant has not moved to withdraw the Complaint with prejudice, Complainant's February 5, 1999, Motion to Withdraw Complaint is the first such motion filed by Complainant in this proceeding, and I do not find, and there is no allegation, that error is apparent on the face of the Complaint. However, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab each contend that allowing Complainant to reinstitute the proceeding would legally prejudice them. I have carefully considered Respondent's and Petitioner Mary Lech's February 17, 1999, and February 25, 1999, filings, and Petitioner Michael Raab's February 25, 1999, filing, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to any of these parties. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab will have the same legal position they would have had, if Complainant had proceeded to hearing on February 9, 1999.[8]

Complainant's Motion to Withdraw Complaint, filed February 5, 1999, should be granted, and the Complaint, filed in this proceeding on February 20, 1998, should be dismissed without prejudice.[9]

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[7](...continued)
alleged that petitioner was not a handler, left petitioner no standing to institute an action under 7 U.S.C. § 608c(15)(A); and holding that the administrative law judge erred by dismissing the petition without prejudice because dismissal without prejudice would allow the petitioner to file the same flawed petition, but stating that there is precedent for allowing the petitioner to file a similar petition in which it alleges that it is a handler).

[8]While Respondent will face the threat of a second proceeding, I do not find that the threat of a second proceeding constitutes substantial legal prejudice.

[9]Complainant's argument that Respondent caused Complainant to file Complainant's Motion to Withdraw Complaint 4 days before the scheduled hearing is without merit. At least by January 11, 1999, Complainant knew of Respondent's "alternative defense theory," which is the basis for Complainant's Motion to Withdraw Complaint (Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice at 3; Affidavit of Stephen P. McCarron ¶ 8). Most of the delay between the time Complainant learned of Respondent's "alternative defense theory" and Complainant's Motion to Withdraw Complaint is inexplicable. Complainant should complete its investigation of the merits of Respondent's "alternative defense theory" as expeditiously as possible. If, based on its investigation, Complainant concludes that no complaint alleging that Respondent
(continued...)

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Dismissal of Complaint filed March 11, 1999.

In accordance with the Judicial Officer's "Ruling on Certified Question", the Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted and the Complaint filed in *In re: Fresh Prep. Inc.*, PACA Docket No. D-98-0014, is dismissed without prejudice.

Copies hereof shall be served upon the parties.

GEORGE L. POWELL and JERALD POWELL, d/b/a POWELL FARMS v. GEORGIA SWEETS BRAND, INC., AND DEL MONTE FRESH PRODUCE, N.A., INC.
PACA Docket No. R-99-0035.
Order of Dismissal as to Respondent Del Monte Fresh Produce, N.A., Inc., filed June 22, 1999.

George S. Whitten, Presiding Officer.
J. Michael Hall, Statesboro, GA, for Complainant.
Jesse C. Stone, Swainsboro, GA, for Respondent Georgia Sweets Brand, Inc.
Joseph P. McCafferty, Cleveland, Ohio, for Respondent Del Monte Fresh Produce, N.A., Inc.
Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Complainant seeks a reparation award from the Respondents in the amount of $193,217.80 in connection with multiple trucklots of onions shipped and sold in interstate commerce in accordance with a grower's agent agreement.

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[9](...continued)
engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995, should be filed, Complainant should inform Respondent's and Petitioner Mary Lech's counsel and Petitioner Michael Raab's counsel of that fact immediately after reaching such a conclusion.

Counsel for Complainant and Counsel for Respondent Del Monte Fresh Produce, N.A., Inc. filed a Consent Order in which Complainant and Respondent Del Monte stipulate to the dismissal of Complainant's claims against Del Monte. Paragraph 3 of the Consent Order provides:

> Powell's claims against Del Monte are dismissed **without prejudice.** Should Complainants refile their claims or otherwise institute proceedings against Del Monte before the Secretary of Agriculture relating to the subject matter of this action, Del Monte agrees to **waive any objection or defense based on statute of limitations, or jurisdictional time limit;** (Emphasis added.)

Complainant and Respondent Del Monte have, by entering this stipulation, attempted to waive a jurisdictional limitation of the Secretary's authority to adjudicate reparation claims. Section 6(a)(1) of the PACA (7 U.S.C. § 499f(a)(1)) provides, in pertinent part:

> Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, ...

It has long been determined that the above-cited section of the PACA is a limit on the jurisdiction of the Secretary to hear reparation claims. *Cadenasso v. California-Mexico Distributing Co.*, 2 Agric. Dec. 751 (1943). This conclusion was based upon the Supreme Court's interpretation of a similar statutory provision in the Interstate Commerce Act in the case of *Louisville Cement Co. v. Interstate Commerce Commission,* 246 U.S. 638 (1918), where the Court found "that the two-year provision of the act is not a mere statute of limitations, but is jurisdictional, - is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusions." *Id.*, 246 U.S. at 642. Since the provision in the PACA that requires that claims involving transactions in perishable agricultural commodities be filed within nine months of the date that the cause of action accrued is jurisdictional, the parties cannot alter or waive the time period. The jurisdiction of the Secretary cannot be waived or extended by agreement of the parties. *Cadenasso, supra.* Therefore, the intended waiver contained in Paragraph 3 of the Consent Order is ineffectual.

The dismissal of Complainant's claim against Respondent Del Monte effectively ends the Secretary's ability to exercise jurisdiction over the claim. Any attempt by Complainant to refile or institute a proceeding before the Secretary against Respondent Del Monte based on the same transactions involved in the current matter would be denied, notwithstanding the parties' attempted agreement to waive the application of the time limit. Jurisdictional issues can be raised in this forum *sua sponte*. *De Backer Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Ltd. v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514 (1980). Because such a complaint would be filed well beyond the statutory time period, the Secretary would raise an objection to the complaint, even if the respondent did not, and dismiss the complaint for want of jurisdiction over the claim.

Accordingly, Complainant's claims against Respondent Del Monte will be dismissed, thereby extinguishing the jurisdiction of the Secretary to adjudicate its claims.

Order

Complainant Powell Farms' claims against Respondent Del Monte Fresh Produce, N.A., Inc., are hereby dismissed.

Complainant Powell Farms' claims against Respondent Georgia Sweets Brand, Inc., shall be adjudicated in the same manner and under the same procedure as if the Order of Dismissal had not been issued.

PERISHABLE AGRICULTLURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: DONALD L. WILSON, d/b/a D&R MARKETING.
PACA Docket No. D-98-0013.
Decision and Order filed November 25, 1998.

Mary Hobbie, 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 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 February 11, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1995, through May 1996, Respondent failed to make full payment promptly to 19 sellers in the total amount of $232,473.50 for 51 transactions involving perishable agricultural commodities it purchased, received, accepted, and resold in interstate and foreign commerce.

A copy of the complaint was mailed to the Respondent by certified mail on February 12, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on May 6, 1998. This complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondent, Donald L. Wilson, d/b/a D & R Marketing, is an individual whose business address is 18530 Kalin Ranch Road, Victorville, California 92392. Respondent's mailing address is 3919-A Guasti Road, Ontario, California 91761.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 910736 was issued to Respondent on March 5, 1991. The license was suspended on October 4, 1996, for failure to pay three reparation orders pursuant to Section 7(d)

of the PACA (7 U.S.C. § 499g(d)). This license terminated on March 5, 1997, when Respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of August 1995, through May 1996, Respondent purchased, received, accepted, and resold in interstate and foreign commerce from 19 sellers, 51 transaction involving perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $232,473.50.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the following Order is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 27, 1999.-Editor]

In re: GEORGE G. GOOSIE, d/b/a G&S PRODUCE.
PACA Docket No. D-98-0024.
Decision and Order filed December 16, 1998.

Jane McCavitt, 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 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 July 23, 1998, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1996 through May 1997, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 281 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $320,184.28.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, George G. Goosie, dba G & S Produce, is a individual, whose address is 2220 Forest Avenue, Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the Act, license number 962489 was issued to respondent on September 4, 1996. This license terminated on September 4, 1997, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1996 through May 1997, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 281 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full

payment promptly of the agreed purchase prices, in the total amount of $320,184.28.

Conclusions

Respondent's failure to make full payment promptly with respect to the 281 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 25, 1999.-Editor]

In re: COSTA & HARRIS PRODUCE, INC.
PACA Docket No. D-98-0023.
Decision and Order filed December 17, 1998.

Imani K. Ellis-Cheek, 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 July 16, 1998, by the Deputy

Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Complaint that during the period of June 1996 through January 1998, Respondent purchased, received and accepted, in interstate commerce from 33 sellers, 265 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $768,434.78.

A copy of the Complaint was served upon Respondent on July 28, 1998, which Complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Costa & Harris Produce, Inc., was a corporation organized and existed under the laws of the State of New York. Its business mailing address was New York City Terminal Market, Unit 334, Bronx, New York 10474.

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number 810934 was issued to Respondent on April 28, 1981. This license terminated on April 28, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499g), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the Complaint, during the period of June 1996 through January 1998, Respondent purchased, received and accepted, in interstate commerce from 33 sellers, 265 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $768,434.78.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and such violations shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 27, 1999.-Editor]

In re: ROBINSON POTATO SUPPLY COMPANY OF KANSAS CITY, KANSAS, INC.
PACA Docket No. D-98-0021.
Decision and Order filed December 30, 1998.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on May 4, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1997, through April 1997, respondent failed to make full payment promptly to 35 sellers in the total amount of $686,434.39 for 272 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the complaint was mailed to the respondent by certified mail on May 4, 1998, using its post office box address and again mailed by regular mail on June 11, 1998 (the complaint was returned unclaimed on June 11, 1998 and undeliverable on July 24, 1998, respectively). The complaint was again mailed to respondent using its street address by certified mail on July 24, 1998, and again by regular mail on August 24, 1998 (the complaint was again returned undeliverable on August 3, 1998 and September 3, 1998, respectively). This complaint has not

been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondent, Robinson Potato Supply Company of Kansas City, Kansas, Inc., was a corporation organized and existing under the laws of the State of Kansas. Its business address was 200 South 5th Street, Kansas City, Kansas 66101-3895. Its mailing address was Post Office Box 171176, Kansas City, Kansas 66117-0176.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 881346 was issued to respondent on June 8, 1988. The license terminated on June 8, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of January 1997, through April 1997, respondent purchased, received, and accepted in interstate commerce from 35 sellers, 272 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $686,434.39.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty-five days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 18, 1999.-Editor]

In re: R&B PRODUCE, INC.
PACA Docket No. D-99-0001.
Decision and Order filed January 22, 1999.

JoAnn Waterfield, 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 October 8, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1996 through July 1997, Respondent failed to make full payment promptly to six sellers of the agreed purchase prices in the total amount of $110,919.39 for 32 lots of perishable agricultural commodities, that Respondent purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent, and it has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, R&B Produce, Inc., is a corporation organized and existing under the laws of the Commonwealth of Virginia, with a business address of 19268

Poplar Street, Melfa, Virginia 23410, and business mailing address of P.O. Box 159, Melfa, Virginia 23410.

2. PACA license number 962264 was issued to Respondent on August 6, 1996. This license was suspended on July 17, 1998, for failure to pay reparation awards, and was terminated on August 6, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period November 1996 through July 1997, failed to make full payment promptly to 6 sellers of the agreed purchase prices in the total amount of $110,919.39 for 32 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 5, 1999.-Editor]

In re: UNITED FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-98-0027.
Decision and Order filed February 3, 1999.

Deborah Ben-David, 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 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 September 1, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 26, 1997, through March 6, 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices totaling $321,878.66 for 240 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. United Fruit and Produce Co., Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of Pennsylvania. Its mailing address is 1812 Peach Street, Erie, Pennsylvania 16501.

2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 870711 was issued to Respondent on February 26, 1987. This license terminated on February 26, 1998, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period March 26, 1997, through March 6, 1998, Respondent purchased, received, and accepted in interstate or foreign commerce 240 lots of perishable agricultural

commodities from 30 sellers but failed to make full payment promptly of the agreed purchase prices thereof in the total amount of $321,878.66.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 3 above constitutes willful, repeated, and flagrant violations of section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the Act (7 U.S.C. §499b(4)). This 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 Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies shall be served upon the parties.

[This Decision and Order became final March 18, 1999.-Editor]

In re: ENNIS & McGEE PRODUCE CO., INC.
PACA Docket No. D-98-0030.
Decision and Order filed February 10, 1999.

Deborah Ben-David, 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 September 11, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period November 1996 through November 1997, Respondent failed to make full payment promptly to 49 sellers of the agreed purchase prices totaling $1,272,394.24 for 4,363 transactions of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. Ennis & McGee Produce Company, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of North Carolina. Its mailing address is 1117 Agriculture Street, Raleigh, North Carolina 27603.

2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the Act. License number 841593 was issued to Respondent on July 3, 1984. This license terminated on July 3, 1997, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period November 1996 through November 1997, Respondent purchased, received, and accepted in interstate or foreign commerce 4,363 transactions of perishable

agricultural commodities from 49 sellers but failed to make full payment promptly of the agreed purchase prices thereof in the total amount of $1,272,394.24.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 3 above constitutes willful, repeated, and flagrant violations of section 2(4) of the Act (7 U.S.C. §499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the Act (7 U.S.C. §499b(4)). This 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 Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies shall be served upon the parties.

[This Decision and Order became final March 20, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

James T. Whitlock, d/b/a Garden Fresh Produce Company. PACA Docket No. D-98-0010. 1/6/99.

Triple-A-Tomato & Produce Co., Inc. PACA Docket No. D-98-0008. 1/11/99.

R.A.M. Produce Distributors, Inc. PACA Docket No. D-98-0011. 1/21/99.

Just A Taste Produce Company of New Jersey, Inc. PACA Docket No. D-99-0005. 1/26/99.

Custom Cuts, Inc. PACA Docket No. D-99-0002. 2/11/99.

Joe Genova & Associates, Inc. PACA Docket No. D-98-0001. 3/2/99.

L & P Fruit Corp. PACA Docket No. D-99-0007. 4/29/99.

Cohen Marketing International, Inc. PACA Docket No. D-98-0029. 5/11/99.

Joseph K. Lurie. PACA Docket No. D-99-0008. 6/25/99.