

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) OFPA Docket No. 13-0196
)
Michael Tierney, d/b/a)
Birchwood Farms,)
Respondent) **Order Denying Petition
for Reconsideration**

PROCEDURAL HISTORY

On December 22, 2014, Michael Tierney filed a Petition for Reconsideration requesting that I reconsider *In re Michael Tierney* (Order Dismissing Purported Appeal Petition), __ Agric. Dec. __ (Dec. 9, 2014). On December 23, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Tierney's Petition for Reconsideration.

DISCUSSION

Summary of Denial of Mr. Tierney's Petition for Reconsideration

The rules of practice applicable to this proceeding¹ provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer, as follows:

¹The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

....

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Mr. Tierney in the Petition for Reconsideration, I find no error of law or fact necessitating modification of *In re Michael Tierney* (Order Denying Purported Appeal Petition), __ Agric. Dec. __ (Dec. 9, 2014). Moreover, Mr. Tierney does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *In re Michael Tierney* (Order Denying Purported Appeal Petition), __ Agric. Dec. __ (Dec. 9, 2014). Therefore, I deny Mr. Tierney's Petition for Reconsideration.

Issues Raised by Mr. Tierney in the Petition for Reconsideration

Mr. Tierney raises two issues in the Petition for Reconsideration. First, Mr. Tierney contends I erroneously found his purported appeal petition was late-filed (Pet. for Recons. at 1).

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.² The Hearing Clerk served Mr. Tierney with Administrative Law Judge Janice K. Bullard's [ALJ] Decision and Order on October 16, 2014;³ therefore, Mr. Tierney was required to file his appeal petition with the Hearing Clerk no later than November 17, 2014.⁴

Mr. Tierney contends his appeal petition was timely filed, on November 8, 2014, when he sent his appeal petition to the ALJ and Buren Kidd, the attorney in the Office of the General Counsel, United States Department of Agriculture, who represents the Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], in this proceeding.

²See 7 C.F.R. § 1.145(a).

³United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 9202.

⁴Thirty days after the date the Hearing Clerk served Mr. Tierney with the ALJ's Decision and Order was Saturday, November 15, 2014. The Rules of Practice provide, when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

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

....

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

7 C.F.R. § 1.147(h). The next business day after Saturday, November 15, 2014, was Monday, November 17, 2014.

I have consistently held a respondent's sending a document or even delivering a document to a location or person other than the Hearing Clerk does not constitute filing with the Hearing Clerk.⁵ Therefore, I find Mr. Tierney's sending his purported appeal petition to the ALJ and counsel for the Administrator does not constitute filing with the Hearing Clerk, as required by 7 C.F.R. § 1.145(a).

Mr. Tierney further contends the Hearing Clerk received his appeal petition on November 17, 2014; therefore, the appeal petition was timely filed.

The Rules of Practice provide that a document is deemed to be filed at the time it reaches the Hearing Clerk, as follows:

⁵See *In re Carolyn & Julie Arends*, 70 Agric. Dec. 839, 851 (2011) (stating complainant's counsel's receipt of respondents' response to an order to show cause does not constitute filing the response with the Hearing Clerk); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 537 (2002) (stating an incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 268 (2000) (stating neither respondents' mailing a response to a motion nor the United States Postal Service's delivering the response to the United States Department of Agriculture, Mail & Reproduction Management Division, constitutes filing with the Hearing Clerk); *In re Sweek's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; the hearing officer erred when he instructed litigants that appeal petitions must be filed with Judicial Officer); *In re Severin Peterson* (Order Denying Late Appeal), 57 Agric. Dec. 1304, 1310 n.3 (1998) (stating that neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's 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, even if the respondent's answer had been received by complainant's counsel within the time for filing the answer, respondent's answer would not be timely because 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).

§ 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[.]

7 C.F.R. § 1.147(g). The most reliable evidence of the date a document reaches the Hearing Clerk is the date stamped on that document by an employee of the Office of the Hearing Clerk.⁶ The Hearing Clerk's date stamp establishes that Mr. Tierney's appeal petition reached the Hearing Clerk on November 18, 2014; therefore, I reject Mr. Tierney's unsupported contention that he timely filed his purported appeal petition with the Hearing Clerk on November 17, 2014. Second, Mr. Tierney appeals the ALJ's Decision and Order (Pet. for Recons. at 1-2).

⁶*In re Paul Rosberg* (Order Denying Respondents' Pet. for Recons.), __ Agric. Dec. ___, slip op. at 4 (Oct. 31, 2014) (stating the Hearing Clerk's date stamp establishes the date a document reaches the Hearing Clerk); *In re Susan Biery Sergojan* (Order Denying Pet. to Reconsider), 69 Agric. Dec. 1438, 1442 (2010) (same); *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 287 (2009) (holding the most reliable evidence of the date a document reaches the Hearing Clerk is the date stamped by the Office of the Hearing Clerk on that document), *appeal dismissed*, No. 1:10-cv-00217-AWA-DLB (E.D. Cal. June 23, 2010); *In re Bruce Lion* (Ruling), 65 Agric. Dec. 1214, 1221 (2006) (same).

As an initial matter, a petition for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) is not the proper vehicle by which to appeal an administrative law judge's decision. Instead, a petition for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) constitutes a request that the Judicial Officer reconsider the Judicial Officer's decision. Moreover, the Hearing Clerk served Mr. Tierney with the ALJ Decision and Order on October 16, 2014;⁷ therefore, Mr. Tierney was required by 7 C.F.R. § 1.145(a) to file his appeal petition with the Hearing Clerk no later than November 17, 2014.⁸ Mr. Tierney filed the Petition for Reconsideration containing his appeal of the ALJ's Decision and Order on December 22, 2014, 35 days after he was required to file his appeal petition. Mr. Tierney's December 22, 2014, appeal of the ALJ's Decision and Order comes far too late to be considered.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Tierney's December 22, 2014, Petition for Reconsideration is denied.

Done at Washington, DC

December 29, 2014

William G. Jenson
Judicial Officer

⁷See note 3.

⁸See note 4.