

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PVPA Docket No. 11-0201
)
Colorado Certified Potato)
Growers' Association, Inc.,)
)
Petitioner) **Remand Order**

PROCEDURAL HISTORY

The Colorado Certified Potato Growers' Association, Inc. [hereinafter CCPGA], filed an application with the Plant Variety Protection Office, Science and Technology Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Plant Variety Protection Office], for plant variety protection, pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act], and the regulations issued under the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations]. The subject of CCPGA's application is a variety of potato known as "Mountain Rose." The Plant Variety Protection Office designated the application as "Potato Application No. 200500232."

The Plant Variety Protection Office requested that CCPGA provide additional information in support of Potato Application No. 200500232 and informed CCPGA that,

if CCPGA failed to provide the information timely, the Plant Variety Protection Office would deem Potato Application No. 200500232 abandoned, as follows:

June 11, 2010

David G. Holm, Ph.D.
Professor of Horticulture (Potato Breeding)
SLV Research Center - CSU
0249 East Road 9 North
Center, CO 81125

Dear Dr Holm:

Subject: Potato Application No. 200500232, 'Mountain Rose'

. . . .

All requested information must be in the Plant Variety Protection Office on or before **July 11, 2010**, or this application will be deemed abandoned. A proposal for an extension of time to supply the requested information may be made on or before the deadline specified above. Such a request must be accompanied by a \$89 fee and an explanation of why additional time is necessary, the amount of time required including the exact date when the response will be in our office, as well as a detailed plan explaining how the information will be obtained if the extension is granted. See sections 97.20 through 97.23, 97.104, and 97.175 of the Regulations and the Rules of Practice under the Plant Variety Protection Act for information on extensions and abandoned applications.

CCPGA's December 10, 2010, Appeal Pet. Attach. 5 (emphasis in original). CCPGA failed to provide the Plant Variety Protection Office with the requested information and did not propose an extension of time, on or before July 11, 2010.

The Plant Variety Protection Office informed CCPGA that Potato Application No. 200500232 was considered abandoned as of July 12, 2010, and informed CCPGA of the process by which to revive the abandoned application, as follows:

July 13, 2010

CERTIFIED MAIL

David G. Holm
San Luis Valley Research Center
0249 East Road 9 North
Center, CO 81125

Dear Dr Holm:

**SUBJECT: Abandonment of Application No. 200500232, Potato,
'Mountain Rose'**

I have not received a satisfactory response from you to my letter of June 11, 2010 (copy enclosed) which requested information on the above application. Since the response to my information request was not received within the time period, the subject application is considered abandoned as of 07/12/2010. You have a 3-month period to request revival of this application. We must receive your written request for revival on or before October 13, 2010. . . .

. . . .

Requests for revival and/or extension will be considered in accordance with sections 97.20 through 97.23 and 97.104 of the Regulations and the Rules of Practice under the Plant Variety Protection Act (Regulations) which cover abandonment and revival of applications.

If we receive no reply by October 13, 2010, the application will be permanently abandoned.

Response to Pet. to Revive Abandoned Application Attach. (emphasis in original).

On October 7, 2010, CCPGA mailed a request to revive abandoned Potato Application No. 200500232 by certified priority mail to the Plant Variety Protection Office. On October 18, 2010, 5 days after the expiration of the deadline for reviving abandoned Potato Application No. 200500232, the United States Postal Service delivered

CCPGA's request to revive abandoned Potato Application No. 200500232 to the Plant Variety Protection Office. (CCPGA's December 10, 2010, Appeal Pet. Exh. A.)

On October 22, 2010, CCPGA informed Paul M. Zankowski, Commissioner, Plant Variety Protection Office [hereinafter the Commissioner], of the circumstances surrounding the late delivery of CCPGA's request to the Plant Variety Protection Office and asked that the Commissioner revive abandoned Potato Application No. 200500232, despite that late delivery (CCPGA's December 10, 2010, Appeal Pet. Attach. 7). On October 26, 2010, the Commissioner denied CCPGA's request to revive abandoned Potato Application No. 200500232, as follows:

I have discussed your email request with both the Examiner (Robin Davis) and our Office of General Counsel (OGC); unfortunately this application is considered as permanently abandoned by the Plant Variety Protection Office (PVPO) since your response was not received at the PVPO by the deadline.

You may be able to file a new application for this variety, if the variety is still New (in the sense that, on the date of filing of the application for plant variety protection, propagating or harvested material of the variety has not been sold or otherwise disposed of to other persons, by or with the consent of the breeder, or the successor in interest of the breeder, for purposes of exploitation of the variety- in the United States, more than 1 year prior to the date of filing; or in any area outside of the United States more than 4 years prior to the date of filing).

You may also file an appeal to the Secretary regarding the PVPO abandonment decision. Any appeal to the Secretary must be filed within 60 days from the date of this communication or this decision will be final. If you do not agree with these findings, you may appeal to the Secretary, in writing, in accordance with 7 CFR § 97.300-97.303 of the Regulations and Rules of Practice and payment of the prescribed fee (97.175).

CCPGA's December 10, 2010, Appeal Pet. Attach. 7. On December 10, 2010, CCPGA appealed the Commissioner's denial of the request to revive abandoned Potato Application No. 200500232 to the Judicial Officer. CCPGA acknowledges that its request to revive abandoned Potato Application No. 200500232 was not delivered to the Plant Variety Protection Office until after the expiration of the deadline for reviving abandoned Potato Application No. 200500232, but states: (1) the cause of the late delivery is the United States Postal Service, (2) CCPGA submitted the request in good faith, and (3) CCPGA missed the deadline due to conditions beyond CCPGA's control (CCPGA's December 10, 2010, Appeal Pet. at 2).

On April 19, 2011, the Commissioner filed a response to CCPGA's Appeal Petition stating, as the Plant Variety Protection Office did not receive CCPGA's request to revive abandoned Potato Application No. 200500232 on or before the October 13, 2010, deadline, the application was permanently abandoned and the Commissioner has no jurisdiction to consider CCPGA's late-delivered request.

Pursuant to 7 C.F.R. § 97.3(b)(2), the Plant Variety Protection Board provided me with a recommendation regarding CCPGA's Appeal Petition. The Plant Variety Protection Board advised that the Commissioner should have discretion to apply the "mailbox rule" to the filing of a request for revival of an abandoned application pursuant to 7 C.F.R. § 97.22 and that the Commissioner could reasonably find that CCPGA's

request to revive abandoned Potato Application No. 200500232 should be accorded a filing date prior to the October 13, 2010, deadline.

On August 31, 2011, the Commissioner filed the Recommendation of the Plant Variety Protection Board stating “[t]he Plant Variety Protection Office cannot endorse the Board’s recommendation.” On September 9, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. By letter dated September 13, 2011, I informed CCPGA and the Commissioner that they each had the right under 7 C.F.R. § 97.300(d), upon request, to orally present data, views, and arguments, and I provided each party until October 7, 2011, to submit a written request to make an oral presentation. Neither CCPGA nor the Commissioner submitted a request to make an oral presentation; therefore, I conclude the Commissioner and CCPGA waive the right to orally present data, views, and arguments.

DECISION

Decision Summary

The facts in this proceeding are not in dispute. The only issue before me is whether the Commissioner has discretion to apply the “mailbox rule” to CCPGA’s request to revive abandoned Potato Application No. 200500232. CCPGA mailed the request to the Plant Variety Protection Office on October 7, 2010, 6 days prior to the expiration of the deadline for reviving abandoned Potato Application No. 200500232, but the Plant Variety Protection Office did not receive CCPGA’s request until October 18,

2010, 5 days after the expiration of the deadline for reviving abandoned Potato Application No. 200500232. I conclude the Commissioner has discretion to apply the “mailbox rule” to CCPGA’s request to revive abandoned Potato Application No. 200500232. I remand the instant proceeding to the Commissioner to determine whether to apply the “mailbox rule” to CCPGA’s request to revive abandoned Potato Application No. 200500232 and whether to consider CCPGA’s application for revival of abandoned Potato Application No. 200500232.

Discussion

The Plant Variety Protection Act is silent as to the applicability of the “mailbox rule” to a request to revive an abandoned application for plant variety protection. Moreover, the Regulations merely state an abandoned application may be revived as a pending application within 3 months of abandonment, as follows:

§ 97.22 Revival of an application abandoned for failure to reply.

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

7 C.F.R. § 97.22. Therefore, I conclude neither the Plant Variety Protection Act nor 7 C.F.R. § 97.22 deprives the Commissioner of discretion to apply the “mailbox rule” to requests to revive abandoned applications.

The Commissioner based the conclusion that he did not have jurisdiction to consider CCPGA's request, in part, on *In re J.R. Simplot Co.*, 62 Agric. Dec. 114 (2003) (Response to Pet. to Revive Abandoned Application at 2), in which I held, as follows:

[O]nce an applicant abandons an application for plant variety protection and the period for reviving the application has expired, the abandoned application is permanently abandoned and the Commissioner then has no application before him. With no application before him, the Commissioner cannot change the status of the application from "permanently abandoned" to "pending."

In re J.R. Simplot Co., 62 Agric. Dec. 114, 134-35 (2003). However, the applicability of the "mailbox rule" to requests for revival of abandoned applications was not at issue in *In re J.R. Simplot Co.*, as the J.R. Simplot Company's first communication with the Plant Variety Protection Office regarding revival of its abandoned application was dated after the expiration of the 3-month deadline for revival.

The Commissioner also analogizes his loss of jurisdiction under 7 C.F.R. § 97.22 to the Judicial Officer's loss of jurisdiction to hear an appeal after an administrative law judge's decision becomes final, as follows:

The result does not differ from the many instances of late appeals of formal administrative disciplinary cases which are dismissed for lack of jurisdiction whether or not the lateness is attributable to the appellant.

Response to Pet. to Revive Abandoned Application at 2. The Commissioner does not specifically identify the administrative disciplinary cases to which he refers; however, the vast majority of proceedings in which the Judicial Officer hears appeals are those conducted under 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]. Under the Rules of Practice, a party may appeal an administrative law judge's decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk (7 C.F.R. § 1.145(a)). The Judicial Officer has held that he has no jurisdiction to hear an appeal that is filed with the Hearing Clerk after the administrative law judge's decision becomes final,¹ even if the appeal petition is late-filed due to delay by the United States Postal Service. The Judicial Officer has no discretion to apply the "mailbox rule" with respect to appeal petitions filed in proceedings conducted under the Rules of Practice

¹See, e.g., *In re Timothy Mays* (Order Denying Late Appeal), ___ Agric. Dec. ___ (Feb. 5, 2010) (dismissing the respondent's appeal petition filed 12 days after the administrative law judge's decision became final); *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Michael Claude Edwards* (Order Denying Late Appeal), 66 Agric. Dec. 1362 (2007) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); *In re Tung Wan Co.* (Order Denying Late Appeal), 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); *In re Jozset Mokos* (Order Denying Late Appeal), 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re Ross Blackstock* (Order Denying Late Appeal), 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David Gilbert* (Order Denying Late Appeal), 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez* (Order Denying Late Appeal), 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

because the Rules of Practice provide that appeal petitions are deemed to be filed when they reach the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computations 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 Commissioner does not cite, and I cannot locate, any similar constraint on the Commissioner's discretion to apply the "mailbox rule" to a request to revive an abandoned application submitted pursuant to 7 C.F.R. § 97.22.

For the foregoing reasons, I adopt the advice of the Plant Variety Protection Board and issue the following Order.

ORDER

This proceeding is remanded to the Commissioner to determine whether to apply the "mailbox rule" to CCPGA's request to revive abandoned Potato Application No. 200500232 and whether to consider CCPGA's application for revival of abandoned Potato Application No. 200500232.

Done at Washington, DC

December 12, 2011

William G. Jenson
Judicial Officer