

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	P. & S. Docket No. D-02-0003
)	
Houston Livestock Co., Inc.,)	
Billy Mike Gentry,)	
)	Order Denying Respondents
Respondents)	Motion for Extension of Time

On July 25, 2002, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision Without Hearing by Reason of Default. The Hearing Clerk sent Houston Livestock Co., Inc., and Billy Mike Gentry [hereinafter Respondents] the ALJ's Decision Without Hearing by Reason of Default by certified mail on July 26, 2002.¹ The United States Postal Service marked the Hearing Clerk's July 26, 2002, certified mailings unclaimed and returned the certified mailings to the Hearing Clerk. On August 28, 2002, the Hearing Clerk remailed the ALJ's Decision Without Hearing by Reason of

¹See: (1) Letter dated July 26, 2002, from Joyce A. Dawson, Hearing Clerk, to Respondents; (2) Certified Mail Receipt Numbers 7099 3400 0014 4578 8256 and 7099 3400 0014 4579 3229; and (3) Document Distribution Form, Office of Administrative Law Judges, Hearing Clerk's Office, indicating the Hearing Clerk sent the ALJ's Decision Without Hearing by Reason of Default and the Hearing Clerk's service letter dated July 26, 2002, to Respondents by certified mail on July 26, 2002.

Default to Respondents by ordinary mail.² On October 2, 2002, Respondents filed a letter requesting an extension of time within which to appeal to the Judicial Officer [hereinafter Motion for Extension of Time]. On October 15, 2002, JoAnn Waterfield, Deputy Administrator, Packers and Stockyards Programs [hereinafter Complainant], filed Complainant's Response to Respondents Request for Extension of Time to Appeal Decision Without Hearing by Reason of Default. On October 18, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents Motion for Extension of Time.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], which are applicable to this proceeding, provide that where the United States Postal Service marks a certified mailing unclaimed and returns the mailing to the Hearing Clerk, the date of service is the date the Hearing Clerk re-mails the mailing to the same address by ordinary mail.³ Thus, the Hearing Clerk served Respondents with the ALJ's Decision Without Hearing by Reason of Default on August 28, 2002.

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party must file an appeal petition with the Hearing Clerk within 30 days after receiving service of the administrative law judge's decision. Hence, Respondents' appeal petition was due no

²See Memoranda to the File, Office of the Hearing Clerk, dated August 28, 2002, signed by Fe Carolina Angeles, Legal Technician.

³See 7 C.F.R. § 1.147(c)(1).

later than September 27, 2002. Respondents filed Respondents Motion for Extension of Time on October 2, 2002, 35 days after the Hearing Clerk served Respondents with the ALJ s Decision Without Hearing by Reason of Default and 5 days after Respondents time for filing an appeal petition had expired. Therefore, Respondents Motion for Extension of Time must be denied.

Moreover, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ s Decision Without Hearing by Reason of Default became final on October 2, 2002. The Judicial Officer does not have jurisdiction to consider an appeal petition filed on or after the date an administrative law judge s initial decision becomes final.⁴ Thus, the Judicial Officer cannot grant a request for an extension of time to file an

⁴See *In re Samuel K. Angel*, 61 Agric. Dec. ____ (Apr. 24, 2002) (dismissing the respondent s appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent s appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent s appeal petition filed 15 days after the initial decision and order became final), *aff d per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman s appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent s appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent s appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent s appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent s appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994)

(continued...)

⁴(...continued)

(dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition 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 the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, 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 the respondents' appeal petition, 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 the respondent's appeal petition 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 the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating 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 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 the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating 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 the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*,

(continued...)

appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final.

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

ORDER

Respondent's Motion for Extension of Time, filed October 2, 2002, is denied.

Done at Washington, DC

October 23, 2002

William G. Jenson
Judicial Officer

⁴(...continued)

41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the 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 since the 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 the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating 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).