

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	2002 AMA Docket No. F&V 989-1
	)	
Lion Raisins, Inc., a California	)	
corporation,	)	
	)	
Petitioner	)	<b>Remand Order</b>

**PROCEDURAL HISTORY**

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition<sup>1</sup> on August 5, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989); 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].

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<sup>1</sup>Petitioner entitles its Petition “Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of Other Seedless Raisins Pursuant To 7 C.F.R. § 989 *Et Seq.* And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law” [hereinafter Petition].

On October 22, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Petition.” Respondent contends the Petition does not contain Petitioner’s date of incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), does not contain an affidavit by an officer of Petitioner as required by section 900.52(b)(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(6)), and should be dismissed (Mot. to Dismiss Pet.). On November 4, 2002, Petitioner filed “Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition,” which, *inter alia*, contains Petitioner’s date of incorporation.

On March 10, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an “Order Denying Respondent’s Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner’s Date of Incorporation” in which the ALJ: (1) found the Petition did not contain the date of Petitioner’s incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)); (2) found the Petition substantially complies with the affidavit requirement in section 900.52(b)(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(6)); (3) denied Respondent’s Motion to Dismiss Petition; (4) ordered Petitioner to file a verification of the date of Petitioner’s incorporation within 20 days after Petitioner received the ALJ’s order; and (5) ordered Respondent to file a response to the Petition no later than March 28, 2003.

On March 13, 2003, in accordance with the ALJ’s Order Denying Respondent’s Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner’s Date of

Incorporation, Petitioner filed a verification of the date of Petitioner's incorporation.

Respondent did not file a response to Petitioner's Petition in accordance with the ALJ's

Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File

Verification of Petitioner's Date of Incorporation. Instead, on March 28, 2003,

Respondent appealed to the Judicial Officer. On April 24, 2003, Petitioner filed

"Petitioner's Response to Respondent's Appeal Petition." On April 25, 2003, the Hearing

Clerk transmitted the record to the Judicial Officer for consideration and decision.

### **CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent contends the ALJ, having found the Petition did not contain the date of Petitioner's incorporation, as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)), should have dismissed the Petition (Respondent's Appeal Pet. at 2).

Section 900.52(b)(1) of the Rules of Practice requires that a petition filed by a corporate petitioner must contain the date of incorporation, as follows:

#### **§ 900.52 Institution of proceeding.**

....

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

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers[.]

7 C.F.R. § 900.52(b)(1).

Petitioner admits, and the ALJ found, the Petition did not contain Petitioner's date of incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. §

900.52(b)(1)). The ALJ denied Respondent's Motion to Dismiss Petition because Petitioner provided the date of its incorporation in Petitioner's Opposition to Respondent's Motion to Dismiss Petition filed November 4, 2002, as follows:

The Petition failed to contain Petitioner's date of incorporation, as required under 7 C.F.R. § 900.52(b)(1). Petitioner's Opposition to Respondent's Motion to Dismiss Petition, filed November 4, 2002, supplies Petitioner's date of incorporation but is not verified or otherwise authenticated.

Order Denying Respondent's Mot. to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation at 1.

The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. Section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) states the *petition*<sup>2</sup> (not some other filing) *shall* contain the information, references, statements, prayers for relief, and affidavit described in section 900.52(b)(1)-(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(6)). The word *shall* is ordinarily the language of command and leaves no room for discretion.<sup>3</sup> Thus, Petitioner is

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<sup>2</sup>The *petition* is a document which a handler files with the Hearing Clerk to institute a proceeding under the Rules of Practice and includes an amended petition (7 C.F.R. §§ 900.51(p), .52(a)).

<sup>3</sup>See generally *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)

(continued...)

required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) to include in its Petition the date of Petitioner's incorporation. The Rules of Practice are binding on administrative law judges and the Judicial Officer,<sup>4</sup> and administrative law judges

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<sup>3</sup>(...continued)

(stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) (stating the term "shall" is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary); *United States v. Hughes*, 414 F.2d 1330, 1334 (9th Cir. 1969) (referring to the word "shall" as "imperative"); *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364, 369-70 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for administrative law judge discretion); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

<sup>4</sup>*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various

(continued...)

and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.<sup>5</sup>

I conclude the ALJ should have: (1) dismissed all or a portion of Petitioner's Petition as provided in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)); (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal as provided in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)); and (3) permitted Respondent to file an answer to any amended petition as provided in section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Denying Respondent's

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<sup>4</sup>(...continued)

Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

<sup>5</sup>*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified 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); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified 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).

Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

The ALJ issued an "Order Scheduling Oral Hearing" on March 18, 2003.

Respondent filed a "Motion to Cancel Oral Hearing" on April 4, 2003. On April 25, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Cancel the Oral Hearing."

Section 900.59(a)(2) of the Rules of Practice provides administrative law judges are authorized to rule upon motions filed prior to the time the Hearing Clerk transmits the record of the proceeding to the Judicial Officer and the Judicial Officer is required to rule upon motions filed after that transmittal, as follows:

**§ 900.59 Motions and requests.**

(a) *General. . . .*

(2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart.<sup>[6]</sup> The Secretary shall rule upon all motions and requests filed after that time.

7 C.F.R. § 900.59(a)(2) (footnote added).

Respondent filed the Motion to Cancel Oral Hearing 3 weeks prior to the date the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer. Therefore,

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<sup>6</sup>The subpart (7 C.F.R. §§ 900.50-.71) requires the Hearing Clerk to transmit the record of the proceeding to the Secretary after an appeal is filed by a party to the proceeding. (7 C.F.R. § 900.65(d).)

the ALJ is authorized to rule on Respondent's Motion to Cancel Oral Hearing and the Judicial Officer is not required to rule on Respondent's Motion to Cancel Oral Hearing.

Therefore, I remand the Motion to Cancel Oral Hearing to the ALJ for a ruling.

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

### **ORDER**

1. The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation, issued March 10, 2003, is vacated.

2. The proceeding is remanded to the ALJ to:
  - (a) issue an order in accordance with the Rules of Practice; and
  - (b) rule on Respondent's Motion to Cancel Oral Hearing.

Done at Washington, DC

May 12, 2003

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William G. Jenson  
Judicial Officer