

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 07-0119
)
Susan Biery Sergiojan,)
an individual,)
)
Respondent) **Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative proceeding by filing a Complaint on May 23, 2007. The Administrator alleges Susan Biery Sergiojan committed violations of 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]. On July 16, 2007, Ms. Sergiojan filed an answer denying the allegations in the Complaint.

On April 15-18, 2008, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Olympia, Washington. The Administrator filed a post-hearing brief on February 19, 2009. Ms. Sergiojan did not file a post-hearing brief,

and, on March 18, 2010, after the time for filing post-hearing briefs had expired, the ALJ issued a Decision and Order in which she: (1) found Ms. Sergiojan committed violations of the Animal Welfare Act and the Regulations; (2) ordered Ms. Sergiojan to cease and desist from violations of the Animal Welfare Act and the Regulations; and (3) assessed Ms. Sergiojan a \$10,000 civil penalty.

The Hearing Clerk served Ms. Sergiojan with the ALJ's Decision and Order on March 23, 2010.¹ On April 20, 2010, Ms. Sergiojan requested, and I granted, an extension to May 20, 2010, within which to file an appeal petition.² On May 20, 2010, Ms. Sergiojan requested an extension to June 21, 2010, within which to file an appeal petition, which I also granted.³ On June 22, 2010, Ms. Sergiojan filed "Respondent's Notice of Appeal and Declaration in Support Thereof" [hereinafter Appeal Petition]. On June 28, 2010, the Administrator filed "Complainant's Response to Respondent's Notice of Appeal and Declaration in Support Thereof." On June 30, 2010, the Hearing Clerk transmitted the record to me for consideration and decision. On June 30, 2010, I issued an Order Denying Late Appeal concluding Ms. Sergiojan filed her Appeal Petition 1 day late.

¹United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3860 9115.

²April 20, 2010, Order Extending Time To File Respondent's Appeal Petition.

³May 21, 2010, Order Extending Time To File Respondent's Appeal Petition And Ruling Denying Respondent's Request To Extend Time To File Petition To Reconsider.

On June 30, 2010, the Hearing Clerk served Ms. Sergiojan with the Order Denying Late Appeal.⁴ On July 22, 2010, Ms. Sergiojan filed a letter [hereinafter Petition to Reconsider] requesting that I reconsider *In re Susan Biery Sergiojan* (Order Denying Late Appeal), ___ Agric. Dec. ____ (June 30, 2010). On July 30, 2010, the Administrator filed a response to Ms. Sergiojan's Petition to Reconsider, and on August 2, 2010, the Hearing Clerk transmitted the record to me for consideration of Ms. Sergiojan's Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Hearing Clerk served Ms. Sergiojan with the Order Deny Late Appeal on June 30, 2010.⁵ The rules of practice applicable to the instant proceeding⁶ provide that a petition to reconsider must be filed within 10 days after the date of service of the Judicial Officer's decision, as follows:

⁴Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form, indicating the Hearing Clerk mailed the Order Denying Late Appeal by ordinary mail to Ms. Sergiojan on June 30, 2010.

⁵See note 4.

⁶The rules of practice applicable to the instant proceeding are 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].

§ 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). Therefore, Ms. Sergiojan was required to file a petition to reconsider no later than Monday, July 12, 2010. On July 22, 2010, Ms. Sergiojan filed a Petition to Reconsider *In re Susan Biery Sergiojan* (Order Denying Late Appeal), ___ Agric. Dec. ___ (June 30, 2010). Ms. Sergiojan's Petition to Reconsider was not timely filed. Accordingly, Ms. Sergiojan's Petition to Reconsider is denied.⁷

Even if Ms. Sergiojan's Petition to Reconsider had been timely filed, I would deny the Petition to Reconsider. Ms. Sergiojan asserts that, on Friday, June 18, 2010, she

⁷See *In re David L. Noble* (Order Denying Motion for Recons.), ___ Agric. Dec. ___ (Jan. 20, 2010) (denying, as late-filed, the respondent's motion to reconsider filed 19 days after the Hearing Clerk served the respondent with the order denying late appeal); *In re Mitchell Stanley* (Order Denying Pet. for Recons.), 65 Agric. Dec. 1171 (2006) (denying, as late-filed, a petition to reconsider filed 13 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition to reconsider filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition to reconsider filed 15 days after the date the Hearing Clerk served the respondent with the decision and order).

attempted on numerous occasions to send her Appeal Petition to the United States Department of Agriculture by fax. Each of her June 18, 2010, attempts to fax her Appeal Petition failed because the Hearing Clerk's "FAX machine remained busy and would not accept [her] filing." (Pet. to Reconsider at 1.) Ms. Sergiojan further asserts that, on Monday, June 21, 2010, she again made numerous attempts to send her Appeal Petition to the United States Department of Agriculture by fax, but was unable to successfully fax the Appeal Petition until after 4:30 p.m., June 21, 2010, the deadline for filing the Appeal Petition. Ms. Sergiojan contends that on June 22, 2010, she called the Office of Administrative Law Judges and spoke to an employee of that office, who assured her that, as the Appeal Petition had arrived on June 21, 2010, "there was no problem with the timing of [the] [A]ppeal [P]etition." (Pet. to Reconsider at 2.)

The Rules of Practice provide that the effective date of filing a document is the date the 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). Ms. Sergiojan's unsuccessful attempts to file her Appeal Petition with the Hearing Clerk do not constitute filing with the Hearing Clerk.⁸ Moreover, Ms. Sergiojan's faxing her Appeal Petition to a United States Department of Agriculture office after the time for filing the Appeal Petition does not constitute timely filing with the Hearing Clerk.

The Hearing Clerk's date and time stamp establishes the date and time a document reaches the Hearing Clerk.⁹ The Hearing Clerk's date and time stamp establishes that Ms. Sergiojan's Appeal Petition reached the Hearing Clerk on June 22, 2010, 1 day after Ms. Sergiojan's Appeal Petition was due. Therefore, even if I were to find Ms. Sergiojan's Petition to Reconsider timely, I would reject Ms. Sergiojan's contention that her Appeal Petition was timely and decline to set aside the June 30, 2010, Order Denying Late Appeal.¹⁰

For the foregoing reasons, the following Order is issued.

⁸*In re Gerald Fuches*, 56 Agric. Dec. 517, 528 (1997) (stating attempts to reach the Hearing Clerk do not constitute filing with the Hearing Clerk).

⁹*In re Bruce Lion* (Ruling), 65 Agric. Dec. 1214, 1221 (2006) (holding the most reliable evidence of the date a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document).

¹⁰Even though Ms. Sergiojan's Appeal Petition was not timely filed, I reviewed the Appeal Petition and found that the Appeal Petition fails to set forth grounds to set aside the ALJ's Decision and Order.

ORDER

1. Ms. Sergiojan's Petition to Reconsider, filed July 22, 2010, is denied.
2. The ALJ's Decision, filed March 18, 2010, is the final decision in the instant proceeding.

Done at Washington, DC

August 3, 2010

William G. Jenson
Judicial Officer