

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-06-0019  
)  
Tung Wan Company, Inc., )  
)  
Respondent ) **Order Denying Late Appeal**

**PROCEDURAL HISTORY**

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on July 26, 2006. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and 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].

Complainant alleges Respondent violated the PACA.<sup>1</sup> The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 4,

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<sup>1</sup>Compl. ¶¶ III-VI.

2006.<sup>2</sup> Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated September 6, 2006, informing Respondent that an answer to the Complaint had not been filed within the time required in the Rules of Practice. Respondent did not respond to the Hearing Clerk's September 6, 2006, letter.

On October 12, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 16, 2006.<sup>3</sup> Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter dated December 7, 2006, informing Respondent that objections to Complainant's Motion for Default Decision had not been filed within the time required in the Rules of Practice and the Hearing Clerk would refer the proceeding to an

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<sup>2</sup>United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4087 9344.

<sup>3</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4346.

administrative law judge for consideration and decision. Respondent did not respond to the Hearing Clerk's December 7, 2006, letter.

On January 9, 2007, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] filed a Decision Without Hearing by Reason of Default [hereinafter Decision and Order] concluding Respondent violated the PACA as alleged in the Complaint and ordering publication of the facts and circumstances of Respondent's violations of the PACA.<sup>4</sup>

On January 10, 2007, the Hearing Clerk served Respondent with the Chief ALJ's Decision and Order and a service letter.<sup>5</sup> Respondent failed to file an appeal petition within 30 days after service as required by section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)). On February 13, 2007, the Hearing Clerk served Respondent with a Notice of Effective Date of Decision Without Hearing by Reason of Default<sup>6</sup> stating the Chief ALJ's Decision and Order became final February 13, 2007.

On March 27, 2007, Respondent filed a Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing. On April 3, 2007, Complainant filed a Reply to Respondent's Petition to Appeal Decision Without Hearing,

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<sup>4</sup>Decision and Order at second and third unnumbered pages.

<sup>5</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4797.

<sup>6</sup>United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4933.

Petition to Reopen the Proceeding, and Request for Hearing. On April 4, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

### **CONCLUSION BY THE JUDICIAL OFFICER**

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service; therefore, Respondent was required to file its appeal petition with the Hearing Clerk no later than February 9, 2007. The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.<sup>7</sup> Pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ's Decision and Order became final on February 14, 2007. Respondent filed its Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing with the Hearing Clerk on March 27, 2007, 41 days after the Chief

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<sup>7</sup>See, e.g., *In re Tim Gray*, 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*, 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 David Gilbert*, 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*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); *In re Ross Blackstock*, 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 McCauley*, 63 Agric. Dec. 639 (2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final).

ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

**Rule 4. Appeal as of Right—When Taken**

**(a) Appeal in a Civil Case.**

**(1) Time for Filing a Notice of Appeal.**

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.<sup>[8]</sup>

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<sup>8</sup>*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating, since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed and the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 264 (1978) (stating, under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed

(continued...)

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.<sup>9</sup> The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

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<sup>8</sup>(...continued)  
within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating, under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing).

<sup>9</sup>Fed. R. App. P. 4(a)(5).

The Administrative Orders Review Act (“Hobbs Act”) requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.<sup>[10]</sup>

Accordingly, Respondent’s Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing must be denied, since it is too late for the matter to be further considered.

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

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<sup>10</sup>*Accord Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court’s baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant’s petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

**ORDER**

Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed March 27, 2007, is denied. Chief Administrative Law Judge Marc R. Hillson's Decision and Order, filed January 9, 2007, is the final decision in this proceeding.

Done at Washington, DC

April 25, 2007

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William G. Jenson  
Judicial Officer