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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

MIDWAY FARMS, INC., A CALIFORNIA CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 97-5460 AWI SMS.
Decided May 18, 1998.

Raisins — Handler — *In camera* inspection of documents.

The Court held that the plain language of 7 U.S.C. § 608c(15)(A) limits the statute's application to *any handler subject to an order* and rejected Plaintiff's contention that the Judicial Officer erred in dismissing with prejudice Plaintiff's 15(A) petition, based on Plaintiff's denial that it was a handler subject to the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California (Raisin Order). The Court also rejected Plaintiff's contention that the administrative law judge erred in determining that he could not conduct an *in camera* inspection of Plaintiff's documents. Moreover, the Court rejected Defendant's contention that the issue before the Court was whether Plaintiff was a handler subject to the Raisin Order and that Court lacked subject matter jurisdiction because the issue was not ripe for judicial review. The Court denied Plaintiff's motion for summary judgment, denied Defendant's motion for judgment on the pleadings, and granted Plaintiff an opportunity to submit evidence in opposition to the Court's contemplated *sua sponte* entry of summary judgment for Defendant.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is an action for declaratory relief, based on the review of an administrative proceeding. The court has jurisdiction over this matter pursuant to 7 U.S.C. § 608c(15)(B), part of the Agricultural Marketing Agreement Act. Pursuant to the request of the parties, this matter, originally calendared for April 27, 1998, was submitted on the papers.

PROCEDURAL HISTORY

Plaintiff Midway Farms, Inc. ("Midway Farms") filed a "Complaint for Review of Agency Action; Declaratory Relief," on May 5, 1997. In its complaint, Midway Farms sets forth two claims for relief. First, Midway Farms alleges that pursuant

to 7 U.S.C. § 608c(15)(A) and 5 U.S.C. §§ 702 through 706, this court has jurisdiction to order Defendant United States Department of Agriculture ("USDA") to proceed with Midway Farms' administrative petition, and to declare that a petitioner does not have to admit that it is a handler in order to bring an administrative petition when USDA claims that Midway Farms must comply with various marketing order provisions. Second, Midway alleges that this court has authority to order that an Administrative Law Judge can review its records *in camera* in an administrative proceeding to prevent the disclosure of proprietary information.

USDA filed an answer to the complaint on August 7, 1997. On November 21, 1997, Midway Farms filed a motion for summary judgment. In response, on January 9, 1998, USDA filed memorandum in support of judgment on the pleadings and in opposition to Midway Farms' motion for summary judgment, seeking dismissal for lack of subject matter jurisdiction. On February 10, 1998, Midway Farms filed an opposition to the motion for judgment on the pleadings and a reply to the opposition to its motion for summary judgment. On March 5, 1998, USDA filed a reply in support of its motion for judgment on the pleadings.

UNDISPUTED FACTS

Midway Farms has submitted the following undisputed facts in support of its motion for summary judgment. Midway Farms asserts that the initial facts are taken directly from the Joint Scheduling Report filed September 5, 1997.

1. Midway Farms filed an Administrative Petition with USDA alleging that it is not a "handler" under the Raisin Marketing Order and therefore is not subject to the reporting requirements and other obligations imposed on handlers under the Order. (JSR 2:8-10)

2. In June 1994 the Raisin Administrative Committee had informed Midway Farms that it should comply with certain reporting requirements under the Raisin Marketing Order. (JSR 2:10-12)

3. During the pendency of the administrative process, USDA subpoenaed documents from Midway Farms in order to determine whether Midway Farms was a handler under the Raisin Marketing Order. Midway Farms provided documents to USDA in redacted form in order to protect its business. USDA objected to the redactions and deemed the documents nonresponsive, and the Chief Administrative Law Judge arranged for an *in camera* inspection of Midway Farms's documents in unredacted form, to which USDA objected. (JSR 2:12-16)

4. On motion by USDA the ALJ dismissed the petition without prejudice and Midway Farms appealed to the Secretary. The Secretary's Judicial Officer

dismissed the petition with prejudice, on the grounds that Midway Farms could not litigate the interpretation of "handler" while alleging itself not to be a handler, because the Agricultural Marketing Agreement Act of 1937 only allows handlers to file a petition. (JSR 2:17-20)

5. The Judicial Officer also ruled that the ALJ erred in protection of Midway Farms's documents from disclosure to USDA, and the JO rejected the ALJ's view that the petitioner could toll any civil penalties during the pendency of its petition. (JSR 2:20-23)

Midway Farms asserts that the following are undisputed facts from Midway Farms's verified petition filed with the USDA, attached as Exhibit "1" to the complaint. Any reference to the verified petition will be noted as "VP" and then the paragraph number.

6. Midway is a corporation, incorporated in the State of California on or about April 28, 1989, with its principal place of business in Fresno. (VP ¶ C, D)

7. Midway Farms purchases from raisin packers and processors off-grade raisins, failing raisins, raisin residue matter, stems, sticks, sand and other junk that the processor or packer grades out of the raisins that the packers and processors are packing for sale into the normal stream of interstate and foreign commerce for human consumption. (VP ¶ 2)

8. The product purchased by Midway Farms is distillery material, cattle feed and concentrate material. (VP ¶ 2)

9. None of the products received by Midway from processors and packers is resold by Midway as "raisins" as that term is defined in § 989.5, § 989.9, and in conjunction with the grade and condition standards found in § 989.58 and § 989.59 (7 C.F.R.). (VP ¶ 2)

10. Midway Farms alleges that it is not a processor, not a packer and not a handler of California raisins pursuant to the Raisin Marketing Order, but even if it were considered a handler pursuant to § 989.15 it has never been the first handler. (VP ¶ 3)

11. Under the Raisin Marketing Order, packers and processors must account for the disposition of off grade raisins, other failing raisins and raisin residue material. (VP ¶ 4)

12. The Raisin Administrative Committee has taken the position, as of at least June, 1994 that Midway is required to fill out and account for all of the material received from other handlers (packers and processors) and to account to the Raisin Administrative Committee for all of Midway's dispositions, including to whom Midway sells its product. (VP ¶ 4)

13. The Raisin Administrative Committee Manager has memorialized the purported requirement in a letter dated June 13, 1994 to Midway, which is attached

to the Verified Petition as Exhibit "A". (VP ¶ 4)

14. As far as Midway knows, understands and has been told, Midway is not responsible for any assessments, any reserve obligation or any other obligations under the Raisin Marketing Order. (VP ¶ 5)

15. The processor/packer/handler who acquires and receives raisins from growers or from others after reconditioning said raisins is obligated under the R.A.C. rules and regulations and under the Raisin Marketing Order to account for the acquisitions and the disposition of said raisins, and the disposition of off grade raisins, failing raisins and raisin residue material, and, upon information and belief, Midway understands that said packer/processor/handlers from whom Midway purchases said off grade, failing and residual raise material do account to the R.A.C. for the material sold to Midway. (VP ¶ 6)

16. Those persons and entities to whom and which Midway sells its distillery material, cattle feed and concentrate material are an extremely important and safeguarded trade secret of Midway. (VP ¶ 7)

17. That is, if the packers/processors/handlers knew of Midway's outlet sources for said material, said packer/processor/handlers would simply bypass Midway and sell directly to Midway's outlet sources. (VP ¶ 7)

18. Midway is extremely fearful that if Midway is required to fill out R.A.C. forms showing the quantity sold by Midway and to whom that quantity is sold, that said information would be passed back, intentionally, negligently, or perhaps even innocently to others in the industry who would then use that information to bypass Midway and put Midway out of business by dealing to Midway sources directly. (VP ¶ 7)

19. Midway further believes that the R.A.C., in retaliation for Midway's refusal to fill out the R.A.C. forms and/or filing this administrative opinion, will advise Midway's sources not to deal with Midway. (VP ¶ 7)

20. As a result of Midway Farms receiving the letter described in paragraph 13 above, Midway promptly filed an administrative petition with USDA (described above) seeking declaratory relief from the Secretary that Midway is not a handler pursuant to the AMAA and therefore cannot be subjected to the Raisin Marketing Order. (Complaint, ¶ 9)

21. During the administrative process USDA filed a motion to dismiss the petition, alleging that since Midway claims that it is not a handler it could not bring an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). (Complaint, ¶ 11)

22. USDA also sought through a subpoena a large volume of documents from Midway that USDA could, purportedly, determine whether Midway was a handler subject to the Marketing Order. (Complaint, ¶ 11)

23. Midway provided many documents to USDA showing that Midway's acquisitions of off-grade raisins from various handlers and showed disposition documents but with the name of the buyer and the price received redacted. (Complaint, ¶ 11)

24. Midway claimed to the Administrative Law Judge, and then to the Secretary's Judicial Officer, and claims today that providing USDA with unredacted sales documents, if the names of the buyers and the purchase prices were ever disclosed, it would put Midway out of business because first handlers of raisins could simply bypass Midway, go directly to Midway's buyers and sell the product directly to those buyers and thus eliminate Midway as a "middle man" altogether. (Complaint, ¶ 11)

25. Midway offered to provide all of the original documents to the ALJ *in camera* and Midway further agreed that Terry Stark, the manager of the Raisin Administrative Committee, could assist the ALJ in reviewing those documents, as Midway trusted Terry Stark, but not the USDA official that USDA said should look at the documents. (Complaint, ¶ 11)

26. The Administrative Law Judge originally agreed to this method, USDA filed another motion to dismiss, and on May 10, 1996 the Chief Administrative Law Judge issued an order dismissing that petition without prejudice because of the uniqueness of the case, but the ALJ tolled the civil penalties which might be assessed if an administrative action was filed against the Midway Farms pursuant to 7 U.S.C. § 608c(14)(B) to allow the petitioner to allege any said proceedings that it was not a handler subject to the marketing order. (Complaint, ¶ 11, Exhibit "2" to said Complaint)

27. Midway then filed an appeal to USDA's Judicial Officer (Complaint, ¶ 12), with a true and correct copy of said appeal attached to the complaint and marketed Exhibit "3".

28. On April 18, 1997, the Judicial Officer rendered a decision and order dismissing Midway's petition *with prejudice*. (Complaint, ¶ 13, Exhibit "4" to said Complaint)

29. The Judicial Officer found that since Midway alleges that it is not processor/packer/handler subject to the Raisin Marketing Order that Midway has no standing to bring an administrative petition because Midway would either have to admit that it is a handler, or produce documents showing that it is such a handler. (Complaint, ¶ 13, Exhibit "4" to said Complaint, pp. 12-14)

30. The Judicial Officer also declared that the ALJ erred in tolling civil penalties because, as the Judicial Officer held, Midway should not again be allowed to allege that it is not a handler. (Complaint, ¶ 13, pp. 14-16)

31. Midway timely filed its complaint in U.S. District Court pursuant to 7 U.S.C. § 608c(15)(B).

USDA has not reproduced the above itemized Statement of Undisputed Facts, explaining which are disputed and which are undisputed. USDA is therefore in violation of Local Rule 56-260(b). However, there does not appear to be a factual dispute in this case.

LEGAL STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984).

> Under summary judgment practice, the moving party [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the `pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 298-89

(1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1995).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *Poller*, 368 U.S. at 468; *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)(per curiam); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1997).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for

the nonmoving party, there is no `genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

DISCUSSION

I. Midway Farms' Motion for Summary Judgment

A. First Claim for Relief

Midway Farms contends that it is entitled to summary judgment on its first claim for relief, alleging that the Judicial Officer erred in stating that Midway farms must admit that it is a handler in order to bring an administrative petition to challenge USDA's claim that it is subject to the Raisin Marketing Order.

In support of this contention, Midway Farms first correctly argues that the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601 et seq., regulates only "handlers" of the product in question. Specifically, 7 U.S.C. § 608c provides in part, "[t]he Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers" Midway Farms claims, without authority, that "[t]he long established interpretation by USDA is that the AMAA only regulates the `first handier,' the one who first places the product into the stream of interstate commerce, not those who thereafter buy the product and resell it." Midway Farms's Motion for Summary Judgment, 8:10-12.

Midway Farms argues second that when, on June 13, 1994, it received a letter from the manager of the Raisin Administrative Committee advising it that pursuant to provisions of the Raisin Marketing Order it was required to fill out several forms, the Raisin Administrative Committee was claiming that Midway Farms was subject to the Raisin Marketing Order. After receiving the letter, Midway Farms filed its administrative petition with the Secretary, pursuant to 7 U.S.C. § 608c(15)(A), which provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposes in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with the regulations made by the

Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

The rules of practice governing administrative petition proceedings, 7 C.F.R. § 900.50 et seq., defines the term "handler" as "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51. Midway Farms claims not that it is a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable." Midway Farms contends, therefore, that it is a "handler" pursuant to the rules of practice governing administrative petition proceedings, which would allow it to seek a ruling from the USDA either that it is not a "handler," and so not subject to the Raisin Marketing Order, or, is a person "to whom a marketing order is sought to be made applicable," but to whom the Raisin Marketing Order does not apply.

In so arguing, Midway Farms ignores the plain and simple language of the statute in question, 7 U.S.C. § 608c(15)(A). The statute expressly limits its application to a specific type of handler, this is, "Any handler subject to an order." Thus, the fact that 7 C.F.R. § 900.51 provides an additional definition for "handler," is not dispositive. Midway Farms defines itself as a person, "to whom a marketing order is sought to be made applicable," which is undeniably *not* the type of handler covered under 7 U.S.C. § 608c(15)(A).

Alternatively, Midway Farms contends that if it has no standing to bring an administrative petition contesting whether the Raisin Marketing Order can be made applicable to it, it should have the absolute right to seek declaratory relief in the District Court without exhausting administrative remedies. Midway Farms argues that if it must admit not only that it is a handler but also that it is subject to the marketing order before it can file an administrative petition, it should not be forced to exhaust administrative remedies, but instead should be able to bring an action directly in district court seeking declaratory relief pursuant to 28 U.S.C. §§ 1131, and 2201 - 2202. Midway Farms provides no authority for this proposition.

Based on the above two contentions, Midway concludes that it is entitled to a ruling from this court that the Administrative Law Judge's and Judicial Officer's dismissals of Midway Farms' petition were arbitrary, capricious and not in accordance with law.

B. Second Claim for Relief

Midway Farms contends that it is entitled to summary judgment on its second

claim for relief that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of Midway Farms' documents. Midway Farms asserts that redacted versions of the documents had already been provided to the USDA, and the only information that was redacted was the buyer's name and the price for which the product was sold.

Midway Farms argues that the ALJ's decision was arbitrary, capricious and not in accordance with the law. Citing no authority, Midway Farms claims, "Proprietary information should be protected from harmful disclosure just as much as in administrative proceedings as they are protected in District Court." Midway Farms's Motion for Summary Judgment, 10:19-20. Midway Farms further claims without authority that, "Particularly in light of the fact that if Midway is not subject to the Raisin Marketing Order, USDA is not entitled to its records to be with [sic]. *Id.* at 10:21-22. In so arguing Midway Farms ignores USDA's ability to investigate to determine whether a person is subject to the Raisin Marketing Order.

C. Motion for Judgment on the Pleadings and Opposition to Motion for Summary Judgment

In its combined memorandum of points and authorities in support of motion for judgment on the pleadings and in opposition to Midway Farms' motion for summary judgment, USDA contends that this case should be dismissed for lack of subject matter jurisdiction, because it is not ripe. As USDA explains, Article III, § 2 of the Constitution limits the jurisdiction of the courts to cases or controversies, and one aspect of this requirement is ripeness. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253 (1990); *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 3332 (1985). In the present case, USDA claims that the issue to be decided is whether Midway Farms is "handler" of raisin material and therefore subject to the reporting requirement of the Raisin Marketing Order.

The United States Supreme Court has explained the ripeness doctrine as follows:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both

the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967).

In regard to the issue of fitness, the Ninth Circuit has held that "[a] claim is fit for decision if the issue raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989), *cert. den.*, 495 U.S. 904, 110 S.Ct. 1923 (1990); *see Winter v. California Medical Review*, Inc., 900 F.2d 1322, 1325 (9th Cir. 1990). Applying this standard to the present case, USDA argues that whether Midway Farms "receives or acquires" raisin material and uses it "in the production of a product other than raisins, for market or distribution" so as to fall within the definition of processor/handler under 7 C.F.R. §§ 989.13 and 989.15, is largely a question of fact. USDA argues that this question can only be resolved through further factual development, *i.e.*, through the complete examination of the documents it has subpoenaed.

In regard to the finality requirement for fitness, the court "looks to whether the agency action represents the final administrative work to insure that judicial review will not interfere with the agency's decision-making process." *State of Cal., Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987). The Ninth Circuit has further stated in regard to finality that:

> "It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process." *Getty Oil Co. v. Andrus*, 607 F.2d 253, 245 (9th Cir. 1979). Indicia of finality include: the administrative action challenged should be a definite statement of an agency's position; the action should have a direct and immediate effect on the day-to-day business of the complaining parties; the action should have the status of law; immediate compliance with the terms should be expected; and the question should be a legal one. *FTC v. Standard Oil*, 449 U.S. 232, 239-40, 101 S.Ct 488, 493, 66 L.Ed.2d 416 (1980) (Standard Oil) (citations omitted).

Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990).

In the present case, USDA contends that none of the above criteria of finality are met. USDA argues persuasively that although Midway Farms brought this action in reaction to a letter from the Raisin Administrative Committee suggesting that it was a handler, the Raisin Administrative Committee's letter is not a definite statement of USDA's position, and the letter does not subject Midway Farms to

obligations imposed on "handlers" would affect its day-to-day business. *See Blincoe v. Federal Aviation Administration*, 37 F.3d 462, 464 (9th Cir. 1994) (letter did not constitute a definitive determination by the agency, agency's characterization of its own action is relevant in determining whether the letter is a "final" administrative resolution); *Flagship Federal Savings Bank v. Wall*, 748 F. Supp. 742, 746 (S.D. Cal. 1990) (letters did not constitute a formalized determination by an agency).

USDA summarizes its arguments regarding the lack of finality in this case as follows:

> Thus, while the Committee's conjectures prompted defendant to pursue an investigation, defendant has yet to reach a final determination on the question of plaintiff's status, and indeed, cannot do so without first examining the subpoenaed documents. No final administrative action has yet occurred, and a declaration by the Court would only interrupt the decision-making process of the agency and usurp its role prematurely. Plaintiff's claim is therefore not fit for decision by this Court.

Memorandum in Support of Motion for Judgment on the Pleadings and in Opposition to Plaintiff's Motion for Summary Judgment, 8:12-20.

In regard to hardship to the parties of withholding court consideration, the second aspect of consideration under *Abbott Laboratories*, the Ninth Circuit has held that a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss. *State of Cal., Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-34 (9th Cir. 1987). In the present case, USDC contends that the possibility of hardship to Midway Farms is purely speculative. USDC argues that if the administrative process is allowed to run its course, USDA may ultimately determine that Midway Farms is not a handler and therefore not subject to reporting requirements which allegedly would reveal Midway Farms' trade secrets.

With respect to Midway Farms' claim that complying with USDA's investigatory subpoena will result in publication of trade secrets, USDA asserts that its officers and employees are legally bound to hold all such information confidential or face criminal sanctions and removal from office. *See Tinoco, v. Belshe, M.D.*, 916 F. Supp. 974, 983 (N.D. Cal. 1995) (court must presume that agency will act within the law). USDA contends that Midway Farms thus has no reasonable basis for predicting financial loss and will suffer no "direct and immediate" hardship in the absence of this court's review. USDA also contends that because it has not determined that Midway Farms is a "handler," the Court

need not consider its argument that it has standing to file an administrative petition challenging USDA's alleged determination without admitting that it is a handler. Finally, USDA contends that because any harm to Midway Farms from complying with USDC's document subpoena is purely speculative, it is unnecessary for the court to consider Midway Farms' argument that it can properly submit the subpoenaed documents *in camera*.

In opposition to USDA's motion for judgment on the pleadings and in reply to the opposition to its motion for summary judgment, Midway Farms contends that USDA is mistaken in describing what issue is now before the court. Specifically, Midway Farms contends that contrary to USDA's claim, the issue before the court is not whether it is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Rather, the issue before the court is the whether USDA can dismiss Midway Farms' administrative petition because it does not admit that it is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Midway argues at length that this issue is ripe for decision and that USDA's motion for judgment on the pleadings should therefore be denied. Echoing USDA's analysis of ripeness, Midway Farms contends that the issue before the court is fit for decision because it is primarily legal, does not require further factual development, and the challenged action is final. *See Schaible*, 874 F.2d at 627.

In regard to the hardship to the parties of withholding court consideration, *see Abbott Laboratories*, 387 U.S. at 148, Midway Farms contends that it could be subject to substantial hardship in the form of possible penalties, both criminal and civil, if it cannot file an administrative petition at this stage of the proceedings. Midway Farms cites 7 U.S.C. § 608c(14), which provides for both criminal fines and civil penalties.[1]

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[1]7 U.S.C. § 608c(14) provides as follows:

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provisions of such order shall, on conviction, be fined not less than $50 or more than $5000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(continued...)

The remedies for both criminal fines and civil penalties provided for in 7 U.S.C. § 608c(14) are self-apparent. A conviction is subject to challenge through the appeals process. Pursuant to § 608c(14)(B), the order assessing a civil penalty "shall be treated as a final order reviewable in the district courts of the United States." Midway Farms in no way demonstrates how, in the context of the threat of these fines and penalties, a decision on its existing petition would have a differing impact from a decision by the USDA in the regular course of proceedings. Under either procedure, a decision that it is subject to the Raisin Marketing Order subjects it to the possibility of a fine or penalty.

In its reply, USDA contends that Midway "mischaracterizes the central issue in this case." USDA claims, "According to plaintiff, the issue is not whether plaintiff is subject to the Marketing Order -- even though the ultimate relief plaintiff seeks is a declaration that is not. *See* Complaint for Review of Agency Action; Declaratory Relief ¶ 17." Defendant's Reply, 1:25-28. The court finds that mischaracterizes the contents of paragraph 17 of the Complaint, which provides as follows:

> 17. Plaintiff therefore alleges that the Judicial Officer's dismissal of this petition and the ALJ's dismissal of this petition was arbitrary, capricious, and not in accordance with law.

Complaint, 5:11-12. This paragraph comes within Midway Farms' statement of its First Claim for Relief, which seeks a declaratory judgment that it did not have to admit that it is a handler in order to bring an administrative petition.

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[1](...continued)

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this subsection for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to subsection (15) of this section. The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such an order may not be reviewed in an action to collect such civil penalty.

Based on the above, the court finds that Midway Farms correctly argues that USDA's ripeness argument is based on a misconception of the issue before the court. The issue before the court is not, as the USDA claims, whether Midway Farms is a handler subject to the Agricultural Marketing Agreement Act or the Raisin Marketing Order. Rather, the issue before the court, as set forth in the complaint, is whether or not USDA can dismiss Midway Farms' administrative petition because it does not admit that it is a handler subject to the Raisin Marketing Order. Thus, USDA's ripeness argument, while well-reasoned, is simply not on point.

Accordingly, the court finds that USDA has not demonstrated that the issue presented in Midway Farms' complaint is not ripe, and that USDA's motion for judgment on the pleadings should therefore be denied.

In spite of its failure to prevail on its motion for judgment on the pleadings, one of additional arguments USDA makes in its Reply is directly on point in this case. USDA argues that Midway Farms' arguments rest on the erroneous presumption that it is currently subject to the Raisin Marketing Order. As discussed above in relation to finality under ripeness analysis, the Raisin Administrative Committee's letter advising Midway Farms that it appeared to be a handler does not constitute a final or legally binding agency determination. *See Blincoe v. Federal Aviation Admin.*, 37 F.3d 462, 464-65 (9th Cir. 1994). *Flagship Fed. Sav. Bank v. Wall*, 748 F. Supp. 742, 747 (S.D. Cal. 1990). The applicable statute, 7 U.S.C. § 608c(15)(A) is expressly limited to "any handler subject to an order." Midway Farms claims not that it is a handler subject to a marketing order, but that it is a person "to whom a marketing order is sought to be made applicable." Therefore, accepting Midway Farms' own definition of itself, the court could never find that the dismissal of Midway Farms' administrative petition under 7 U.S.C. § 608c(15)(A) is arbitrary, capricious and not in accordance with law, because USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms.

Accordingly, the court will deny Midway Farms' motion for summary judgment as to its first claim for relief.

In its second claim for relief, Midway Farms contends that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of Midway Farms' documents. As stated above, Midway Farms argues without authority that propriety information should be protected from harmful disclosure in administrative proceedings as it is in District Court, and that if Midway is not subject to the Raisin Marketing Order, USDA is not entitled to its records to begin with. The court finds that these arguments are not sufficient to demonstrate that Midway Farms is entitled to judgment as a matter of law, particularly in light of the USDA's claims regarding its duty of confidentiality regarding records before it.

Accordingly, the court will deny Midway Farms' motion for summary judgment as to its second claim for relief.

II. Sua Sponte Granting of Summary Judgment for USDA

In *Cool Fuel, Incorporated v. Connett*, 685 F.2d 309 (9th Cir. 1982), the plaintiff filed and served a motion for summary judgment. The defendant made no motion, yet the court entered summary judgment for the defendant and dismissed the case. On appeal, the Ninth Circuit discussed this unusual situation as follows:

> It is, nevertheless, true that the overwhelming weight of authority supports the conclusion that if one party moves for summary judgment and, at the hearing, it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may sua sponte grant summary judgment to the non-moving party.

Cool Fuel, 685 F.2d at 311 (citations omitted). The Ninth Circuit went on to state:

> It is, of course, essential that the appellate court carefully review the record and determine that the moving party against who summary judgment was rendered had a full and fair opportunity to ventilate the issues involved in the motion. *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949), is the keystone case. There the court declined to pass on the propriety of a summary judgment for a non-moving party, but held it error to grant such a judgment if the victim had been deprived "of an opportunity to dispute the facts material to that claim." *Id.* at 683, 69 S.Ct. at 755.

Id. at 312. The Ninth Circuit subsequently summarized the rule as follows:

> As a general rule, a district court may not sua sponte grant summary judgment on a claim without giving the losing party ten days' notice and an opportunity to present new evidence as required by Federal Rule of Civil Procedure 56(c). There is an exception to this rule, however: A district court may grant summary judgment without notice if the losing party has had a "'full and fair opportunity to ventilate the issues involved in the motion.'" Waterbury v. T.G. & Y Stores Co., 820 F.2d 1479,1480 (9th Cir. 1987) (quoting Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir.

1982)).

United States v. Grayson, 879 F.2d 620, 625 (1989).

In the instant case, the court finds that it appears that USDA is entitled to summary judgment on the same grounds on which Midway Farms' motion will be denied. The statute under which Midway Farms filed its petition, 7 U.S.C. § 608(c)(15)(A), is expressly applicable to "[a]ny handler subject to an order." Midway Farms claims that it is not a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable," under 7 C.F.R. § 900.51. The USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms. It therefore appears that there is no way in which Midway Farms can prevail on its first claim that it does not have to admit that it is a handler to now proceed with a petition pursuant to 7 U.S.C. § 608(c)(15)(A), which is applicable only to "[a]ny handler subject to an order." It further appears that Midway Farms cannot prevail on its second claim for relief because, as explained above, it provides no authority for the proposition that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of its documents.

Under these circumstances, the court is considering granting summary judgment for USDA. The court will grant Midway Farms 10 days to oppose the entry of summary judgment for USDA. *See United States v Grayson*, 879 F.2d 620, 625 (1989).

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that:

1. Midway Farms' motion for summary judgment is DENIED;
2. USDA's motion for judgment on the pleadings is DENIED;
3. Midway Farms is GRANTED 10 days from the date of service of this order to submit evidence pursuant to Rule 56(c), Federal Rules of Civil Procedure, in opposition to the *sua sponte* entry of summary judgment for USDA by the court;
4. USDA is GRANTED 10 days from the date of service of Midway Farms' opposition to file and serve a response to Midway Farms' opposition.

MIDWAY FARMS, INC., A CALIFORNIA CORPORATION v. UNITED STATES DEPARTMENT OF AGRICULTURE.
CV F 97-5460 AWI SMS.
Decided June 15, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT USDA

This is an action for declaratory relief, based on the review of an administrative proceeding. The court has jurisdiction over this matter pursuant to 7 U.S.C. § 608c(15)(B), part of the Agricultural Marketing Agreement Act.

On May 19, 1998, the court entered a memorandum opinion and order in this case, denying Midway Farms' motion for summary judgment and USDA's motion for judgment on the pleadings. The court further granted Midway Farms ten days to submit evidence in opposition to the *sua sponte* entry of summary judgment for USDA by the court.

On June 1, 1998, the court received from counsel for Midway Farms a statement that it would not be submitting any additional evidence to the court with respect to the court's intended decision.

Accordingly, for the reasons explained at length in the memorandum opinion of May 19, 1998, the court finds that USDA is entitled to summary judgment on the same grounds on which Midway Farms' motion was denied. The statute under which Midway Farms filed its petition, 7 U.S.C. § 608c(15)(A), is expressly applicable to "[a]ny handler subject to an order." Midway Farms claims that it is not a handler subject to a marketing order, but rather is a person "to whom a marketing order is sought to be made applicable," under 7 C.F.R. § 900.51. The USDA has not yet sought to make the Raisin Marketing Order applicable to Midway Farms. The court finds, therefore, that Midway Farms cannot prevail on its first claim that it does not have to admit that it is a handler to now proceed with a petition pursuant to 7 U.S.C. § 608c(15)(A), which is applicable only to "[a]ny handler subject to an order." The court further finds that Midway Farms cannot prevail on its second claim for relief because, as explained in the memorandum opinion of May 19, 1998, it provides no authority for the proposition that the Administrative Law Judge erred in determining that he could not conduct an *in camera* inspection of its documents.

Under these circumstances, the court finds that there exists no genuine issue as to any material fact and that USDA is entitled to judgment as a matter of law. Accordingly, the court will granted summary judgment to USDA. *See* Fed. R. Civ. P. 56(c); *Cool Fuel, Incorporated v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982) (if one party moves for summary judgment and it is made to appear from all the records, files, affidavits and documents presented that there is no genuine dispute respecting a material fact essential to the proof of movant's case and that the case cannot be proved if a trial should be held, the court may sua sponte grant summary judgment to the non-moving party.

ORDER

For the reasons stated above, IT IS HEREBY ORDERED that:
Summary judgment is GRANTED to USDA, and
The Clerk of the Court is directed to enter final judgment in favor of USDA.

SAULSBURY ENTERPRISES v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. CV-F-97-5136 REC.
Filed June 30, 1999.

Raisins — Civil penalty — Excessive fines clause — Eighth amendment.

Plaintiffs filed a complaint for review in the United States District Court for the Eastern District of California of the Judicial Officer's decision finding that plaintiffs violated the Raisin Order (7 C.F.R. pt. 989) and assessing plaintiffs a civil penalty of $219,000. The Court held that, except for the Judicial Officer's findings concerning plaintiffs' failures to file off-grade raisin reports, the findings were supported by substantial evidence and were not arbitrary or capricious. The Court found that $14,000 of the civil penalty assessed by the Judicial Officer was attributable to plaintiffs' failure to file off-grade raisin reports and since the Judicial Officer found that plaintiffs' raisins were standard raisins, no civil penalty could be assessed for failure to file off-grade raisin reports. Consequently, the Court reduced the civil penalty assessed by the Judicial Officer to $205,000. The Court also found that civil penalty provision in 7 U.S.C. § 608c(14)(B) is subject to the Excessive Fines Clause of the Eighth Amendment and remanded the proceeding to the Judicial officer for further findings concerning whether the civil penalty assessed by the Judicial Officer, as reduced by the Court, is excessive within the meaning of the Excessive Fines Clause.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REMANDING MATTER TO USDA

On May 3, 1999, the court heard the cross-motions for summary judgment of the parties. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants these motions in part and denies them in part as set forth herein. The court further reduces the civil penalties and assessments imposed on plaintiffs by $14,000.00. Finally, the court remands this matter to the United States Department of Agriculture for further findings concerning whether the civil penalties imposed by the Judicial Officer are excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

Saulsbury Enterprises and Robert J. Saulsbury (hereinafter referred to as Saulsbury) have filed a Complaint for Review of Agency Action Under 7 U.S.C. § 608c(14)(B), Agricultural Marketing Agreement Act of 1937 and Declaratory Relief against the United States Department of Agriculture (hereinafter referred to as the Department).

The Agricultural Marketing Service (AMS), an agency of the Department, filed a complaint against Saulsbury, alleging that Saulsbury violated the Marketing Order for Raisins (the Marketing Order), 7 C.F.R. § 989.1 *et seq.*, which was promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 (the Act), 7 U.S.C. § 601 *et seq*. The Complaint alleged that Saulsbury was a raisin handler as defined by the regulations and that, during the 1988-1989, 1989-1990, and 1990-1991 crop years, Saulsbury shipped raisins to Canada without having them inspected, failed to withhold raisins in reserve, failed to file reports, and failed to pay assessments as required by the Order. Saulsbury denied that the product shipped to Canada was raisins or that he was a handler subject to the Order. A two-day evidentiary hearing was held before Administrative Law Judge James W. Hunt (hereinafter referred to as the ALJ) and briefs filed. On June 27, 1995, the ALJ filed his Decision and Order (hereinafter referred to as the ALJ's Order) finding that the product shipped to Canada by Saulsbury was raisins, that Saulsbury violated Section 989.59 of the Marketing Order by shipping off-grade or failing raisins during the crop years in question without having them inspected, and assessing a $1,000 penalty for each year that Saulsbury violated the Marketing Order, for a total penalty of $3,000.00. Saulsbury appealed the ALJ's Decision and Order to Judicial Officer William G. Jenson (hereinafter referred to as the JO). On

May 7, 1996, the JO issued his Decision and Order (hereinafter referred to as the JO's Order) wherein he affirmed the ALJ's conclusion that the product shipped by Saulsbury was raisins, but also disagreed with certain findings and conclusions of the ALJ and imposed a civil penalty in the amount of $219,000, and ordered Saulsbury to pay to the Raisin Administrative Committee $1,673.30 in assessments for the crop years in issue. Saulsbury then filed a Petition for Reconsideration, which petition was denied by the JO in his Order Denying Petition for Reconsideration filed on January 29, 1997.

Saulsbury thereafter filed the Complaint for Review in this court.

A. Standard of Review.

7 U.S.C. § 608c(14)(B) provides in pertinent part:

> Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation . . . The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States . . . .

The court's review of the JO's order is governed by 5 U.S.C. § 706 of the Administrative Procedures Act, which provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;
>
> . . .
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

B. Substantiality of Evidence that Product Shipped was Raisins.

Plaintiff argues that the conclusion that the product shipped by plaintiff was raisins is not supported by substantial evidence.

With respect to review pursuant to Section 706(2)(E), the Supreme Court holds that substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "'[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However,

> [t]he substantiality of the evidence must take into account whatever in the record fairly detracts from its weight . . . Nor does it mean that even as to matters not requiring expertise a court may displace [the agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside [an agency's] decision when it cannot conscientiously find that the evidence supporting a decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view.

Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 488 (1951).

Prior to 1972, Section 989.5 of the Marketing Order defined raisins as:

> `Raisins' means grapes of any variety grown in the area, from which a part of the natural moisture has been removed by sun-drying or artificial dehydration after such grapes have been removed from the vines.

However, in 1972, the Department determined that product was being dried on the vine and thus competing with sun-dried raisins. Therefore, an amendment was proposed to the Marketing Order because, as an industry representative testified at the hearing on the proposed amendment, "it is the consensus of the raisin industry and the committee that the Marketing Order should be amended to include all dried grapes under the definition of raisins." Section 989.5 of the Marketing Order was amended to provide as follows:

> `Raisins' means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

Section 989.5 as amended was substantially the amendment proposed by the Raisin Administrative Committee.

In arguing that the JO's conclusion that the product shipped was raisins is not supported by substantial evidence, Saulsbury refers to the evidence of "percipient witnesses" to the product shipped by Saulsbury to Canada that the product was not raisins, that the product shipped to Canada was picked at 16% sugar as opposed to the normal 20-22% sugar for raisins, that the vineyard was trellised so that the grapes would receive less sun, that the product was picked up after seven days instead of the normal 20 to 30 days, that the product was not wrinkly and had a substantial amount of moisture when it was picked up and when it was shipped to Canada. Saulsbury argues that Section 989.5 requires that the product have a significant amount of the natural moisture removed to the point where the grape skin develops wrinkles. Saulsbury contends that the product shipped to Canada was a brown and green grape from which significant moisture had not been removed.

The court concludes that there is substantial evidence in the record supporting the JO's conclusion that the product shipped was raisins. There is the testimony of Bond describing the product as having wrinkles like raisins and that Spear praised the product to Bond as being raisins. The JO as well as the ALJ placed primary reliance on Bond's testimony. In addition, even Mayes testified that some of the product had developed wrinkles (although Mayes testified that he attributed the wrinkles to substandard water berries). Saulsbury's evidence and argument that the product was too "trashy" to be processed as raisins, did not taste like raisins and had a lower sugar content than raisins used for processing is not relevant to the determination whether the product shipped to Canada was raisins. To be a raisin within the meaning of Section 989.5 of the Marketing Order, the grape must had removed by drying the natural moisture to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins. Nothing in Section 989.5 bases the definition of raisins on quality.

C. Admission of Evidence and Denial of Right to Confront Witnesses.

Saulsbury further contends that the unsworn statement of a non-testifying witness and/or evidence concerning that statement should not have been allowed into evidence and that the admission of this evidence deprived Saulsbury of its constitutional right to confront the witnesses against it. Saulsbury is referring to the statement of Willie Harris admitted as respondent's Exhibit 4 during the proceedings before the ALJ about which statement AMS Investigator Renee Wassenberg testified.[1]

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[1]Initially, the ALJ did not admit Harris's written statement in evidence. However, after Wassenberg was examined and cross-examined about the statement and her interview of Harris at some length, the ALJ admitted the statement so that he and the record would know what the parties were discussing.

Saulsbury repeatedly argues that the statement, which was handwritten by Wassenberg, was not signed by Harris. The administrative record establishes to the contrary. Exhibit 4 shows that Harris initialed each page of the statement and signed it at the end of it. Wassenberg testified that Harris could read because she asked him if he could. In addition, Wassenberg testified that Harris signed the statement. During cross-examination of Wassenberg by Saulsbury, Saulsbury referred to a letter that Wassenberg sent to Harris on August 22, 1991, which letter stated in pertinent part:

> I thought I should type your statement so you could read it better. I would like for you to sign it and send it back to me. Add or change anything you believe is necessary. It was a pleasure meeting you.

(continued...)

Harris's statement dated August 20, 1991 is as follows:

I was a laborer for Robert Saulsbury for 6 years off an [sic] on. However, I have not worked out there for about two years since they sold their almond property. I live at 521 Maple Street, Madera, Ca.

When I worked for Saulsbury I worked with almonds and grapes. I am from Mississippi and don't know a lot about how raisins are produced. When I worked with the raisins I drove the tractor (see *). I know that a few days later they had to turn the raisins, then after they were dry I drove the tractor and wagon through the rows so they could put the bins on the wagon. I brought the raisins over to the barn where they were sprayed for nats [sic] and flys. The raisins were locked up when they were sprayed (fumigated). The raisins I took from the vineyard to the barn was [sic] exactly the same type raisin I buy in the box from the grocery store. I eat raisins all the time and ate them when I was in the field.

I know a big truck came and and [sic] Saulsbury loaded it for shipment. I was around when they were weighing the bins for shipment.

Robert Saulsbury was always good to me.

* When I worked in the vineyard, they (the crew) (a hired contract for the crew) cut the grapes and let them dry for a few day [sic] and turned them to dry on the other side. Then after they dried I and about 7 other drivers hauled them to skid. Then the foreman would stack them in the shed.

Everybody referred to these as raisin grapes.

Saulsbury contends that, because Wassenberg testified that she did not know if Harris had been subpoenaed to appear at the hearing before the ALJ or how the subpoena had been served, and because Harris lived in Madera, Saulsbury was denied due process when the Department was allowed to introduce percipient

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[1](...continued)
Wassenberg testified that Harris did not sign the typed statement and return it to her. It may be that Saulsbury is relying on this testimony in contending that Harris did not sign the statement admitted into evidence at the hearing before the ALJ. However, as noted, the evidence establishes that the statement was signed and it was the signed statement that was admitted into evidence.

witness testimony through the introduction of Harris's statement.

With regard to the subpoena, although Wassenberg testified that she did not know whether Harris had been subpoenaed, Ms. Carroll, counsel for the Department, stated that Harris had been subpoenaed for the administrative hearing, that he had not appeared, and that he had an unlisted telephone number. Therefore, to the extent that Saulsbury's contention that it was denied due process is premised on the factual assertion that the Department failed to subpoena the witness even though it had the ability to do so, the record does not support the premise.

Furthermore, Willie Harris was listed as a Department witness on its witness list filed in connection with the administrative hearing, and Exhibit 4, the statement handwritten by Wassenberg and signed by Harris, was listed on the Department's exhibit list. Saulsbury also listed Willie Harris as one of its witnesses on its witness list.

The admission of hearsay in administrative proceedings is not governed by the Federal Rules of Evidence. As explained by the Ninth Circuit in *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981):

> We begin with the recognition that strict rules of evidence do not apply in the administrative context . . . Indeed, the Administrative Procedures Act provides that '*Any* oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.' 5 U.S.C. § 556(d) . . . .
>
> Perhaps the classic exception to the strict rules of evidence in the administrative context concerns hearsay evidence. Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactorily indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and fundamentally fair . . . .
>
> We too reject any *per se* rule that holds that hearsay can never be substantial evidence. To constitute substantial evidence, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility — it must have probative value and bear indicia of reliability. Although no bright line test can be established, cases isolate a number of factors that may be helpful in such an analysis. First . . ., the independence or possible bias of the

> declarant must be considered as well as the type of hearsay material submitted . . . Other factors that should be considered are whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn . . ., whether or not the statements are contradicted by direct testimony . . ., whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenaed the declarant . . ., or whether the declarant is unavailable and no other evidence is available . . ., the credibility of the declarant if a witness, or of witness testifying as to the hearsay . . ., and finally whether or not the hearsay is corroborated. Although not controlling, the Federal Rules of Evidence 803(24) standards for the admission of hearsay not specifically covered by any exception but bearing `circumstantial guarantees of trustworthiness' may be of assistance.

626 F.2d at 148-149.

In contending that it had an absolute right to confront the witnesses against it in the administrative hearing, Saulsbury relies primarily on *Goldberg v. Kelly*, 397 U.S. 254 (1970).

In *Goldberg v. Kelly*, New York City residents receiving financial aid under the federally assisted Aid to Families with Dependent Children program or under New York State's general Home Relief program alleged that officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law. The district court held that only a pre-termination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the welfare workers that the combination of the existing post-termination "fair hearing" and informal pre-termination review was sufficient. The Supreme Court reversed, holding that a pre-termination evidentiary hearing was necessary to provide the welfare recipient with procedural due process. In so holding, the Supreme Court stated in pertinent part:

> `The fundamental requisite of due process of law is the opportunity to be heard.' . . . The hearing must be `at a meaningful time and in a meaningful manner.' . . . In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

397 U.S. at 267-268.

However, the mere fact that Harris did not appear at the administrative hearing in response to the Department's subpoena does not result in the conclusion that Saulsbury was denied due process. In *Richardson v. Pearles*, 402 U.S. 389 (1971), the Supreme Court addressed the issue of what procedural due process requires with respect to examining physicians reports in a social security disability claim hearing. The Supreme Court ruled:

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with an opportunity for cross-examination of the physician.

402 U.S. at 402. The Supreme Court further stated that the holding in *Goldberg v. Kelly* that due process requires an effective opportunity to defend by confronting adverse witnesses was distinguishable:

> *Kelly*, however, had to do with the termination of AFDC benefits without prior notice. It also concerned a situation, the Court said, 'where credibility and veracity are at issue, as they must be in many termination proceedings.'
>
> . . . .
>
> The *Perales* proceeding is not the same. We are not concerned with termination of disability benefits once granted. Neither are we concerned with a change of status without notice. Notice was given to claimant Perales. The physicians' reports were on file and available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed. Further, the specter of questionable credibility and veracity is not present; there is professional disagreement with the medical conclusions, to be sure, but there is no attack here upon the doctors' credibility or veracity. *Kelly* affords little comfort to the claimant.

Id. at 406-407. The Supreme Court further concluded:

> The matter comes down to the question of the procedure's integrity and fundamental fairness. We see nothing that works in derogation of that integrity and of that fairness in the admission of the consultants' reports, subject as they are to being material and to the use of the subpoena and consequent cross-examination.

Id. at 410.

In *United States v. International Broth. of Teamsters*, 941 F.2d 1292, 1297-1298 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992), the Second Circuit relied on *Perales* in rejecting the argument that Senese and Talerico were denied their right to confront and cross-examine the witnesses against them:

> This claim rests principally on the fact that much of the evidence introduced at their hearing was in the form of hearsay. However, procedural due process does not require rigid adherence to technical evidentiary rules in administrative hearings, as long as the evidence is reliable.

In *Cuellar v. Texas Employment Com'n*, 825 F.2d 930, 938 (5th Cir. 1987), the Fifth Circuit, after discussing the Supreme Court's decision in *Perales*, stated in pertinent part:

> To put *Perales* in context, we note that Perales could only request a meaningful *opportunity* to cross-examine. A claimant may choose to waive an opportunity to cross-examine, and is not required to make the case against himself, nor to call all witnesses who may be adverse so as to be able to confront them. The critical question, therefore, is whether the plaintiff is afforded a *viable* opportunity to confront *the witnesses* against him — not just to anticipate or to respond to the substance of their testimony — or has been denied the opportunity to cross-examine such witnesses. In the case of affidavit testimony, this depends critically upon the nature of the hearing, upon notice that the claimant has of the witnesses and their testimony, and upon the opportunities for obtaining and availability of witness subpoenas.
>
> Cuellar expressed his surprise at the production of Salazar's affidavit, and explicitly requested the opportunity to confront his discreditor by obtaining a subpoena. There is no evidence that the affidavit was previously filed

> with the agency or that its existence otherwise was made known to Cuellar prior to the hearing. Witnesses could only be obtained by subpoena at the hearing if they were shown to be `necessary.' It would take a Shakespearean actor (and an irrational or incompetent lawyer) to object to the affidavit as a surprise and then to request a continuance to permit confrontation, were the affidavit in fact expected and Cuellar's version true. There is *nothing* to gain and everything to lose by such a strategy. We must assume the truth of Cuellar's account and the rationality and competence of his attorney because of the summary posture of this case. Moreover, the affidavit in question is neither inherently reliable nor a product routinely relied upon by administrative or judicial processes. That Cuellar specifically noted reliability failings of the particular affidavit to the hearing examiner could not transform it into reliable hearsay.

In *Woolsey v. National Transp. Safety Board*, 993 F.2d 516, 521 (5th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994), the Fifth Circuit, in ruling that certain documents were properly admitted in an administrative proceeding, held that the admission of the documents did not violate the right of confrontation of adverse witnesses. In so ruling, the Fifth Circuit distinguished the only case cited by Woolsey, *Greene v. McElroy*, 360 U.S. 474 (1959), by noting:

> The petitioner [in *Greene*] had no opportunity whatsoever to confront the evidence against him. In the instant case, by contrast, the FAA presented witnesses and documents which Woolsey was free to confront. Although he objected to the admission of the documents based on the absence of the persons who signed them, he did not claim that the documents were forged or altered in any way. FAA investigators were available for cross-examination as to how they obtained the documents and why it would be reasonable to conclude that the documents ware authentic.

The court concludes that the introduction of Willie Harris's statement did not deprive Saulsbury of the right to confront adverse witnesses against it. As noted, the record establishes that Harris was subpoenaed by the Department and failed to appear. It must be inferred from the witness and exhibit lists filed by the parties in connection with the administrative hearing that Saulsbury was aware of Willie Harris as a witness and was aware of the content of his statement. As noted, Saulsbury also listed Harris as a witness. Therefore, this case is distinguishable from *Cuellar*. It does not appear from the record that Saulsbury made any effort to subpoena Harris or to request a continuance to do so, relying instead on

objecting to the admission of Harris's statement and testimony concerning Harris's statement. There is no indication in the record before the court that Saulsbury would not have been able to subpoena Harris.

Evidentiary rulings in administrative proceedings are reviewed under the abuse of discretion standard. *Atlantic-Pacific Const. Co., Inc. v. N.L.R.B.*, 52 F.3d 260, 263 (9th Cir. 1995). In *Calhoun v. Ballar*, the Ninth Circuit stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair. For admission of hearsay to be reversible error, Saulsbury must show that the admission of this evidence was prejudicial.

Here, the JO's Order specifically finds in pertinent part:

> Wassenberg also testified that Harris, Saulsbury's former employee, told her that the product looked the same as raisins he bought from a store. While Harris did not testify, his description [corroborates] Bond's testimony and there is no information in the record reflecting adversely on Harris' integrity or that he had any reason to make a false statement to Wassenberg. I find that, although hearsay, Harris' statement is sufficiently reliable in the circumstances to add weight to the evidence showing that the product had wrinkles characteristic of raisins . . . However, in making the finding that the product had raisin-like wrinkles, I rely principally on Bond's testimony.

In arguing that the testimony concerning Harris's statement and his statement itself should not have been admitted because it did not have sufficient indicia of reliability, Saulsbury notes that the statement was not written by Harris but by Wassenberg and that no other effort was made by the Department to visit Harris or to talk with him. However, as noted, Harris initialed each page of the statement written by Wassenberg and signed it.

Saulsbury further notes that Wassenberg's interview of Harris took place on August 20, 1991. However, Harris told Wassenberg that he had not worked in the vineyard for two years and that he had only worked off and on for Saulsbury. Saulsbury asserts that there is nothing in Wassenberg's testimony on in Harris's statement that shows that Harris saw the product for the crop years 1988, 1989 and/or 1990. Therefore, Saulsbury argues, this evidence was not sufficiently reliable to be admitted in the administrative proceedings.

The court agrees with this objection to the admission of the testimony concerning Harris's statement. It simply cannot be determined from the record before the court that Harris was describing the product at issue in this proceeding. From the record, Saulsbury had produced raisins in years prior to 1988. That being the case, Harris could have been describing something other than the product

produced in 1988, 1989 and 1990. Therefore, the admission of this evidence was improper because it was not sufficiently reliable and probative.

However, the court cannot conclude that the admission of this evidence was an abuse of discretion requiring reversal of the JO's Order. Saulsbury shows no prejudice to it because of the admission of this evidence. The JO relied on the evidence concerning Harris's statement as corroboration of Bond's evidence. The JO specifically stated that he was relying primarily on Bond's testimony. Therefore, the admission of this evidence cannot be seen to have prejudiced Saulsbury. That being the case, it cannot be stated that the admission of this evidence was an abuse of discretion requiring reversal of the JO's Order.

D. Denial of Due Process — Failure to Provide Exculpatory Evidence.

Saulsbury further contends that it was denied due process of law because the Department "hid" exculpatory evidence from Saulsbury. In so contending, Saulsbury asserts that Wassenberg spoke to the Canadian buyer, Mr. Spear, during her investigation. Wassenberg's notes of this telephone conversation relate that Spear told Wassenberg in pertinent part: "He brought in dried grapes for distillery purposes. He said they were unprocessed grapes in various states of decay. They had stems in them. He said they were partially dried and he sold them to distilleries and liqueur manufacturers." In addition, by letter dated sometime in August, 1991, Spear wrote to David Lewis, Director, Compliance Staff, AMS, in pertinent part as follows:

> In answer to your letter, date stamped August 7, 1991, I should like to answer as follows.
>
> I, nor my company, Haida Sales Ltd., has ever imported California raisins.
>
> We brought in, each fall, totes (1500 lbs) of semi-dried grapes for distillery purposes. This product contains leaves, branches, stems, grapes in various states of decay or dryness.

Counsel for Saulsbury asserts that he first learned that Spear had advised the Department that the product imported was dried grapes for distillery purposes when he received a letter to that effect from Spear dated February 8, 1995, less than a month before the administrative hearing. During the cross-examination of Wassenberg by Saulsbury, Saulsbury requested and received copies of Wassenberg's notes of the telephone conversation and of Spears' letter to Lewis and

cross-examined Wassenberg about the telephone conversation and the letter. Complaining that it only learned that Spear had provided similar information to the Department when it received Spear's 1995 letter, Saulsbury asserts that "[m]eanwhile USDA has this exculpatory information, fails to disclose or investigate it, and that denies Plaintiff Due Process."

Saulsbury cites absolutely no authority that the failure by the Department to disclose what Saulsbury characterizes as "exculpatory evidence" constitutes a denial of due process. The only case that the court could locate in its research does not completely support Saulsbury's position. In *Mister Discount Stockbrokers, Inc. v. S.E.C.*, 768 F.2d 875 (7th Cir. 1985), the Seventh Circuit held:

> The thrust of petitioners' argument concerning the discovery procedures is that, because the NASD disciplinary procedures are quasi-criminal in nature due to their penal aspects, the petitioners were entitled to examine exculpatory evidence in the possession of the NASD prior to the hearing before the District Committee. Since NASD procedures do not require the disclosure of exculpatory evidence, the petitioners contend that their rights to due process were violated. We hold the petitioners' argument to be without merit.
>
> Petitioners rely solely on *Brady v. Maryland* . . . in which the Court held that the prosecutor's suppression of 'evidence favorable to an accused [in a criminal case] upon request violates due process where the evidence is material . . . .' . . . *Brady v. Maryland*, however, involved a criminal prosecution, while the petition currently before the court involves the review of an administrative agency proceeding and not a violation of criminal law. The difference is significant. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings, and the Administrative Procedures Act fails to provide for discovery. Instead, [t]he extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency.' . . . 'Nevertheless, the due process clause does insure the fundamental fairness of the administrative hearing.' . . . Consequently, 'discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.'
>
> . . . .

In any event, the Department contends that the evidence at issue is not "exculpatory", noting the references made by Spear to "dried grapes", which, assuming that the grape skins have wrinkles, are raisins.

In the criminal context, material favorable evidence must be disclosed by the prosecution if there is a reasonable probability that, if the evidence had been disclosed to the defense, the result of the proceeding would have been different. *See United States v. Sarno, supra.* Assuming that is the standard, the court concludes that Saulsbury has not established a violation of due process. The court concurs with the Department that the evidence is not particularly exculpatory. Moreover, even if the evidence is determined to be exculpatory, Saulsbury has not shown any prejudice to it resulting from the timing of the disclosure. The evidence was provided during Saulsbury's cross-examination of Wassenberg and Saulsbury makes no argument that the timing of the disclosure alone prejudiced it.[2]

E. Arbitrary and Capricious.

Saulsbury contends that the JO's Order is arbitrary and capricious for a number of reasons.

With respect to review pursuant to Section 706(2)(A), the Supreme Court has explained:

> . . . Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' . . . To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). "In order for an agency decision to be upheld under the arbitrary and capricious standard, a court must find that evidence before the agency provided a rational and ample basis

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[2]As noted, Saulsbury further asserts that the USDA's failure to investigate the information set forth in the notes and the letter deprived it of due process. However, other than making the statement, Saulsbury provides no authority or analysis for this assertion. Therefore, the court denies this ground for relief as unsupported.

for its decision." *Northwest Motorcycle Ass'n v. USDA*, 18 F.3d 1468, 1471 (9th Cir. 1994).

1. Credibility Findings.

Saulsbury contends that the JO's Order is arbitrary and capricious because the JO reversed the credibility findings made by the ALJ.

As explained in *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983), the standard governing judicial review of agency decisions

> does not change merely because the final decision rejects the ALJ's determinations . . . The decision for court review is that of the agency, here the administrator's decision adopted by the Secretary. The court does not review the ALJ's decision, which is merely part of the record . . . .
>
> But the court must take into account the `whole record.' . . . Because the ALJ's factual findings are part of that record, contrary agency findings are given less weight than they would otherwise receive . . . This principle has greatest force, however, with credibility determinations from demeanor evidence . . . .

In *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 496-497 (1951), the Supreme Court commented:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The `substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is `substantial.'

In *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074 (9th Cir. 1977), the Ninth Circuit addressed the standards governing judicial review of the agency's decision when the ALJ and the JO disagree on the facts. After quoting the Supreme Court's statement in *Universal Camera Corp.*, the Ninth Circuit impliedly held that a finding of fact by the JO which rests *solely* on the testimonial evidence discredited either expressly or by clear implication by the ALJ will not be sustained. 565 F.2d at 1076-1077. Furthermore, the Ninth Circuit held, even when the record contains independent, credited evidence supportive of the JO's decision, a reviewing court will review the JO's factual findings more critically if they are contrary to the ALJ's factual conclusions. *Id.* at 1078. "Thus, evidence in the record which, when taken alone, may amount to `substantial evidence' and therefore support the Board's decision, will often be insufficient when the trial examiner has, on the basis of the witnesses' demeanor, made credibility determinations contrary to the Board's position." *Id.* The Ninth Circuit in *Penasquitos Village* explained the difference in treatment on judicial review of testimonial inferences, i.e., credibility determinations based on demeanor, and derivative inferences, i.e., inferences drawn from the evidence itself:

> Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she `sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.' . . . All aspects of the witness's demeanor — including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, the coloration during critical examination, the modulation or pace of his speech and other non-verbal communication — may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals. But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation of demeanor makes weighty only the observer's testimonial inferences.
>
> Deference is accorded the Board's factual conclusions for a different reason — Board members are presumed to have broad experience and expertise . . . Accordingly, it has been said that a Court of Appeals must abide by the Board's derivative inference, if drawn from not discredited testimony, unless those inferences are `irrational,' . . ., `tenuous' or `unwarranted.' As already noted, however, the Board, as a reviewing body, has little or no

basis disputing an administrative law judge's testimonial inferences.

. . .

We emphasize that we do not hold that the administrative law judge's determinations of credibility based on demeanor are conclusive on the Board. Many circuits, including ours, have held that they are not . . . We simply observe that the special deference afforded administrative law judge's factual determinations based on testimonial inferences will weigh heavily in our review of a contrary finding by the Board. In our view, this position is mandated by the Supreme Court's instruction that `[t]he significance of [the administrative law judge's] report, of course, depends largely on the importance of credibility in the particular case.' . . . .

In arguing that the JO's credibility determinations, to the extent they differ from those of the ALJ, render the JO's order arbitrary and capricious, Saulsbury contends:

. . . The JO rejected the ALJ's findings claiming that Mayes and Saulsbury had very little credibility, that their testimony is self-serving and based upon no real evidence. This is error as a matter of law. Their testimony is based upon real evidence, as they were eye witnesses to the product that was shipped, what was picked and what the buyer stated that he wanted as far as the product was concerned. It must be the Judicial Officer's frame of mind that when USDA accuses someone of committing a violation that the testimony of Respondent must be rejected because it is `self-serving'. Certainly the same could be true with respect to Bond who had an ax to grind with Saulsbury, and certainly it would be true with respect to Wassenberg who was out to get Saulsbury and convict him. In civil and criminal trials, an instruction is given to the jury that the testimony of the accused or testimony of a party is to be judged by the same standard the jurors are to judge other witnesses. This Judicial Officer apparently believes that all those accused by the his agency would lie because it would be `self-serving' for them to lie. The Judicial Officer states that Mayes and Saulsbury's testimony was rebutted by `unrefuted proof that Respondents' scenario did not happen.' . . . It was refuted by Saulsbury, it was refuted by Mayes, and it was refuted by the buyer of the product.

However, the JO's Order sets forth specifically why he did not find either Robert Saulsbury, Mr. Mayes or Mr. Spears to be credible. In part, the JO's credibility determination accepts those of the ALJ, i.e., with respect to the acceptance of Bond's testimony. Where the JO disagrees with the credibility determinations of the ALJ, his disagreement is based on inferences drawn from documents and testimony in the record, i.e., Bond's testimony concerning the description of the product, Bond's testimony concerning Spears' description to her of the product as raisins, his review of Saulsbury's invoices, bills of lading and payroll records as well as the Canadian customs documents, and the testimony of Mr. Murray. These are derivative inferences drawn from not discredited testimony. Therefore, they are entitled to deference. There is nothing in the JO's Order in which the JO disagrees with the ALJ's credibility findings based on testimonial inferences.

2. Burden of Proof.

Saulsbury further argues that the JO's Order is arbitrary and capricious because the JO made a "critically serious error by stating it was up to Respondents to bring in Mr. Spear to testify and `this mystery of the end user was always in the power of the Respondents to reveal.'" Saulsbury asserts that it had no authority to issue a subpoena to a Canadian citizen to attend these administrative proceedings. While Saulsbury concedes that the USDA could not have issued such a subpoena either, Saulsbury notes that the Department had a Canadian official testify concerning the Canadian customs documents. Saulsbury complains: "[N]ever once did Wassenberg or anybody at USDA request the Canadian official to contact the buyer to find out about the product or to look for proof as to what the product was eventually used for. Certainly that is within the power of Canadian officials yet they were never requested to perform the investigative function, despite the fact that the USDA called the Canadian official to testify about customs documents." Saulsbury continues, that "[s]ince the `end user' was not in the power of Saulsbury to produce for testimony (because there is no subpoena power in Canada), but was certainly within the ability of USDA to investigate, through its cooperation with the Canadian custom officials, the Judicial Officers [sic] refusal to attribute truthfulness to Mr. Spears two letters and his statements to Renee Wassenberg over the phone, and instead to critically claim that they must be lies, is clearly erroneous."

This argument is without merit. First of all, there is no evidence that Saulsbury even attempted to subpoena the "end user" of the product or to obtain a declaration from the "end user" substantiating the use to which the product was put. Therefore,

Saulsbury's argument that it did not have the authority to issue the subpoena is speculation to the extent that it implies that any such subpoena would have been ignored. Secondly, Saulsbury cites no authority that the Department has any power to compel Canadian officials to conduct USDA investigations. Finally, and most importantly, the JO's Order does not conclude that the "end user" for the product testified to by Robert Saulsbury, and Mayes, and described by Spears in his letter to the USDA and in the notes of the telephone conversation with Wassenberg, was not credible because Saulsbury did not subpoena the "end user" of the product. The JO's determination that the"end use" described by Saulsbury's witnesses and documentary evidence was not credible is based on Bond's testimony concerning the description of the product, Bond's testimony concerning Spears' description to her of the product as raisins, his review of Saulsbury's invoices, bills of lading and payroll records as well as the Canadian customs documents, and the testimony of Mr. Murray. The JO's Order concludes from this evidence that the Department carried its burden of proof by a preponderance of the evidence. The JO's comments about Saulsbury's failures to present evidence from the "end user" and from its payroll records and other documents did not constitute a shift the burden of proof from the Department to Saulsbury. Rather, the JO noted that Saulsbury's failure to produce any of this evidence in support of its position lessened the plausibility or credibility of Saulsbury's defense.

3. Champagne Base.

Saulsbury further asserts that the JO's Order is arbitrary and capricious to the extent that the JO concluded that Saulsbury's product could not be used for a champagne base. Noting that the JO's conclusion derives from the testimony of Mr. Murray, Saulsbury contends that the JO fails to recognize that it was the Department's burden to prove that the product was raisins and that, for purposes of assessments, reserve obligations and inspections, was passing raisins under the Marketing Order. Saulsbury argues:

> The fact that Sunmaid, in the heart of the valley where the product is produced, that must obviously get an incredible number of tons of failing raisins, would only pay $150.00 a ton, is no evidence whatsoever as to what someone in Canada would pay for the type of product described by Saulsbury. It is quite obvious that the Judicial Officer desires to ignore the fact that it is USDA's burden of proof, and whatever was missing from its case (which was substantial), the Judicial Officer will merely fill in the holes by drawing inferences that are not supported by the record, or making

statements out of whole cloth and act as though the Judicial Officer is an expert in distilleries, raisins, and the product in question. Nowhere in the Judicial Officer's opinion does the Judicial Officer set forth any claim as to the Judicial Officer's expertise in this product or its uses. Therefore, for the Judicial Officer to reject Mr. Spear's claim as to what the product was and what it was used for is clearly erroneous.

However, as ruled *supra*, the JO's conclusion that the product was raisins is supported by substantial evidence.

Saulsbury's arguments that the inferences drawn by the JO from Mr. Murray's testimony are arbitrary and capricious because the JO does not set forth any particular expertise in the product or its uses are not persuasive. The JO was drawing inferences from Mr. Murray's expert testimony concerning the possibility of using Saulsbury's product for distillery purposes, including using the product as a base for champagne. There is nothing in the JO's Order wherein he was making statements out of "whole cloth" concerning the "end use" of Saulsbury's product.

To the extent that Saulsbury is asserting that drawing inferences concerning the use of the product in Canada from the expert testimony of Mr. Murray is arbitrary and capricious, it is true that the Department did not present evidence concerning the price being paid in Canada at that time for the product. However, the court cannot conclude that the inferences drawn by the JO from Mr. Murray's expert testimony are arbitrary and capricious merely because of the absence of this evidence.

F. Legality of Civil Penalties Imposed.

As noted, the JO imposed civil penalties of $219,000 and assessments of $1,673.00 on Saulsbury.

Saulsbury contends that the sanctions imposed by the JO's decision "are draconian, violate Due Process, are not substantially related to the harm caused but merely epitomizes USDA's and the judicial officer's (past and present) disdain for any little guy regulated by a marketing order who is found to have violated it." In addition, Saulsbury argues that the sanction imposed by the JO's decision violates the excessive fine clause of the Eighth Amendment and are arbitrary and

capricious.[3]

1. Violation of Due Process

As noted, Saulsbury asserts that the sanctions imposed by the JO's Order violate due process.

In so arguing, Saulsbury refers the court to *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) as authority that this court should find that the sanctions imposed violate due process.

BMW of North America is not relevant to this issue. Involved in *BMW of North America* was whether the scope of a punitive damages award in Alabama was so grossly excessive in relation to the State's legitimate interests in punishment and deterrence that it violated the Due Process Clause. In discussing the constitutional issue, the Supreme Court noted that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 574. In the case before this court, there is no issue of lack of notice of the severity of the penalty that may be imposed because the penalties imposed are set forth in statutes and in the Marketing Order.

Moreover, from the court's research, "[a] statutorily prescribed penalty violates due process rights `only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' . . . ." *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992). Here, Saulsbury makes no argument that the penalties prescribed by Section 608c(14)(B) or the Marketing Order violate due process under this test.

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[3]As quoted above, Saulsbury refers to the "judicial officer's (past and present disdain) for any little guy regulated by a marketing order who is found to have violated it." In its reply brief, Saulsbury asserts that "[t]here have been a number of court of appeal cases that have severely criticized the JO for his punitive mentality." The court is not aware of any evidence in the record before it that would support a finding of Judicial Officer Jenson's past and present disdain for the little guy. In addition, none of the cases cited by Saulsbury in its reply brief as supporting the inference that Courts of Appeal have severely criticized JO Jenson for his "punitive mentality" involved decisions issued by JO Jenson. Rather, they all appear to involve decisions issued by JO Donald A. Campbell.

In addition, the court notes that Saulsbury requests, in the event of a remand, that the court's remand be with the instruction that JO Jenson not be allowed to hear the matter. Saulsbury cites no statutes or case law which would authorize such an order from this court to the USDA. Other than the assertions set forth above, which are not supported by evidence or which involve another judicial officer, there is nothing presented to the court from which such an order could be based. Furthermore, litigants are not entitled to recusal of judges based on rulings that the judges have made nor can recusal be based on scurrilous attacks on the judge by the litigant.

2. Excessive Fines Clause Violation.

a. Applicability of Excessive Fines Clause of the Eighth Amendment.[4]

The threshold issue is whether the Excessive Fines Clause applies to the civil penalties set forth in Section 608c(14)(B).

The Eighth Amendment provides that "excessive fines" shall not be imposed. "Excessive Fines analysis proceeds in two steps: first, whether a payment, 'in cash or in kind, [i]s punishment for some offense.' and second, 'whether the particular sanction in question is so large as to be "excessive."'" *Grove v. Kadlic*, 968 F. Supp. 510, 516 (D. Nev. 1997). The first step is a question of law. *Id.* at 517.

The excessive fines clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-610 (1993). Involved in *Austin* was whether forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) is a monetary punishment subject to the Excessive Fines Clause. The Supreme Court in *Austin* explained;

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained in part to punish. We said in *Halper* that a 'civil sanction that cannot fairly be said solely to serve remedial purposes, but rather can only be explained as also serving retributive or deterrent purposes, is punishment, as we have come to understand the term.'

Id. at 610. The Supreme Court further held:

> Fundamentally, even assuming that §§ 881(a)(4) and (a)(7) serve some

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[4]The court notes that Saulsbury did not clearly raise either the applicability of the Excessive Fines Clause of the Eighth Amendment or the alleged violation of the Excessive Fines Clause to the either the ALJ or the JO. The only reference by Saulsbury to the Eighth Amendment is the statement made by Saulsbury in Respondent's Post Hearing Reply Brief wherein Saulsbury contended to the ALJ that the imposition of the $219,000.00 in civil penalties sought by the Department are "draconian, violated the Eighth Amendment, and violate Saulsbury's right to a jury trial." However, in the absence of any contention by the Department that this issue is not properly before the court, the court concludes that Saulsbury's brief and conclusory reference to the Eighth Amendment suffices to have raised the issue in the administrative proceedings.

> remedial purpose, the Government's argument must fail. `[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' . . . In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes `payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

Id. at 621-622. In *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028 (1998), the Supreme Court held that the forfeiture provisions in 18 U.S.C. § 928(a)(1) constitutes punishment for purposes of the Excessive Fines Clause, holding in pertinent part:

> . . . The statute directs a court to order forfeiture as an additional sanction when `imposing sentence on a person convicted of' a willful violation of § 5316's reporting requirement. The forfeiture is thus imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation. Cf. *Austin v. United States* . . . (holding forfeiture to be a `fine' in part because the forfeiture statute `expressly provide[d] an "innocent owner" defense; and thus `look[ed] . . . like punishment').
>
> The United States argues, however, that the forfeiture of currency under § 982(a)(1) `also serves important remedial purposes.' . . . The Government asserts that it has `an overriding sovereign interest in controlling what property leaves and enters the country.' . . . It claims that full forfeiture of unreported currency supports that interest by serving to `dete[r] illicit movements of cash' and aiding in providing the Government with `valuable information to investigate and detect criminal activities associated with that cash.' . . . Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of currency here does not serve the remedial purpose of compensating the Government for a loss . . . Although the

> Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144.
>
> . . .
>
> "We do not suggest there merely because the forfeiture of respondent's currency in this case would not serve a remedial purpose, other forfeitures may be classified as nonpunitive (and thus not `fines') if they serve some remedial purpose as well as being punishment for an offense. Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part. (The Government concedes as much.) This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause. See *Austin v. United States*, 509 U.S. 602, 621-672 . . . .

118 S. Ct. at 2033-2034. In determining whether a civil sanction serves in part to punish, "the court considers factors such as the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction." *Louis v. C.I.R.*, 170 F.3d 1232 (9th Cir. 1999).

Saulsbury relies on *Austin* and *Bajakajian* in contending that the civil penalties provided in Section 608c(14)(B) are intended to serve retributive and deterrent purposes as well as remedial purposes.

Section 608c(14)(B) provides in pertinent part:

> Any handler subject to an order issued under this section, or any officer director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation . . . .

The legislative history of Section 608c(14)(B) explains the purpose of the amendment enacting this civil penalty provision:

> Under current law, any handler who violates a marketing order regulation, is subject to a criminal fine of not less than $50 or more than $5,000 for each violation and each day during which the violation occurs. Such violations are referred by the Department of Agriculture to the U.S.

Attorney's Office of the Department of Justice for prosecution. Only the U.S. Attorney's Office may enforce this section and take action against violators of marketing orders.

This criminal prosecution procedure, however, is both time-consuming and cumbersome. In addition, the U.S. Attorneys offices handle an enormous number and variety of cases on behalf of all Federal Government agencies. Because the offices cannot effectively handle the volume of cases that they now receive, many regulatory violations are often not pursued.

In many cases, the U.S. Attorneys Offices have not taken any action against reported marketing order violations. In 1986, for example, out of 52 investigations of alleged violations of fruit, vegetable, and specialty crop marketing orders, only 11 were resolved by the U.S. Attorneys Offices.

To maintain the integrity of the marketing order program, it is necessary that civil penalties (imposed through administrative procedures) be used as an enforcement tool to respond to regulatory violations in addition to the criminal enforcement procedures currently provided. Furthermore, administrative civil penalties will ensure that regulatory violations of marketing orders will be dealt with in a timely, efficient, and effective manner.

Thus, section 1051 contains a provision that gives the Department of Agriculture the authority to initiate an administrative action to assess a civil penalty of not more than $1000 for each violation against any handler who violates a marketing order. Each day during which a violation continues would be considered a separate violation.

The Secretary would be required to give notice and an opportunity for any agency hearing before assessing a civil penalty. A penalty order would be reviewable in the U.S. district court . . . The bill does not eliminate the authority to seek a criminal fine for a marketing order violation, were appropriate. It simply will authorize the Secretary of Agriculture to seek an administrative civil penalty when circumstances indicate that it would be an effective regulatory tool.

H. Rep. No. 391(I), 100th Cong., 1st Sess. 29-30, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-29-30.

There can be little question that the Department's construction of the purpose of Section 608c(14)(B) includes deterrent as well as remedial purposes. The JO's Order quotes extensively from *In re Onofrio Calabrese*, 51 Agric. Dec. 131 (1992), *aff'd on other grounds*, *Balice v. USDA*, No. CV-F-92-5483 AWI. In *Calabrese*, the legislative history of the Act pertaining to marketing order penalties is quoted. In *Calabrese*, the Department ruled:

> It is the intent of Congress that the penalties assessed in this proceeding be a complement to the criminal penalties which the United States Attorneys have the authority to seek, but often do not due to their workload demands. In order to be an effective complement (or alternative) to criminal prosecution, the sanctions imposed in these proceedings should be sufficient to remedy the violations committed by the Respondents, and also sufficient to deter such conduct by Respondents and others in the future. An insufficient penalty might be seen by these Respondents or other potential violators as a tolerable cost of doing business, in light of the potential returns available for operating in violation of the Order requirements.

See also Spencer Livestock Com'n v. Dept. of Agriculture, 841 F.2d 1451, 1456 (9th Cir. 1988) (addressing the Department's "severe sanction" policy wherein, although the Department stated that the purpose was not primarily punishment for a past offense, its purpose is to deter those on whom the sanctions are imposed and other potential violators. Although *Spencer Livestock Com'n* does not discuss the Excessive Fines Clause, it does reiterate the Department's view that the civil penalties serve a punitive as well as a deterrence purpose.)

This court is not bound by the construction given Section 608c(14)(B) by the Department as it relates to the Excessive Fines Clause analysis. However, it is an indication that the agency charged with enforcement of the penalty provision believes that one of the purposes of the civil penalty provision is deterrence.

Although this is an area of the law which appears to be still evolving since the decision in *Austin*, the court concludes, based on the analysis in *Austin* and *Bajakajian* and the legislative history quoted above, that Section 608c(14)(B) is subject to the Excessive Fines Clause.[5]

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[5]During the administrative proceedings and in the Complaint filed with this court, Saulsbury contended that, because the penalties imposed by the JO's Order were penal in nature and amounted to cruel and unusual punishment, Saulsbury is entitled to a jury trial before an Article III court. Saulsbury does not move for summary judgment on this ground. Given the failure to assert this ground

(continued...)

b. Excessiveness Within Eighth Amendment.

Because the court has concluded that the civil penalty provision of Section 608c(14)(B) is subject tot he Excessive Fines Clause, the court must next determine whether the penalties imposed by the JO's Order are excessive within the meaning of the Eighth Amendment.

In making this determination, the court decides whether the civil penalties imposed are "grossly disproportional to the gravity of a defendant's offense." *Bajakajian, supra*, 118 S. Ct. at 2036; *United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 & n.3 (9th Cir. 1999). The Supreme Court in *Bajakajian* held that the district court's factual findings in conducting the excessiveness inquiry must be accepted unless clearly erroneous, but that the "question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." 118 S. Ct. at 2037 n.10. The court assumes that these standards apply to judicial review of an administrative imposition of civil penalties.

Here, however, the JO made no findings specifically addressed to the contention that the civil penalties sought and obtained by the Department were or were not excessive as that term has been defined by the Supreme Court. Therefore, the court will remand this action to the Secretary for the purpose of making these findings.[6] The court will retain jurisdiction of this action pending those findings. The parties shall renew their motions for summary judgment before the court on this issue once those findings are final.

4. Arbitrary and Capricious/Substantial Evidence.

Saulsbury further argues that the penalties imposed by the JO's Order are arbitrary and capricious and unsupported by substantial evidence.

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[5](...continued)
for relief in the motion, the court concludes that Saulsbury has abandoned this ground for relief.

[6]Following oral argument, the court ordered the parties to submit supplemental briefs whether this court had the authority to reduce the penalties imposed in an administrative proceeding or whether the matter must be remanded to the Department. The court concludes from the authority cited by the Department, especially *Butz v. Glover*, 411 U.S. 182 (1973) that the court does not have the authority to reduce the civil penalties imposed by the Department unless and to the extent those penalties are not supported by the evidence or are arbitrary and capricious and that the court cannot determine whether the civil penalties imposed violated the Excessive Fines Clause until the findings necessary to such a determination are made by the Department.

As noted, a determination whether the civil penalties imposed are arbitrary and capricious requires a consideration whether the JO's decision concerning the penalties was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, supra*, 402 U.S. at 416. As further noted, substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood, supra*, 497 U.S. at 565.

Saulsbury argues that the civil penalties are arbitrary and capricious because Robert J. Saulsbury is in his 70s and will be bankrupted by the civil penalties imposed by the JO if affirmed. Mr. Saulsbury's age is not relevant to this issue. Moreover, there is no evidence in the administrative record establishing that Saulsbury will be bankrupted by civil penalties.

Saulsbury repeatedly argues that the JO abdicated his decision-making authority by accepting in toto the Department's position concerning the civil penalties to be imposed. However, the JO accepted that position because he agreed with it after considering the record.

An issue concerning evidence of the willfulness of Saulsbury's offenses because of his knowledge of the Marketing Order involves the JO's conclusion that Saulsbury had to know about the Marketing Order's requirements because of the petition pursuant to Section 608c(15)(A) filed in 1987 by Saulsbury Orchards & Almond Processing, Inc. and subsequent review in this court concerning various challenges to the Almond Marketing Order. The JO refers to evidence that the address for Saulsbury Enterprises (the entity plaintiff herein) is the same as that of Saulsbury Orchards & Almond Processing, Inc., that Saulsbury used Saulsbury Orchards & Almond Processing, Inc.'s almonds bins to store its raisins, that Robert J. Saulsbury (the individual plaintiff herein) admitted that he was in the almond business with family members and others at Saulsbury Orchards & Almond Processing, Inc. from 1969 until the late 1980's, that Mayes testified that when he began working for Saulsbury in 1974, it was for Saulsbury's almond business, and that Robert J. Saulsbury and Bond testified that Bond worked with Skip Pettit and Saulsbury's son after being fired from Saulsbury's Enterprises.

Saulsbury argues that the Section 15(A) petition and subsequent litigation brought by Saulsbury Orchards & Almond Processing, Inc. cannot form the basis for an inference that Saulsbury was aware of the requirements of the Raisin Marketing Order. In so doing, Saulsbury notes that the two cases involve different marketing orders and different issues. Saulsbury contends that it is arbitrary and capricious to assume that knowledge of one industry regulation provides

knowledge of another industry regulation.[7]

If the only evidence upon which the JO based his inference that Robert J. Saulsbury was aware of the requirements of the Raisin Marketing Order was the fact of the almond marketing order and the litigation with the Department concerning the Almond Marketing Order brought by Saulsbury Orchards & Processing, Inc., the court would agree with Saulsbury that this evidence is not probative and that the JO's reliance upon it is arbitrary and capricious. However, as noted above, this evidence is not the only evidence upon which the JO bases the inference that Saulsbury was not ignorant of the requirements at the Raisin Marketing Order. Therefore, the court cannot conclude from the record before it that the JO's conclusion that Saulsbury was aware of the requirements of the Marketing Order was arbitrary or capricious or unsupported by substantial evidence.

With regard to the $1,673.30 sanction imposed by the JO because of violations of the Marketing Order's assessment requirements,[8] Section 989.80 of the Marketing Order requires that handlers of raisins pay certain assessments determined pursuant to a formula set forth in Section 989.80. The ALJ did not require Saulsbury to pay these assessments for the crop years in question because the ALJ concluded that the assessments are based on "standard raisins" and that the raisins Saulsbury sold to Canada "were off-grade raisins which would have failed to qualify as standard (Grade A) raisins." The JO concluded that, because "the raisins [Respondents] sold to the Canadian distillery were, as noted, [sold at a price which would] qualify as (Grade A) raisins" and because assessments are based on the raisins being standard raisins, Saulsbury would be required to pay the assessments calculated from the tonnage shipped by Saulsbury during the crop

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[7]Brian Leighton, counsel for plaintiffs herein and counsel for Saulsbury Orchards & Processing, Inc., asserts in a footnote that, during the 12 years that the litigation concerning Saulsbury Orchards & Processing, Inc.'s challenges to the almond marketing order has been proceeding, he, Brian Leighton, has never discussed any matters concerning the almond operation and the litigation with Robert J. Saulsbury. That Mr. Leighton never discussed the almond matter with Robert J. Saulsbury is not probative that Robert J. Saulsbury was unaware of the requirements of the almond marketing order and of the issues raised in the almond litigation.

[8]"This total amount is broken down as follows: (1) $557.33 for 1988-1989; (2) $564.68 for 1989-1990; and (3) $521.29 for 1990-1991.

years in question.[9] In addition, the JO based his conclusion on the fact that Saulsbury did not have the raisins inspected, "so there is no reason for presuming that they would have failed inspection or received any particular grade simply because Saulsbury and Mayes said so."

The court concludes that the imposition of the assessments is not arbitrary and capricious or unsupported by substantial evidence. The inferences drawn by the JO from the prices received by Saulsbury for the product, shipped to Canada when compared to the prices received by handlers of raisins during the same time period supports the JO's conclusion.

The JO imposed civil penalties in the amount of $59,000 with regard to the reserve requirements of the Marketing Order. Section 989.66 of the Marketing Order requires a handler of raisins to hold a percentage of his raisins in storage under the Raisin Administrative Committee notifies the handler that he is relieved of that responsibility. Therefore, the JO imposed a penalty pursuant to Section 608c(14)(B) of $1,000 for each of the 59 months that Saulsbury failed to hold the applicable percentage of raisins in reserve pursuant to the reserve requirement of the Marketing Order for the crop year in question. The ALJ did not impose any sanction because of Saulsbury's failure to comply with the Marketing Order's reserve requirements because of the ALJ's conclusion that Saulsbury's raisins were "off-grade raisins which would have failed to qualify as standard (Grade A) raisins." The JO, as noted, disagreed with the ALJ's conclusion for the reasons discussed in connection with the assessments. For the reasons set forth above concerning the assessments, the JO's conclusion that the evidence established that

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[9]Section 989.24 of the Marketing Order defines the various grades of raisins as follows:

(a) 'Standard raisins' means raisins which meet the then effective minimum grade and condition standards for natural condition raisins.

(b) 'Offgrade raisins' means raisins which do not meet the then effective minimum grade and condition standards for natural condition raisins: *Provided*, That raisins which are certified as off-grade raisins shall continue to be such until successfully reconditioned or become 'other failing raisins.'

(c) 'Other failing raisins' means any raisins received or acquired by a handler, either as standard raisins or off-grade raisins, which are processed to a point where they qualify as packed raisins but fail to meet the applicable minimum grade standards for packed raisins.

(d) 'Raisin residual material' means defective raisins, steamer waste, sweepings, and other residue accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins.

Saulsbury failed to hold the raisins for a total of 59 months because Saulsbury sold 100% of its raisins during the crop years in question, thus holding no raisins in reserve is not arbitrary and capricious or unsupported by substantial evidence.

With respect to the $40,000 penalty imposed in the JO's Order for failing to file reports as required the Marketing Order, Section 989.73 of the Marketing Order and the evidence presented at the administrative hearing establishes that handlers are required to file reports of inventory, acquisition, disposition, shipment, and status of raisins. The ALJ found that Saulsbury failed to file a total of 20 reports required by the Marketing Order during the crops years in question but did not impose a specific penalty for these violations of the Marketing Order.[10] The JO concluded that Saulsbury had failed to file a total of 40 reports required by the Marketing Order[11] during the crop years in question and imposed a $1,000.00 penalty for each failure to file the report, stating in pertinent part:

> The [ALJ] agreed that Saulsbury had failed to file `any of the RAC reports required of handlers,' but found that he was only required to file 20 of them, on the assumption that Saulsbury's raisins were `off-grade' or `failing.' As discussed above, the [ALJ's] finding is erroneous. One cannot assume that [Respondents were] exempt from filing all 40 reports, and [their] failure to do so is serious and warrants the imposition of the full $1,000 civil penalty for each violation.

As discussed above, the inferences drawn by the JO from the record concerning the quality of Saulsbury's raisins are not arbitrary and capricious or unsupported by

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[10]The ALJ found that Saulsbury failed to file: (a) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection; (b) eight RAC-30 Forms, reporting off-grade raisins; (c) three RAC-32 Forms, reporting the disposition of off-grade or failing raisins, or residual material; (d) three RAC-35 Forms, applying to sell, ship or dispose of raisins or raisin residual materials; and (e) three RAC-51 Forms, reporting inventory of off-grade raisins by variety.

[11]The JO found that Saulsbury failed to file: (a) eight RAC-1 Forms, reporting standard raisin acquisitions; (b) three RAC-5 Forms, giving notice of intention to handle raisins and making application for inspection; (c) three RAC-7 Forms, reporting the status of reserve pool raisins; (d) three RAC-20 Forms, reporting the disposition of free tonnage raisins; (e) three RAC-21 Forms, reporting free tonnage shipments to foreign countries; (f) eight RAC-30 Forms, reporting off-grade raisins; (g) three RAC-32 Forms, reporting the disposition of off-grade or failing raisins, or residual material; (h) three RAC-35 forms, applying to sell, ship, or dispose of raisins or raisin residual materials; (i) three RAC-50 Forms, reporting inventory of free tonnage raisins, by variety; and (j) three RAC-51 Forms, reporting inventory of off-grade raisins, by variety.

substantial evidence.

However, the court concludes from the record herein that the imposition of a $40,000 civil penalty is not supported by the record. $14,000 of the $40,000 penalty imposed for failing to file reports required by the Marketing Order is attributable to the failure to file reports reporting off-grade raisins, the disposition of off-grade or failing raisins, and the reporting of off-grade raisins by variety. The court concludes that the JO cannot impose a penalty for failing to file these particular reports, given tho JO's conclusion that Saulsbury's raisins were standard raisins. Therefore, the civil penalty imposed on Saulsbury because of violations of Section 989.73 of the Marketing Order will be reduced by $14,000.00.

With regard to the penalty imposed for Saulsbury's failure to have the raisins inspected, Section 989.58(d) of the Marketing Order requires the inspection and certification of all natural condition raisins acquired or received by a handler and Section 989.102 *et seq.* sets forth how and where natural condition raisins are inspected and certified. The ALJ found that Saulsbury did not have the raisins inspected for shipment to Canada. The ALJ did not impose any penalty for these violations of the Marketing Order because Saulsbury's raisins were not have qualified as standard (Grade A) raisins and could not have been sold in competition with other standard (Grade A) raisins subject to the Marketing Order even if inspected. The JO concluded that Saulsbury made 60 shipments of raisins to Canada during the crop years at issue "without having either incoming or outgoing inspections, thus committing 120 violations of the [Raisin] Order" and imposed a $1,000 penalty for each violation for a total penalty for failure to inspect of $120,000.00.

Again, the court concludes that the inferences drawn by the JO from the record concerning the quality of Saulsbury's raisins were not arbitrary and capricious or unsupported by substantial evidence.

As noted, the JO refers to "incoming and outgoing inspections" and concludes that, because there were 60 shipments of raisins to Canada, there were 120 violations.

Saulsbury complains that the JO has imposed a double penalty for the same conduct.

Saulsbury's objection is without merit. The record establishes that the raisins were stored at a warehouse for several weeks before being shipped to Canada. Section 989.58(d)(1) provides in pertinent part that "[e]ach handler shall cause an inspection and certification to be made of all natural condition raisins acquired or received by him . . . ." Section 989.59(d) provides in pertinent part:

> [E]ach handler shall, at his own expense, before final shipping or otherwise

> making final disposition of raisins, cause and [sic] inspection to be made of such raisins . . . Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted a copy of such other certificate together with such other documents or records as the committee may require.

Because the regulations require inspections when the handler receives the raisins and inspections when the raisins are disposed of, the JO did not impose a double penalty.

Finally, Saulsbury argues that the civil penalties imposed are arbitrary and capricious because the "junk" raisins shipped to Canada would not have competed with raisins for consumer consumption. However, as noted, the court concludes that the inferences concerning the quality of the raisins shipped to Canada made by the JO are neither arbitrary and capricious or unsupported by substantial evidence

5. Small Business Regulatory Enforcement Fairness Act of 1996.

Saulsbury contends that the penalties imposed by the JO's Order are clearly contrary to Section 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, codified as a note to 5 U.S.C. § 601.[12] Specifically, Saulsbury

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[12]Section 223(a) provides in pertinent part as follows:

(a) In general. — Each agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section [Mar. 29, 1996] to provide for the reduction, and under appropriate circumstances for the waiver of, civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.

(b) Conditions and exclusions. — Subject to the requirements of limitations of other statutes, policies or programs established under this section shall contain conditions or exclusions which may include, but shall not be limited to —

(1) requiring the small entity to correct the violation within a reasonable correction period;

(2) limiting the applicability to violations discovered through participation by the small entity in a compliance assistance or audit program operated or supported by the agency or a State;

(3) excluding small entities that have been subject to multiple enforcement actions by the

(continued...)

complains, the JO did not consider whether Saulsbury had the ability to pay the penalties imposed, whether the penalties imposed would put Saulsbury out of business "or any of the factors under the Act."

However, Saulsbury did not raise this contention during the administrative proceedings. Generally, parties must raise objections to agency proceedings during the actual proceeding. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Furthermore, Saulsbury could not have asserted any contentions based on Section 223(a) because, as noted, its effective date was two months after the Department took final action in this case.

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that the JO's Order is affirmed with the exception of $14,000.00 in civil penalties.

IT IS FURTHER ORDERED that this action is remanded to the Department for further findings concerning whether the civil penalties imposed by the JO, as reduced by the court herein, are excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

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[12](...continued)
agency;

(4) excluding violations involving willful or criminal conduct;

(5) excluding violations that pose serious health, safety or environmental threats; and

(6) requiring a good faith effort to comply with the law.

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISION

In re: NEW ENGLAND DAIRIES, INC.
98 AMA Docket No. M 1-3.
Decision and Order filed February 23, 1999.

Dismissal of petition — Modification of or exemption from order — Premature petition.

The Judicial Officer affirmed the Decision and Order by Administrative Law Judge Baker (ALJ) under 7 U.S.C. § 608c(15)(A), which dismissed a petition filed by a handler subject to the New England Milk Marketing Order (7 C.F.R. pt. 1001). The Judicial Officer held that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from referring to other documents for the administrative law judge's reasons for a decision upon a motion to dismiss and that an administrative law judge is not prohibited by 7 C.F.R. § 900.52(c)(2) from adopting reasons from other documents, as the administrative law judge's reasons for a decision upon a motion to dismiss. The Judicial Officer held that the petition contains neither a request for modification of the New England Milk Marketing Order nor a request to be exempted from the New England Milk Marketing Order; thus, dismissal of the petition was not error. Moreover, the Judicial Officer found that the petition was premature because it challenged an order that the Secretary of Agriculture had not issued; but was based solely on petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, which petitioner contends will violate the Agricultural Marketing Agreement Act of 1937, as amended, and the equal protection guarantees of the United States Constitution.

Donald A. Tracy, for Respondent.
John Vetne, Newburyport, Massachusetts, for Petitioner.
Initial Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

New England Dairies, Inc. [hereinafter Petitioner], instituted this proceeding on September 14, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; 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], by filing: (1) a petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) [hereinafter Petition]; (2) an answer to an amended petition filed by Stew Leonard's in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1; (3) a petition to intervene in *In re Stew Leonard's, supra* [hereinafter Motion to Intervene]; and (4) a petition to consolidate this proceeding with *In re Stew Leonard's, supra* [hereinafter Motion to

Consolidate].[1]

Petitioner alleges in its Petition that the relief requested by Stew Leonard's in *In re Stew Leonard's, supra*, is not in accordance with the AMAA or the New England Milk Marketing Order or, in the alternative, if Stew Leonard's is found exempt from the pricing provisions of the New England Milk Marketing Order, the pricing obligations imposed on Petitioner under the New England Milk Marketing Order are not in accordance with the uniform pricing provisions of the AMAA (7 U.S.C. § 608c(5)(A)) and the equal protection guarantees of the United States Constitution (U.S. Const. amend. V) (Pet. at 4).

On October 30, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Motion to Dismiss Petition and to Have the Case Assigned to Judge Baker [hereinafter Motion to Dismiss]. Respondent requests dismissal of Petitioner's Petition because the Petition: (1) requests neither modification of, nor exemption from, the New England Milk Marketing Order, as required by section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); (2) does not comply with the content requirements in section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)); and (3) challenges an order by the Secretary of Agriculture, which the Secretary of Agriculture has not issued.

On December 15, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] issued Dismissal of Petition [hereinafter Initial Decision and Order] in which the ALJ dismissed Petitioner's Petition, Motion to Intervene, and Motion to Consolidate.

On January 19, 1999, Petitioner appealed to, and requested oral argument before, the Judicial Officer; on February 12, 1999, Respondent filed Respondent's Reply to Petitioner's Appeal; and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 900.65(b)), is refused because the issues have been fully briefed by the parties; thus, oral argument would

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[1]Petitioner captioned each of its September 14, 1998, filings "*In re Stew Leonard's*, 98 AMA Docket No. M 1-1" and "*In re New England Dairies*, 98 AMA Docket No. M 1-_." I infer, based upon the caption on each of Petitioner's September 14, 1998, filings, that Petitioner intended to file each of its September 14, 1998, filings in this proceeding and in *In re Stew Leonard's, supra*. However, I find Petitioner's filing an answer and a motion to intervene in this proceeding perplexing. In order to avoid any possible confusion regarding the records in this proceeding and *In re Stew Leonard's, supra*, Petitioner is strongly urged in any future filing in this proceeding and in *In re Stew Leonard's, supra*, to specify the proceeding to which the filing relates.

appear to serve no useful purpose.

Based upon a careful consideration of the record and pursuant to section 900.66(a) of the Rules of Practice (7 C.F.R. § 900.66(a)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order, as restated.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

ALJ'S INITIAL DECISION AND ORDER (AS RESTATED)

This Decision and Order is based upon the whole record, including Respondent's Motion to Dismiss, filed October 30, 1998, which sets forth compelling reasons why Petitioner is attempting to intervene in *In re Stew Leonard's*, 98 AMA Docket No. M 1-1, and why Petitioner has filed an inappropriate, baseless Petition not in conformity with the AMAA or the Rules of Practice.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

As an initial matter, Respondent appeals not only the Initial Decision and Order issued in this proceeding, but also the "Rulings on Respondent's Motion to Strike Agri-Mark, Inc.'s, `Answer' and Agri-Mark, Inc.'s, Motion for Consolidated Hearing; Rulings on New England Dairies, Inc.'s `Answer' to Amended Petition of Stew Leonard's . . . and Petition to Intervene and Consolidate for Hearing," which the ALJ issued in *In re Stew Leonard's, supra*, on September 22, 1998. Petitioner cannot in this proceeding appeal the ALJ's rulings issued in another proceeding. Therefore, I restrict my additional conclusions in this proceeding to the issues raised by Petitioner that relate to the ALJ's Initial Decision and Order issued on December 15, 1998, in this proceeding.

Petitioner raises three issues in Petitioner's Appeal of New England Dairies, Inc., to the Judicial Officer [hereinafter Appeal Petition]. First, Petitioner contends that:

> Judge Baker's dismissal of [Petitioner's] Petition as it relates to past agency action was entered in violation [of] procedural and substantive requirements of 7 C.F.R. § 900.52(c)(2) expressly requiring "reasons" for any dismissal[.]

Appeal Pet. at 4.

I agree with Petitioner that an administrative law judge must state the reasons for dismissal of a petition, and I find that the ALJ's Initial Decision and Order does state her reasons for dismissing Petitioner's Petition. Section 900.52(c)(2) of the Rules of Practice provides, as follows:

§ 900.52 Institution of proceeding.

. . . .

(c) *Motion to dismiss petition. . . .*

(2) *Decision by Administrative Law Judge.* The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

7 C.F.R. § 900.52(c)(2).

The ALJ's Initial Decision and Order states, in its entirety:

The following Order is issued after a consideration of the record as a whole, including Respondent's Motion to Dismiss the Petition, filed October 30, 1998. Respondent has set forth compelling reasons why the Petitioner herein is attempting to intervene in another 15A proceeding and has filed an inappropriate baseless Petition and one which is not in conformity with the law and regulations, all as more fully set forth by Respondent in its Motion to Dismiss.

New England Dairies, Inc.'s Petition to Intervene and to Consolidate for Hearing on its Affirmative Petition Pursuant to 7 U.S.C. § 608(c)(15)(A); and, its Affirmative Claims of Intervenor/Petitioner filed September 14, 1998, are Dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 15th day of December, 1998
/s/
Dorothea A. Baker
Administrative Law Judge
(202) 720-8305

The ALJ clearly states in the Initial Decision and Order that the reasons for the Initial Decision and Order are set forth in Respondent's Motion to Dismiss. An administrative law judge is not prohibited by section 900.52(c)(2) of the Rules of Practice from referring to other documents filed in the proceeding for the administrative law judge's reasons for a decision upon a motion to dismiss. Moreover, an administrative law judge is not prohibited by section 900.52(c)(2) of the Rules of Practice from adopting reasons from other documents filed in the proceeding, as the administrative law judge's reasons for a decision upon a motion to dismiss. The ALJ's reference to, and adoption of, the reasons in Respondent's Motion to Dismiss for her decision regarding Respondent's Motion to Dismiss meet the requirement in section 900.52(c)(2) of the Rules of Practice (7 C.F.R. § 900.52(c)(2)) that an administrative law judge must state the reasons for his or her decision regarding a motion to dismiss.

Second, Petitioner contends that:

> [T]he action of the administrative law judge denying declaratory relief requested by [Petitioner] is erroneous as a matter of law[.]

Appeal Pet. at 4.

Petitioner requests declaratory relief in its Petition, as follows:

> WHEREFORE, Petitioner . . . respectfully prays:
>
> . . . .
>
> D. That if the Secretary deems that Stew Leonard's is qualified as a producer handler under the provisions of 7 C.F.R. § 1001.10, the Secretary in such case declare that the provisions of § 1001.10 are unauthorized, or otherwise not in accordance with law.
>
> E. That the Secretary find and declare, as matter of fact and law, that farm and dairy herd leasing by a handler does not vest the lessee handler

complete and unshared enterprise and risk in the milk producing facilities.

Pet. at 5.

I disagree with Petitioner's contention that the ALJ's dismissal of Petitioner's requests for declaratory relief is error. Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) provides that any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection with any such order is not in accordance with law and praying for a modification of the order or to be exempted from the order. The Petition contains neither a request for modification of the New England Milk Marketing Order nor a request to be exempted from the New England Milk Marketing Order. Therefore, the ALJ properly dismissed the Petition.

Moreover, even if I found the Petition to contain a request for modification of, or to be exempted from, the New England Milk Marketing Order, the ALJ properly dismissed the Petition because it is premature.

The record reveals that Petitioner believes that, in connection with another proceeding instituted under the AMAA, *In re Stew Leonard's, supra*, the Secretary of Agriculture will determine that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. The gravamen of Petitioner's Petition is a challenge to what Petitioner believes is the Secretary of Agriculture's imminent determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order and the declaratory relief requested in the Petition is relief from the Secretary of Agriculture's alleged imminent determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order.

However, the Secretary of Agriculture has not determined that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. Therefore, the Petition requests declaratory relief from an order which the Secretary of Agriculture has not issued. The ALJ's dismissal of the Petition, which is based on Petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's, supra*, which Petitioner contends will violate the AMAA and the equal protection guarantees of the United States Constitution, is not error.

Third, Petitioner contends that:

> [T]he decision of the ALJ denying a regulatory exemption to [Petitioner], so that it may purchase and market milk under essentially the same pricing terms as handlers exempted under 7 C.F.R. § 1001.10, is erroneous as a matter of statutory and constitutional law.

Appeal Pet. at 4.

Petitioner describes the basis for its requested "regulatory exemption" in its Petition, as follows:

> . . . [I]f Stew Leonard's, Inc., is or may be deemed exempt from the minimum pricing provisions of the New England Milk Marketing Order, [P]etitioner . . . claims that pricing obligations imposed upon [Petitioner] under the [New England Milk Marketing] Order, including those set forth in 7 C.F.R. §§ 1001.70 through 1001.74[] and 1001.85, are not in accordance with law in that said obligations are in conflict with the requirements of 7 U.S.C. § 608c(5)(A), requiring that regulated prices be uniform as to all handlers, and also operate in conflict with equal protection guarantees of the U.S. Constitution, in that the regulatory discrimination which would favor Stew Leonard's and disfavor [Petitioner] is not supported by rational basis or serve to further a legitimate government interest.

Pet. at 4.

I disagree with Petitioner's contention that the ALJ's dismissal of Petitioner's request for a "regulatory exemption" is error.

Petitioner's request for a "regulatory exemption" is based on Petitioner's contention that a determination that Stew Leonard's is a producer-handler under the New England Milk Marketing Order and a failure to determine that Petitioner has the same status would violate both the uniform pricing provisions in section 8c(5)(A) of the AMAA (7 U.S.C. § 608c(5)(A)) and the equal protection guarantees of the United States Constitution (U.S. Const. amend. V). Thus, the basis for Petitioner's request for a "regulatory exemption" is Petitioner's expectation that the Secretary of Agriculture will determine that Stew Leonard's is a producer-handler under the New England Milk Marketing Order.

However, the Secretary of Agriculture has not determined that Stew Leonard's is a producer-handler under the New England Milk Marketing Order. Therefore, the Petition requests a "regulatory exemption" based on an order which the Secretary of Agriculture has not issued. The ALJ's dismissal of the Petition, which is based on Petitioner's expectation that the Secretary of Agriculture will issue an order in *In re Stew Leonard's, supra*, which Petitioner contends will violate the AMAA and the equal protection guarantees of the United States Constitution, is not error.

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

Order

Petitioner's Petition filed in this proceeding on September 14, 1998, is dismissed, and Petitioner's Motion to Intervene and Motion to Consolidate, filed in this proceeding on September 14, 1998, are denied.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

In re: DANIEL E. MURRAY.
A.Q. Docket No. 98-0003.
Decision and Order filed January 22, 1999.

Default — Failure to file timely answer — Civil Penalty.

The Judicial Officer affirmed Chief Administrative Law Judge Palmer's (Chief ALJ) decision assessing a civil penalty of $500 against Respondent. The Judicial Officer held that Respondent's failure to file a timely answer to the Complaint is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process.

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under sections 2 and 3 of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. §§ 78.1-.44 (1996)); 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], by filing a Complaint on January 15, 1998.

The Complaint alleges that on or about June 12, 1996, Daniel E. Murray [hereinafter Respondent], "in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cattle [sic] to a recognized slaughtering establishment without being accompanied by a permit or 'S' brand permit, as required" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on January 24, 1998.[1] Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R.

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[1]Domestic Return Receipt for Article Number p368421153 signed by "Katie Murray" stating that the date of delivery was "1/24/98."

§ 1.136(a)).

On August 18, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on August 24, 1998.[2] Respondent filed an objection to Complainant's Motion for Default Decision, but gave no basis for his objection.[3]

On September 23, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Default Decision and Order in which the Chief ALJ: (1) found that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint; and (2) assessed a civil penalty of $500 against Respondent (Default Decision and Order at second unnumbered page).

On October 27, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory

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[2]Domestic Return Receipt for Article Number p093143432 signed by "Dan Murray" stating that the date of delivery was "8-24-98."

[3]Respondent's objection to Complainant's Motion for Default Decision states, in its entirety, as follows:

Sept. 12, 1998

To: Susan C. Golabek
Attorney for Complainant
USDA/OGC

I Daniel E[.] Murray am in objection of the Motion for Decision and want to appeal this decision.
A.Q[.] Docket No. 98-0003

Daniel E. Murray
1756 Whitetail Rd.
Decorah IA 52101
(319) 382-8496

proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[4]

On January 20, 1999, Complainant filed Complainant's Opposition to Respondent's Appeal Petition of the Default Decision and Order, and on January 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

APPLICABLE STATUTORY PROVISIONS AND REGULATION

21 U.S.C.:

TITLE 21—FOOD AND DRUGS

. . . .

CHAPTER 4—ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS

. . . .

SUBCHAPTER III—PREVENTION OF INTRODUCTION AND SPREAD OF CONTAGION

. . . .

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious,

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[4]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

§ 122. Offenses; penalty

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. §§ 111, 122.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS (INCLUDING POULTRY) AND ANIMAL PRODUCTS

. . . .

PART 78—BRUCELLOSIS

. . . .

Subpart B—Restrictions on Interstate Movement of Cattle Because of Brucellosis

. . . .

§ 78.8 Brucellosis exposed cattle.

Brucellosis exposed cattle may be moved interstate only as follows:

(a) *Movement to recognized slaughtering establishments. . . .*

(2) Brucellosis exposed cattle may be moved interstate directly to a recognized slaughtering establishment if such cattle are:

. . . .

(ii) Accompanied by a permit or "S" brand permit[.]

9 C.F.R. § 78.8(a)(2)(ii).

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION AND ORDER (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, on August 18, 1998, Complainant filed Motion for Default Decision. Respondent filed an objection to Complainant's Motion for Default Decision, which gave no basis for the objection. The allegations in the Complaint having been admitted and there being no valid reason before me for not entering a default decision, the material allegations in the Complaint are adopted and set forth in this Decision and Order as the Findings of Fact, and this Decision and

Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Daniel E. Murray, Respondent, is an individual with a mailing address of 1756 Whitetail Rd., Decorah, Iowa 52101.

2. On or about June 12, 1996, Respondent, in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cow to a recognized slaughtering establishment without being accompanied by a permit or "S" brand permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, Respondent has violated 9 C.F.R. § 78.8(a)(2)(ii).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises one issue in a letter dated October 24, 1998, and addressed to the Chief ALJ, which I infer to be Respondent's appeal petition [hereinafter Respondent's Appeal Petition]. Respondent admits in Respondent's Appeal Petition that on or about June 12, 1996, a cow was moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, but denies that he moved, or caused the movement of, the cow interstate, as alleged in the Complaint. Respondent's denial of the material allegations of the Complaint is too late. Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint because Respondent failed to file an answer within 20 days after he was served with the Complaint.

A copy of the Complaint and a copy of the Rules of Practice were served on Respondent on January 24, 1998.[5] Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

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[5]See note 1.

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on January 24, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

> The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.)*. Failure to file an answer within the prescribed time shall constitute an admission of all the allegations in this complaint and a waiver of a hearing.

Compl. at 2.

Likewise, Respondent was informed in the letter of service, which accompanied the Complaint and Rules of Practice, that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> January 15, 1998
>
> Mr. Daniel E. Murray
> 1756 Whitetail Road
> Decorah, Iowa 52101
>
> Dear Mr. Murray:
>
> Subject: In re: Daniel E. Murray, Respondent -
> A.Q. Docket No. 98-0003
>
> Enclosed is a copy of a Complaint, which has been filed with this office under . . . Section 2 of the Act of February 2, 1903, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth

any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Regina A. Paris
Legal Technician

Letter dated January 15, 1998, from Regina A. Paris, Legal Technician, USDA, Office of Administrative Law Judges, Hearing Clerk, to Mr. Daniel E. Murray (emphasis in original).

On February 18, 1998, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time (Letter dated February 18, 1998, from Joyce A. Dawson, Hearing Clerk, to Mr. Daniel E. Murray). Respondent did not respond to the Hearing Clerk's February 18, 1998, letter.

On August 18, 1998, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent filed an

objection to Complainant's Motion for Default Decision, but Respondent provided no basis for his objection.[6] On September 23, 1998, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued the Default Decision and Order in which he found that Respondent admitted the allegations in the Complaint by reason of default and assessed a civil penalty of $500 against Respondent.

Respondent's answer, which is contained in Respondent's Appeal Petition, was filed on October 27, 1998, 9 months and 3 days after Respondent was served with the Complaint. Respondent's answer, which was due February 13, 1998, is filed too late, and Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint. Thus, I find that the Default Decision and Order was properly issued.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[7] Respondent has shown no basis for setting aside the Default Decision and Order and allowing Respondent to file an

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[6]See note 3.

[7]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the PACA had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*. 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

Answer.[8] The Rules of Practice clearly provide that an answer must be filed within

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[8]*See generally In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (holding that the default decision was proper where respondents filed an answer 49 days after they were served with the complaint); *In re Conrad Payne*, 57 Agric. Dec. ___ (Dec. 8, 1998) (holding that the default decision was proper where respondent failed to answer the complaint); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. ___ (July 16, 1998) (holding the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the

(continued...)

[8](...continued)
default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the
(continued...)

20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondent's answer was filed 9 months and 3 days after Respondent was served with the Complaint.

Further, the requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its workload in an expeditious and economical manner. USDA's three administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 30 to 50 cases per year. As such, the courts have recognized that administrative agencies "should be `free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[9] If Respondent was permitted to contest some of the allegations of fact after failing to file a timely answer, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Accordingly, the Default Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth

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[8](...continued)
consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood USDA's procedural requirements, when there is no basis for the misunderstanding).

[9]*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See also Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

Amendment to the United States Constitution.[10]

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

Order

Respondent Daniel E. Murray is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0003.

In re: DANIEL E. MURRAY.
A.Q. Docket No. 98-0003.
Order Denying Petition for Reconsideration filed March 8, 1999.

Default — Mailing — Filing.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed his Answer within 20 days after he was served with the Complaint, his Answer would not be timely because Respondent's Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent.

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[10]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980).

Susan C. Golabek, for Complainant.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under sections 2 and 3 of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122); regulations issued under the Act of February 2, 1903, as amended (9 C.F.R. §§ 78.1-.44 (1996)); 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], by filing a Complaint on January 15, 1998.

The Complaint alleges that on or about June 12, 1996, Daniel E. Murray [hereinafter Respondent], "in violation of 9 C.F.R. § 78.8(a)(2)(ii), moved interstate from Maquoketa, Iowa, to Norwalk, Wisconsin, one brucellosis exposed cattle [sic] to a recognized slaughtering establishment without being accompanied by a permit or 'S' brand permit, as required" (Compl. ¶ II).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on January 24, 1998.[1] Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On August 18, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order [hereinafter Proposed Default Decision]. Respondent was served with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on August 24, 1998.[2] Respondent filed an objection to Complainant's Motion for Default Decision, but gave no basis for his objection.[3]

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[1]See Domestic Return Receipt for Article Number p368421153 signed by "Katie Murray" stating that the date of delivery was "1/24/98."

[2]See Domestic Return Receipt for Article Number p093143432 signed by "Dan Murray" stating that the date of delivery was "8-24-98."

[3]Respondent's objection to Complainant's Motion for Default Decision states, in its entirety, as follows:

(continued...)

On September 23, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] issued a Default Decision and Order in which the Chief ALJ: (1) found that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint; and (2) assessed a civil penalty of $500 against Respondent (Default Decision and Order at second unnumbered page).

On October 27, 1998, Respondent appealed to the Judicial Officer. On January 20, 1999, Complainant filed Complainant's Opposition to Respondent's Appeal Petition of the Default Decision and Order, and on January 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On January 22, 1999, I issued a Decision and Order in which I concluded that Respondent violated 9 C.F.R. § 78.8(a)(2)(ii), as alleged in the Complaint, and assessed Respondent a civil penalty of $500. *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7, 16 (Jan. 22, 1999).

On February 8, 1999, Respondent filed a Petition for Reconsideration, and on March 4, 1999, Complainant filed Complainant's Opposition to Respondent's Petition to to [sic] Reconsider the Decision of the Judicial Officer. On March 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued January 22, 1999.

Respondent raises one issue in his Petition for Reconsideration. Respondent asserts that a document which he mailed for filing in this proceeding was not made a part of the record, as follows:

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[3](...continued)

Sept. 12, 1998

To: Susan C. Golabek
Attorney for Complainant
USDA/OGC

I Daniel E[.] Murray am in objection of the Motion for Decision and want to appeal this decision.

A.Q[.] Docket No. 98-0003

Daniel E. Murray
1756 Whitetail Rd.
Decorah[,] IA 52101
(319) 382-8496

Feb. 7, 1999

Subject Daniel E[.] Murray Respondent
A.Q. Docket No. 98-0003

I want to file for a petition for reconsideration. From your Jan. 22, 1999[,] letter[,] I found out that you don[']t have in your files my first appeal which was sent between Jan[.] 30 and Feb[.] 28 from the US Post Office in Creston, IA on a Friday. I have a copy of that letter which I made when I made 3 copys [sic] for you and am enclosing a copy. The reason I didn't . . . respond to your letter sent to me in Feb[.] 18, 1998[,] because I thought the letters crossed in the mail. I am in contact with the Post Office in Creston[,] IA.

Dan Murray
1756 Whitetail Rd.
Decorah[,] IA 52101
(319) 382-8496

The Chief ALJ filed the Default Decision and Order on September 23, 1998, and Respondent was served with the Default Decision and Order on September 28, 1998.[4] Respondent filed a timely appeal on October 27, 1998. Therefore, I infer that Respondent's reference in his Petition for Reconsideration to his "first appeal" as having been mailed between January 30th and February 28th is error, and I further infer that Respondent's reference is to an Answer which Respondent allegedly mailed between January 30, 1998, and February 28, 1998, at a United States Post Office in Creston, Iowa.

Respondent attached a copy of his Answer to his Petition for Reconsideration, and his Answer was filed in this proceeding on February 8, 1999, 1 year and 15 days after Respondent was served with the Complaint. Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service of the complaint, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint

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[4]See Domestic Return Receipt for Article Number p093143452 signed by "Millie Murray" stating that the date of delivery was "9-28-98."

. . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Respondent contends in his Petition for Reconsideration that he may have mailed his Answer within 20 days after he was served with the Complaint. However, Respondent's Answer states that it "is being sent even though it is late." Therefore, it appears that Respondent admits in his Answer that he mailed his Answer more than 20 days after he was served with the Complaint.

Even if I found that Respondent mailed his Answer within 20 days after he was served with the Complaint, Respondent's Answer cannot be accepted as timely. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) requires that a respondent *file with the Hearing Clerk* an answer within 20 days after service of the Complaint, and section 1.147(g) of the Rules of Practice provides that the effective date of filing is the date a 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).

Therefore, even if I found that Respondent mailed his Answer within 20 days after he was served with the Complaint, his Answer would not be timely because Respondent's Answer was not *filed* with the Hearing Clerk within 20 days after service of the Complaint on Respondent.[5] The record reveals that Respondent filed his Answer with his Petition for Reconsideration, on February 8, 1999, 1 year and 15 days after Respondent was served with the Complaint.

For the foregoing reasons and the reasons set forth in the Decision and Order filed January 22, 1999, *In re Daniel E. Murray, supra*, Respondent's Petition for

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[5]*See In re Severin Peterson*, 57 Agric. Dec. ___ slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk). *Cf. In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by the party filing the pleading does not constitute the date that the pleading is filed with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that unsuccessful attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[6] Respondent's Petition for Reconsideration was timely filed and automatically stayed the January 22, 1999, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed January 22, 1999, is reinstated, with allowance for time passed.

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

Order

Respondent Daniel E. Murray is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

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[6]*In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 98-0003.

ANIMAL WELFARE ACT

COURT DECISIONS

VOLPE VITO, INC. v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-3603.
Filed January 7, 1999.

Animal Welfare Act — ALJ credibility determinations — Willful — Civil penalty — License revocation.

Petitioner appealed the Judicial Officer's (JO) Decision and Order: (1) finding that Petitioner violated the Animal Welfare Act (AWA) and the regulations and standards issued under the AWA; (2) assessing a $26,000 civil penalty against Petitioner; (3) ordering Petitioner to cease and desist from violating the AWA and the regulations and standards issued under the AWA; and (4) revoking Petitioner's AWA license. The Court affirmed the JO's Decision and Order. The Court held that the JO is not required to accept administrative law judge (ALJ) findings of fact, even when those findings are based on credibility determinations, and the JO did not err when he overturned the ALJ finding that the United States Department of Agriculture inspector was biased. The Court held that no showing of malicious intent is necessary to support a finding that a violation is willful and that the Petitioner's violations were willful. The Court held that the sanction imposed by the JO was permitted by the AWA and justified by the facts and that the Court would not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases.

United States Court of Appeals
Sixth Circuit

Before: MARTIN, Chief Judge, RYAN, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge.

Petitioner Volpe Vito, Inc. appeals a decision by the Secretary of the United States Department of Agriculture ("Secretary"), under the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-59. The Secretary imposed against Volpe Vito a $26,000 civil penalty, issued a cease and desist order, and revoked Volpe Vito's license to operate an animal park. For the reasons that follow, we **affirm** the decision of the Secretary.

I.

Volpe Vito operates the Four Bears Water Park and Recreation Area ("park"),

a 125-acre park in Utica, Michigan, displaying animals such as zebras, elephants, goats, camels, and chimpanzees. Since 1983, Volpe Vito has been licensed to exhibit animals in compliance with AWA regulations concerning the transportation, housing, handling, treatment, and inspection of its animals. Sites such as Volpe Vito are inspected at least once annually by the Animal and Plant Health Inspection Service ("APHIS"), an agency within the Department of Agriculture, to ensure compliance with the AWA.

Dr. Lisa Dellar, an APHIS veterinarian, inspected the park in 1988 after it was first licensed. Dr. Dellar observed several AWA violations. Despite her discussions with park employees regarding compliance with the act, she noted both recurring and new violations on each of her subsequent visits. Following her ninth visit in February 1994, APHIS filed an administrative complaint against Volpe Vito. The Administrative Law Judge ("ALJ") issued an Initial Decision and Order ("Initial Decision") finding that Volpe Vito had violated five provisions of the AWA. The ALJ dismissed several of the allegations in the complaint, however, finding that Dr. Dellar was biased in her written comments regarding animal care and husbandry. The ALJ issued a cease and desist order and revoked Volpe Vito's license.

Volpe Vito appealed the Initial Decision to a Judicial Officer ("JO"), the final deciding officer in administrative proceedings. APHIS filed a cross-appeal. The JO affirmed in part and reversed in part. The JO upheld the ALJ's finding of five violations and the ALJ's dismissal of twenty-three of the other allegations. The JO failed to find bias on the part of Dr. Dellar, however, and reversed the ALJ's dismissal of the remaining allegations. Pursuant to the JO's decision, the Secretary issued a cease and desist order, revoked Volpe Vito's license, and also imposed a $26,000 fine. Volpe Vito filed a petition for reconsideration, which the JO denied. Volpe Vito subsequently filed a timely notice of appeal.

II.

Our review of an administrative decision is narrow; we set aside an agency's action only if it is not supported by substantial evidence. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 416 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Volpe Vito first argues that the JO erred in overturning the ALJ's finding that Dr. Dellar was biased. We find this argument unpersuasive. The JO is not required to accept the ALJ's findings of fact, even when those findings are based on

credibility determinations, *see Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) (citing 5 U.S.C. § 557(b)), and the JO is authorized by statute to substitute his or her judgment for that of the ALJ. *See Parchman v. United States Dept. of Agriculture*, 852 F.2d 858, 860 (6th Cir. 1988) (citing *Mattes*, 721 F.2d at 1129). Moreover, given an established presumption that policymakers with decision-making power exercise their power with honesty and integrity, *see Navistar Int'l Transp. Corp. v. United States Envtl. Protection Agency*, 941 F.2d 1339, 1360 (6th Cir. 1991) (internal cites omitted), the burden of overcoming the presumption of impartiality rests on the party making the assertion of bias. *See id.* (internal cites omitted). In the present case, the park was unable to convince the JO of bias on the part of Dr. Dellar, and the evidence proffered by APHIS clearly supports his findings.

The park next contends that the complaint should be dismissed in its entirety because the ALJ found Dr. Dellar to be biased. This argument lacks merit. The JO rejected the ALJ's finding on this matter. The park mischaracterizes Dr. Dellar's inspection reports, which were promptly prepared after *all* inspections, regardless whether violations were found or litigation was anticipated. Therefore, Volpe Vito is misguided in its reliance on *Young v. United States Dep't of Agric.*, 53 F.3d 728, 730-31 (5th Cir. 1995) (disallowing documents after determining that they were prepared solely for administrative proceedings).

Volpe Vito further contends that the Secretary acted inappropriately by imposing a $26,000 sanction and argues that its actions were neither willful nor intentional. According to Volpe Vito, the Secretary also failed to consider mitigating circumstances in Volpe Vito's favor: no prior convictions of state or local regulatory violations involving the treatment of animals; the city water main break that flooded the entire park moments prior to Dr. Dellar's arrival; Volpe Vito's decision to fire a park manager for contributing to the violations; its compliance with the AWA following the complaint; and the ailing health of Mr. Stramaglia, Volpe Vito's president. The park further contends that because the $26,000 penalty was harsher than that imposed on other parties who committed more egregious violations under the AWA, the Secretary's motive was punitive, not remedial, and contrary to the purpose of the AWA.

A sanction under the AWA, if within the bounds of the agency's lawful authority, is subject to very limited judicial review. We determine only whether the agency properly applied the regulations, and whether the sanction is warranted in law and justified in fact. *See Woodward v. United States*, 725 F.2d 1072, 1077 (6th Cir. 1984) (internal cites omitted). Provided that violations are willful, the Secretary is empowered under the AWA to impose a civil penalty up to $2,500 for each violation. *See* 7 U.S.C. § 2149(a), (b). "Willful" means action knowingly

taken by one subject to the statutory provisions in disregard of the action's legality; no showing of malicious intent is necessary. *See Donovan v. Capital City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (internal cites omitted). In imposing a penalty, the Secretary "shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." 7 U.S.C. § 2149(b).

We are unpersuaded by Volpe Vito's arguments. Dr. Dellar's nine inspections clearly revealed that Volpe Vito committed violations willfully: notwithstanding Dr. Dellar's efforts to improve the park's compliance with AWA regulations following each inspection, the park allowed 51 recurring and new violations. The mitigating circumstances proffered by the park do not make its actions less deliberate, intentional, or reckless. Furthermore, this court will not consider the severity of a sanction in a particular AWA case relative to sanctions imposed in other cases, provided that the sanction is "permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged." *Garver v. United States*, 846 F.2d 1029, 1030 (6th Cir. 1988). "This court does not review administrative agency sanctions for reasonableness, or for whether they comport with our ideas of justice." *Id.* In this case, we find that the license revocation was justified by the reported violations, and the $26,000 fine was permitted under the AWA and were substantially lower than the statutory maximum.

Volpe Vito's final claim, that its compliance with the AWA following the filing of the administrative complaint constitutes a mitigating factor, is without merit. Subsequent compliance, while laudable, does not absolve 51 prior violations.

III.

For the reasons stated above, we **affirm** the decision of the Secretary of the Department of Agriculture.

TAMMI LONGHI AND L&H ASSOCIATES v. ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 97-3897.

Decided January 25, 1999.

(Cite as: 165 F.3d 1057)(6th Cir.).

Animal Welfare Act — Multiple licenses.

Petitioners petitioned for review of the Judicial Officer's (JO) Decision and Order denying L & H Associates' application for an Animal Welfare Act (AWA) license on the ground that one of the partners in L & H Associates was a shareholder of a corporation that had an AWA license and that granting an AWA license to L & H Associates would result in that partner holding two AWA licenses in violation of 9 C.F.R. § 2.1(c). The Court reversed the JO, stating that 9 C.F.R. § 2.1(c) prohibits any person from having more than one license and that the regulations issued under the AWA define the word *person* as any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity. Hence, 9 C.F.R. § 2.1(c) prohibits the entities identified in the definition of *person* from having more than one license and refusing to grant an AWA license to L & H Associates, a partnership that was not already licensed, was inconsistent with 9 C.F.R. § 2.1(c).

United States Court of Appeals,
Sixth Circuit.

Before: NELSON, MOORE, and CLAY, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

OPINION

This matter comes before us on a petition for review of an Agriculture Department order denying an application for a Class "A" dealer's license under the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* Piercing the corporate veil of an existing Class "B" licensee, the agency denied the application on the ground that if the Class "A" license were granted there would be a violation of a regulatory prohibition against any "person" having more than one license.

We conclude that the challenged decision was not in accordance with law, no proper justification having been given for the veil-piercing exercise. The petition for review will therefore be granted.

I

The existing licensee is a corporation known as Hodgins Kennels, Inc. This company, a Class "B" licensee under the definition set forth in 9 C.F.R. § 1.1, deals in stray dogs that are sold for use in medical research. The company operates a kennel on Lange Road in Howell, Michigan. Until early 1995 it also had a facility located on Judd Road in nearby Fowlerville, Michigan.

Ownership of the corporate stock of Hodgins Kennels, Inc., is divided between Janice Hodgins and her husband, Fred Hodgins. Petitioner Tammi Longhi, a longtime employee of Hodgins Kennels, is the daughter of Janice and Fred Hodgins.

In February of 1995, or thereabouts, Mrs. Longhi and her mother formed a Michigan partnership—petitioner L & H Associates—that applied for a Class "A" license under the Animal Welfare Act. (Class "A" licensees are not authorized to traffic in stray animals; their animals must be bred and raised on the premises. See 9 C.F.R. § 1.1.) The partnership's license application gave a Lange Road mailing address, but it showed an address on Judd Road as the site where animals would be housed. The application listed both Mrs. Longhi and Mrs. Hodgins as partners in L & H Associates.

A second application—dated two days after the first—listed only Mrs. Longhi as an owner/partner of L & H Associates. The change was made at the suggestion of Dr. Joseph Walker, a veterinarian employed as a supervisor in the Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS").

Under cover of a letter dated March 27, 1995, Dr. Walker returned the second of the L & H license applications to Mrs. Longhi. Dr. Walker's letter, the content of which apparently reflected the advice of his superiors in Washington, said that "your facility should be designated a site of Hodgins Kennel, Inc. . . . ."

Mrs. Longhi, who wanted to start a business separate and apart from Hodgins Kennels, wrote Dr. Walker to request an explanation of the "specific legal basis" for the agency's refusal to accept the L & H application. Dr. Walker forwarded this request to headquarters, where it met an unknown fate.

In May of 1995 L & H Associates submitted a new Class "A" license application. The new application was substantially identical to its immediate predecessor, except that the mailing address of L & H Associates was now shown as Judd Road in Fowlerville rather than Lange Road in Howell.

No license was forthcoming, so Mrs. Longhi, writing on behalf of L & H Associates, sent Dr. Walker a letter requesting an administrative hearing. Dr. Walker then returned the May application and advised that the hearing request had been referred to the Department for scheduling.

The Department responded with a show cause order, issued by the Administrator of APHIS on July 28, 1995, directing Mrs. Longhi and L & H Associates to answer allegations that they were ineligible to be licensed for reasons set forth in the order. Among the reasons stated were these: (1) that Mesdames Longhi and Hodgins had violated 9 C.F.R. § 2.4 by verbally abusing and harassing APHIS personnel during one or more Hodgins Kennels inspections,[1] and (2) that "[t]he issuance of a license to the respondents would violate 9 C.F.R. § 2.1(c)." Section 2.1(c) provides that "[n]o person shall have more than one license."

The petitioners filed timely answers denying the APHIS allegations, and hearings were then conducted before an administrative law judge. (The licensing hearing was consolidated with a hearing on an APHIS disciplinary proceeding against Hodgins Kennels. A separate petition for review is pending before this court in connection with the latter proceeding.)

In June of 1996 the ALJ issued an initial decision and order in the licensing matter. Although the ALJ found that neither Mrs. Longhi nor Mrs. Hodgins had been guilty of harassing or abusing any APHIS official, the ALJ accepted the argument that § 2.1(c) of the regulations precluded issuance of a license to L & H Associates. The ALJ's legal conclusion was expressed in these terms:

> "Respondents Tammi Longhi and L & H Associates are not eligible to receive a license under section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) because one of the partners in L & H Associates is Janice Hodgins, who already had a license through her ownership of Hodgins Kennel."

As permitted under the applicable procedural regulations, the ALJ's decision was appealed to the Judicial Officer of the Department of Agriculture. (Pursuant to authority delegated by the Secretary of Agriculture, the Judicial Officer has the last word for the Department in adjudicatory proceedings of this type.) After accepting briefs from both sides, but having denied a request by the petitioners for oral argument, the Judicial Officer issued his final decision and order on July 11, 1997.

Upholding the ALJ's conclusion of law, the Judicial Officer rejected an argument by the petitioners that Hodgins Kennels, Inc., and L & H Associates are separate "persons" under the agency's own regulations. The petitioners'

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[1]Section 2.4, captioned "Non-interference with APHIS officials," says that "[a] licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties."

interpretation of the regulations, the Judicial Officer observed, "would allow an individual to own and control multiple legal entities licensed under the Animal Welfare Act, thus rendering section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c)) a nullity."

The Judicial Officer did not find that the principals of Hodgins Kennels, Inc., were utilizing the corporate form to perpetuate fraud or subvert justice. Neither did he find any failure to comply with the technicalities of Michigan corporation law. The Judicial Officer seems to have acted, rather, on the understanding that a shareholder in a closely held corporation is necessarily an *alter ego* of the corporation.

This unusual understanding of the law is reflected in the following passage of the Judicial Officer's decision:

> "APHIS denied L & H Associates' application for a license because Janice Hodgins is the owner of and a principal in Hodgins Kennel, Inc. (a Class B licensee), and a partner in L & H Associates. As such, Janice Hodgins is an *alter ego* of both Hodgins Kennel, Inc., and L & H Associates; therefore, if Hodgins Kennel, Inc., and L & H Associates each held a license under the Animal Welfare Act, Janice Hodgins would hold two Animal Welfare Act licenses in violation of section 2.1(c) of the Regulations (9 C.F.R. § 2.1(c))."

The next paragraph of the decision contains a reminder "that an agency's interpretation of its own regulations must be given controlling weight unless the interpretation is plainly erroneous. . . ." In their brief to this court, the petitioners suggest that the interpretation reflected in the Judicial Officer's decision is indeed plainly erroneous. We agree that it is.

II

As noted above, 9 C.F.R. § 2.1(c) prohibits any "person" from having more than one license. This prohibition is found in Subchapter A of Title 9 of the Code of Federal Regulations, the Agriculture Department's *vade mecum* of regulatory provisions relating to animal welfare.

Part 1 of Subchapter A, 9 C.F.R. § 1.1, sets forth definitions for many of the terms used in the subchapter. "For the purposes of this subchapter," § 1.1 begins, "unless the context otherwise requires, the following terms *shall* have the meanings assigned to them in this section." (Emphasis supplied.)

The definitions are very detailed. "*Dog*," to take a random example, "means any live or dead dog (*Canis familiaris*) or any dog-hybrid cross," while "*Dwarf hamster*," the next term defined in § 1.1, "means any species of hamster such as the Chinese and Armenian species whose adult body size is substantially less than that attained by the Syrian or Golden species of hamsters." The drafters of the regulations obviously strove diligently—and, it seems to us, successfully—to achieve a high level of precision and to avoid ambiguity.

The meaning that § 1.1 assigns to the term "person" manifests the same care and attention to detail exhibited in the rest of the definition section. "*Person*," according to § 1.1, "means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity."[2] Except where the context otherwise requires, therefore, we have it on the authority of the regulations themselves that just as an individual is a "person" within the meaning of Subchapter A, so also a partnership is a "person," a corporation is a "person," and any other legal entity is a "person." The context in which the term "person" is used in § 2.1(c) certainly does not require that the term be assigned some other meaning. That being so, what 9 C.F.R. § 2.1(c) says, in the plainest of English, is that none of the entities named—no individual, no partnership, no corporation, etc.—shall have more than one license.

The Judicial Officer, as we have seen, had the idea that an individual who is both a shareholder in a licensee organized as a corporation and a partner in a licensee organized as a partnership must *ipso facto* be a dual licensee. This notion flies directly in the teeth of the traditional corporate law concept—a concept faithfully reflected in the statute and the regulations—that a corporation is a legal person in its own right, separate and distinct from the person or persons holding stock in the corporation. See *Burnet v. Clark*, 287 U.S. 410, 415, 53 S.Ct. 207, 77 L.Ed. 397 (1932) ("A corporation and its stockholders are generally to be treated as separate entities").

There are circumstances, to be sure, under which the corporate veil may be pierced. The question whether such circumstances have been shown to exist in a particular case is to be determined by state law. See *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 580 (6th Cir. 1997) (*en banc*), *vacated on other grounds, United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The state law applicable in the case at bar is that of Michigan,

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[2]When used in the statute itself, similarly, "[t]he term 'person' includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a).

and "Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil." *Id. Cf. Bestfoods*, 118 S.Ct. at 1885 ("the corporate veil may be pierced . . . when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf").

In the instant case neither the ALJ nor the Judicial Officer suggested that the corporate form had been misused to accomplish fraud or some other wrongful purpose. Any such suggestion would have been misguided, for the administrative record simply does not show that the corporate form has been abused here.

The principle that seems to have informed the decisions of the ALJ and the Judicial Officer was one not of law, but of policy: "If an individual has two dealer licenses," the Department tells us, "one under her own name and another as a principal in a legal entity such as a partnership, that person could easily evade and frustrate APHIS' enforcement efforts [by moving animals from one facility to another]." The policy underlying 9 C.F.R. § 2.1(c) would be ill-served, the Judicial Officer suggested, if individuals were not prohibited from owning and controlling "multiple legal entities licensed under the Animal Welfare Act. . . ."

But if the Department of Agriculture thinks it would be sound policy to prohibit individuals from owning and controlling multiple entities licensed under the Animal Welfare Act, there is a right way to effect the prohibition and a wrong way. The wrong way would be to adopt the prohibition as an "agency litigating position" wholly unsupported by the text of the existing regulations. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). The right way would be to amend the regulations—and to do so through a rulemaking proceeding conducted in accordance with the requirements of the Administrative Procedure Act.

If it wished to do so, obviously, the Department could issue a notice of proposed rulemaking advising the public that it was thinking about amending its regulations to say (for example) that an individual who is a corporate shareholder will be deemed an *alter ego* of the corporation if she holds a controlling interest, or some specified percentage, in the company. The Department could propose a change in the regulations, similarly, to say that just as no person shall have more than one license, no person shall exercise control over more than one legal entity that has a license. Under the scheme adopted by Congress, the publication of such a notice in the Federal Register would be followed first by an opportunity for public comment, and then—if the agency still thought the amendment desirable—by publication of a Federal Register notice announcing adoption of the change. See 5 U.S.C. § 553.

The Department of Agriculture has taken none of these steps under the Administrative Procedure Act. Unless and until it does so, the Department is obviously bound by its existing regulations. See *Fluor Constructors, Inc. v. Occupational Safety and Health Review Comm'n*, 861 F.2d 936, 939 (6th Cir. 1988) ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation").

The reason assigned by the Department for refusing to grant a Class "A" license to L & H Associates was "inconsistent with the plain language of the [existing] regulation[s]. . . ." See *Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 557 (6th Cir. 1995). The refusal to grant a license must therefore be held unlawful and set aside under 5 U.S.C. § 706(2)(A) (the court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .").

The petition for review is **GRANTED**, and the Department's conclusion that L & H Associates is not eligible to receive a license under 9 C.F.R. § 2.1(c) is **SET ASIDE** as unlawful.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: KEVIN ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Decision and Order filed October 2, 1998.

Civil penalty - Cease and desist order - License disqualification.

Administrative Law Judge Dorothea A. Baker issued an order assessing a civil penalty of $5,000.00, a cease and desist order and a three-year license disqualification because of Respondent's violations of the Animal Welfare Act and the Regulations thereunder.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding under the Animal Welfare Act as amended (7 U.S.C. §§ 2131 *et seq.*), instituted by a Complaint, dated July 23, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The Complaint alleged that the Respondents Kevin Ackerman and Vicki Ackerman willfully violated the Act and the regulations and standards issued pursuant thereto (9 C.F.R. §§ 1.1 *et seq.*). A Consent Decision and Order has been issued as to Respondent Vicki Ackerman and she is no longer a party to this proceeding.

An oral hearing was held in Pierre, South Dakota, on April 7, 1998, before Administrative Law Judge Dorothea A. Baker at which time the Complainant was represented by Robert Ertman, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondent appeared *pro se*. In due course the party filed briefs, the last brief having been filed July 17, 1998.

The sanction sought by the Complainant includes a cease and desist order, a $25,000.00 civil penalty, and, either permanent disqualification from becoming licensed under the Act, or, in the alternative, disqualification for a stated period of time.

The following Findings of Fact are premised upon the record made at the oral hearing. All requests, suggestions and motions of the parties have been carefully

considered. To the extent that they are not adopted or are inconsistent with this Decision and Order, they are hereby denied.

Findings of Fact and Conclusions

1. Kevin Ackerman, doing business as Ackerman's Puppy Palace, hereinafter referred to as Respondent, is an individual whose address is R. R. 1, Box 66, Mound City, South Dakota. The Secretary has jurisdiction in this matter.

2. Respondent, at all times material hereto, was licensed and operated as a dealer as defined in the Act and the regulations. The Respondent voluntarily surrendered his license on May 20, 1997.

3. The allegations of the Complaint and the evidence adduced at the oral hearing relate principally to inspection reports of Respondent's premises which inspections were undertaken by APHIS animal care Inspector Donovan Borchert on numerous occasions including: February 13, 1995; April 26, 1995; May 31, 1995; October 17, 1995; February 12, 1996; March 19, 1996; May 14, 1996; and November 26, 1996. On the March 19, 1996 inspection, Inspector Borchert was accompanied by APHIS Investigator Larry Neustel. On the May 14, 1996 inspection, Inspector Borchert was accompanied by Dr. Bruce Mammeli, APHIS Supervisory Animal Care Specialist. At the time of the hearing Inspector Borchert had no present recollection of the events to which he was testifying and, for his testimony, relied upon the written inspection reports.

The Respondent believes that the Complainant, through Inspector Borchert, was harassing and intimidating him and writing him up needlessly for minor infractions or no infractions at all.

4. 9 C.F.R. § 2.75(a)(1) of the regulations states:

§ 2.75 Records: Dealers and exhibitors.

(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

Respondent was found to have violated this regulation on February 13, 1995, in that when an inspection was made of Respondent's premises and records, it was found that the Respondent had failed to maintain complete records showing the acquisition, disposition and identification of the animals, contrary to the requirements of 9 C.F.R. § 2.75(a)(1). This same violation was found to have occurred on October 17, 1995; February 12, 1996; May 14,1996; and November 26, 1996. Although the Respondent maintains that he did have ample records in various places and that on one occasion he was in the process of transferring his written records to a computer, his proof in this regard is lacking.

Pursuant to the record keeping requirements, it is necessary to maintain complete records showing the acquisition, disposition and identification of animals. It appears from the testimony of Inspector Borchert that there have been violations of this regulation in the manner set forth in Inspector Borchert's testimony. He indicated in his reports such instances as the records of animals on hand did not show the identification numbers of at least nine, ten and fifteen dogs, nor the dates they arrived on the premises, nor information on the buyer. Also, acquisition records did not show the source of two dogs. In addition, Mr. Borchert testified that disposition records were incomplete because the required form provides one line for each animal but multiple animals were recorded on a single line, resulting in the absence of some of the information on identification of the animals. Multiple listings on one line have not been found to be a violation. A finding has been made that Respondent kept incomplete records. The burden is on the Complainant to show by convincing evidence whether or not a violation exists. Respondent did not adequately dispute the evidence of Complainant.

As concerns the time when Respondent was changing his records over to a computer, and had not obtained a variance, Respondent maintains that he was not asked for his records. The Respondent is not charged herein with failure to get a variance but rather with failure to maintain adequate records to show the acquisition and disposition of the animals. From Inspector Borchert's own testimony (Tr. 76-77) it appears that the Respondent still had his old records and there is no indication that the Complainant inspected those old records and made a determination that they were inadequate. It is Respondent's position that the old records referring to the source of the data which was being transferred to the computerized system were adequate. Respondent did not prove this even if his old records were adequate. (Tr. 67-69, 75-77).

[Cross-examination of Inspector Borchert]

Q. * * * On the October 17th, 1995 inspection, it said the respondents

failed to maintain complete records showing acquisition, disposition and identification of animals in willful violation of Section 10 of the Act. Could you explain that one to me a little bit?

A. You were cited, number one, records of stock on hand needed nine dogs, their ID and who they were acquired from. The second thing, sales records must be filled out one puppy per line. Four puppies were listed per line.

Q. Okay, records of stock on hand, need nine dogs' IDs and two who acquired from. Is it true a person could have been filling out some more forms and you probably didn't see them and there was a complete form probably next to the one that we were filling out that didn't have the requirements in there?

A. I would think when I asked you about it, you would have showed me that if it existed.

Q. Well, if I recall correctly, you very seldom asked me about much of anything until you wrote it up; is that correct?

A. I don't believe so.

Q. It says sales record -- do you recall which dogs them were that didn't have the ID numbers?

A. No.

Q. It says sales records must be filled out one puppy per line. Currently four puppies are being listed per line. You have also got it's gotta be corrected by 10-17, which is that same day. Do you recall what kind of puppies were listed there?

A. No.

Q. Do you recall if I mentioned to you anything about being short on USDA forms and I didn't know what to do?

A. No.

Q. You don't recall that, huh? When did they switch them USDA forms?

A. I don't know.

Q. Was it very possibly like in August and then they were short for a long time previously and a lot of the breeders were out of the USDA forms, do you recall anything about this?

A. I don't recall the dates it happened. I recall, yeah, there was --

Q. They were short on records. What were they supposed to do if they did not have the appropriate forms to fill them out, not sell dogs?

A. I was told that the breeders were instructed from the regional office to make photocopies and use them until the new ones got there.

Q. If we were out and didn't have one to make a photocopy, I guess I don't ever recall seeing that letter. Do you have a copy saying when it was sent to me?

A. No, I don't' have a copy. One photocopied copy of the sales record was sent with each one so they would have a copy.

Q. If we were out of forms, we used our last one for the last set of dogs and we supposedly got this letter, what were we supposed to do? If we would have photocopied them, they would have already had the writing in, correct?

A. When you reordered, you were sent a photocopied copy to use to make other photocopies until we had the new forms sent to you.

Q. Was that in triplicate or would you have had to fill three of them out?

A. You would have had to use carbon paper or something. (Tr. 67-69).

* * * * *

Q. Now we will go to the February 12th inspection. It says, the respondent's premises and records were inspected and found that the respondent had failed to maintain complete records showing the adequate acquisition, disposition and identification of animals. Could you explain that a little bit to me?

A. Under records?

Q. Yeah.

A. The first item, licensee is starting to use a computer to keep records. Licensee must get approval from the regional office and then there's the regional office's address.

Q. Could you stop right there?

A. Yes.

Q. Where does it state in the regulations that you have to get approval to use a computer?

A. In 2.75. I believe it states that you need to request a variance.

Q. Could you tell me what part? Would you like a copy? Can you show me where it's at there?

A. You have an old copy of the regs. Mr. Ertman has a copy from 1996 or '95.

Q. What year is this regulation book?

A. I'm not sure. As close as I can see, the printing date is '92 on yours. There's a new one mailed out each year with your application.

Q. What do the regulations say on the variance?

A. Provided that if a dealer or exhibitor who uses a computerized record keeping system believes that the APHIS form 7005 form and APHIS form 7006 are unsuitable for him to keep and maintain information required in

this paragraph, the dealer or exhibitor may request a variance from the requirement from the APHIS -- from the use of the APHIS 7005 and 7006.

JUDGE BAKER: What was the effective date of that?

A. I do not -- let me go a little farther. I don't see an effective date on this.

JUDGE BAKER: Very well.

Q. (BY MR. ACKERMAN) So it states that I need to get a variance. If I was putting records onto the computer, would I not have still the old records? Where would I get that information from? I should still have the old records to put it on the computer; isn't that correct?

A. I would hope so.

Q. So you just wrote me up for this just because I was transferring it to a computer and didn't get a variance?

A. You were notified that you needed to request approval to use your computer and given the address to request approval and that's all that this says, that you need to do that before it can be approved.

Q. I still should have had my old records; is that correct?

A. I guess. It doesn't say that you didn't.

Q. So basically I could have still used the old records, just because I didn't get a variance, and I could have used the computer for my convenience until I got approval; is that correct?

A. Yes.

Q. The rest of it, I was written up for that part. Where exactly is this at about the acquisition and disposition, which page?

A. On the inspection report?

Q. Yeah.

A. Page five.

Q. The last part?

A. I believe so. (Tr. 75-77).

Although I have no choice but to find that there were record keeping deficiencies, I am of the opinion that the discord which existed between Respondent and this inspector may have contributed to the inspector not going out of his way to thoroughly ascertain what records Respondent had, even though they may not have been in the form the inspector could require. Nevertheless, Complainant has adequately carried its burden of proof. Respondent's cross-examination was not sufficient to disprove the Complainant's evidence.

Accordingly, Respondent willfully violated section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations.

5. 9 C.F.R. § 3.1(a) provides in part as follows:

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

Respondent was in violation of the provisions thereof when his facilities were inspected on February 13, 1995; April 26, 1995; May 31, 1995; October 17, 1995; February 12, 1996; May 14, 1996; and November 26, 1996.

Said violations arose from the inspector's observations and findings that the housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering. The violations included the following. The primary enclosures were constructed with a framework of PVC pipe which had broken and needed to be repaired. Also, some fiberglass board walls were broken and wire dividing the enclosures was broken; there were sharp points protruding into the enclosures; divider panels had rusted off; broken wire was torn away between two pens; doors to shelters were broken; shelters had holes in the sides and tops and windows were broken out; a patch had torn away from a wall, leaving

sharp and jagged metal exposed; strapping had blown away, also leaving sharp and jagged metal exposed; supports holding runs outside a trailer had torn away; and a pen had broken wire floor. Patches in floor wire left exposed wire points, tin walls were rusting through, and tin was torn away, large holes were exposed in siding, floor wire was loose and torn away from supports; a floor had a hole with sharp points exposed, and wire on run floors and dividers was broken.

Respondent willfully violated section 2.100(a) of the regulations and section 3.1(a) of the standards (9 C.F.R. § 3.1(a)).

6. 9 C.F.R. § 3.2(d) states as follows:

§ 3.2 Indoor housing facilities

* * * * *

(d) *Interior surfaces.* The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).

On February 12, 1995, an inspection of the Respondent's facility revealed violations of said regulation.

It was found at the aforesaid inspection that the walls and floors of the indoor housing facilities, and other surfaces in contact with the animals were not impervious to moisture; that fiberglass sheets used for flooring were peeling, leaving gaps which allowed water and urine to run in, and fiberglass sheets used for walls were broken and needs to be sealed. Respondent adduced no substantive proof to refute the results of the inspection report.

Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.2(d) of the standards (9 C.F.R. § 3.2(d)).

7. 9 C.F.R. § 3.6(a)(2)(xi) provides in part as follows:

§ 3.6 **Primary enclosures.**

* * * * *

(a) *General requirements.*

* * * * *

(2) *Primary enclosures* must be constructed and maintained so that they:

* * * * *

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner.

The inspection reports of February 13, 1995; April 26, 1995; February 12, 1996; and May 14, 1996, and the testimony of Inspector Borchert indicated such deficiencies such as the primary enclosures for dogs were not constructed so that they provided sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner. Four puppies were kept in a small "pet taxi" enclosure which only had sufficient room for two puppies. Also, Afghan Hounds did not have the required six inches of headroom. Four adult Dalmatians were in an enclosure providing fifty-six square feet when sixty-four square feet were required. Four shelties were in a pen providing twenty-four square feet when thirty-six square feet were required.

Inspector Borchert did not measure any of the puppies in arriving at a determination that the Respondent had failed to provide the required space for dogs. At Transcript 49 he was asked the question:

"Q. Did you measure any of the puppies?

A. No."

Based upon the evidence of record it is concluded that upon the aforesaid inspections, at the times so stated, it was ascertained by the inspector that the primary enclosures for the dogs were not constructed so that they provided sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable normal position and to walk in a normal manner as required by the regulations. Respondent maintains that because the inspector did not measure the cages and the animals, that it could not be ascertained if Respondent was not in compliance. The inspector testified he utilized the wires of the cages to make his determinations. The Respondent failed to adduce sufficient proof to overcome the Complainant's evidence.

Respondent willfully violated section 2.100 of the regulations (9 C.F.R. § 2.100(a) and section 3.6(a)(2)(xi) of the standards (9 C.F.R. § 3.6(a)(2)(xi)).

8. 9 C.F.R. 3.8 provides as follows:

§ 3.8 Exercise for dogs.

Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise. In addition, the plan must be approved by the attending veterinarian. The plan must include written standard procedures to be followed in providing the opportunity for exercise. The plan must be made

available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding Federal agency. The plan, at a minimum, must comply with each of the following:

(a) *Dogs housed individually.* Dogs over 12 weeks of age, except bitches with litters, housed, held, or maintained by any dealer, exhibitor, or research facility, including Federal research facilities, must be provided the opportunity for exercise regularly if they are kept individually in cages, pens, or runs that provide less than two times the required floor space for that dog, as indicated by § 3.6(c)(1) of this subpart.

(b) *Dogs housed in groups.* Dogs over 12 weeks of age housed, held, or maintained in groups by any dealer, exhibitor, or research facility, including Federal research facilities, do not require additional opportunity for exercise regularly if they are maintained in cages, pens, or runs that provide in total at least 100 percent of the required space for each dog if maintained separately. Such animals may be maintained in compatible groups, unless:

(1) Housing in compatible groups is not in accordance with a research proposal and the proposal has been approved by the research facility Committee;

(2) In the opinion of the attending veterinarian, such housing would adversely affect the health or well-being of the dog(s); or

(3) Any dog exhibits aggressive or vicious behavior.

(c) *Methods and period of providing exercise opportunity.* (1) The frequency, method, and duration of the opportunity for exercise shall be determined by the attending veterinarian and, at research facilities, in consultation with and approval by the Committee.

(2) Dealers, exhibitors, and research facilities, in developing their plan, should consider providing positive physical contact with humans that encourages exercise through play or other similar activities. If a dog is housed, held, or maintained at a facility without sensory contact with another dog, it must be provided with positive physical contact with humans at least daily.

(3) The opportunity for exercise may be provided in a number of ways, such as:

(i) Group housing in cages, pens or runs that provide at least 100 percent of the required space for each dog if maintained separately under the minimum floor space requirements of § 3.6(c)(1) of this subpart;

(ii) Maintaining individually housed dogs in cages, pens, or runs that provide at least twice the minimum floor space required by § 3.6(c)(1) of

this subpart;

(iii) Providing access to a run or open area at the frequency and duration prescribed by the attending veterinarian; or

(iv) Other similar activities.

(4) Forced exercise methods or devices such as swimming, treadmills, or carousel-type devices are unacceptable for meeting the exercise requirements of this section.

(d) *Exemptions.* (1) If, in the opinion of the attending veterinarian, it is inappropriate for certain dogs to exercise because of their health, condition, or well-being, the dealer, exhibitor, or research facility may be exempted from meeting the requirements of this section for those dogs. Such exemption must be documented by the attending veterinarian and, unless the basis for exemption is a permanent condition, must be reviewed at least every 30 days by the attending veterinarian.

(2) A research facility may be exempted from the requirements of this section if the principal investigator determines for scientific reasons set forth in the research proposal that it is inappropriate for certain dogs to exercise. Such exemption must be documented in the Committee-approved proposal and must be reviewed at appropriate intervals as determined by the Committee, but not less than annually.

(3) Records of any exemptions must be maintained and made available to USDA officials or any pertinent funding Federal agency upon request. (Approved by the Office of Management and Budget under control number 0579-0093)

The Respondent is charged with having violated the provisions of the aforesaid regulations on February 13, 1995 and April 26, 1995.

The Respondent was alleged to have violated the aforesaid regulations because he failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise and the exercise plan had not been reviewed and signed by the attending veterinarian and did not include the size of the enclosures.

With respect to the alleged violation respecting the exercise plan, Inspector Borchert testified as follows:

Q. As far as the exercise plan, how long is that good for?

A. Once it's signed and dated and nothing changes, as long as you have the same veterinarian.

Q. You wrote me up for exercise plan not being filled out by the vet but the previous inspection it was not written up. Could you explain that one, and it should have still been the same one, correct?

A. I believe we had a different method at that time that the exercise plan was going to be used.

Q. What would the different method have been?

A. I believe we had decided on a different interpretation of what the exercise plan would encompass.

Q. Well, did the regulations change?

A. No, just the interpretation of them.

Q. Then why would we have to change the exercise plan if the regulations didn't change? If they didn't change, they should have been okay, huh?

A. To meet the new interpretation of the exercise requirement.

Q. What was the difference in the interpretation?

A. I don't recall.

The Respondent should not be held accountable for a change in interpretation as testified to by Inspector Borchert.

However, the allegations relating to exercise for the dogs were abandoned by Complainant and not pursued.

Therefor no finding is necessary nor made.

9. 9 C.F.R. § 3.1(b) provides as follows:

§ 3.1 Housing facilities, general.

* * * * *

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste

material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for clearing the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

An inspection of the Respondent's premises found that the Respondent was not in compliance with the aforesaid regulations on May 31, 1995 and February 12, 1996 because the housing facilities were not kept neat and free of clutter, including equipment, furniture, and stored material. The Respondent maintains that because of work projects he left things out instead of putting them away. The Complainant's evidence (CX 10; Tr. 22) is not of sufficient persuasiveness to make a finding that a violation occurred as to 9 C.F.R. § 3.1(b). This inspector utilized a high degree of subjectiveness and his idea of neatness and clutter should not prevail over Respondent's explanation as set forth in his cross-examination.

10. 9 C.F.R. § 3.11(a) and (b) provides as follows:

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with wire or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

12. 9 C.F.R. § 3.3(e)(1)(i) and (iii) provides as follows:

§ 3.3 Sheltered housing facilities.

. . .

(e) *Surfaces.* (1) The following areas in sheltered housing facilities must be impervious to moisture:

(i) Indoor floor areas in contact with the animals;

* * * * *

(iii) All walls, boxes, houses, dens, and other surfaces in contact with the animals.

Said regulations required that surfaces of sheltered-housing facilities for dogs that are in contact with the animals be impervious to moisture. The Respondent is found to have violated the aforesaid provisions.

The surfaces of sheltered housing facilities for dogs that were in contact with the animals were not impervious to moisture. Fiberglass sheets were broken and chewed. Although the fiberglass sheets were on the exterior of the trailer, they were inside the primary enclosures; this is shown in photographs taken on later inspections, e.g.. (CX 13.19-13.20). The trim around the dogs' doors needed to be resealed because there were gaps and holes where old caulk had fallen out. Also, raw wood exposed to the dogs needed to be resealed.

The Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and section 3.3(e)(1)(i) and (iii) of the standards (9 C.F.R. 3.3(e)(1)(i) and (iii).

13. 9 C.F.R. § 3.12 provides as follows:

§ 3.12 Employees.

Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.

Respondent was found to have violated this requirement when his facilities were inspected. The requirements of the aforesaid regulations resulted in Respondent being charged with not having enough employees to carry out the required level of husbandry practices and care, as set forth in the provisions of the afore-quoted regulations. However, the findings of the inspector were conclusory in nature, were not specific as to how many employees would have been needed. Also, it appears that the deficiencies in Respondent's performance were due, at least in part, to him having a full-time job, the burning of his barn, and personal problems, which, had they not been present, would have enabled him to devote more attention to his facilities.

The Complainant's evidence is not sufficient to sustain this allegation.

14. 9 C.F.R. § 2.40 provides as follows:

Subpart D--Attending Veterinarian and Adequate Veterinary Care

§ 240 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being, *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and

Provided, further, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved In the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

Respondent is said to have violated the provisions of this section on more than one occasion.

Respondent's Exhibit J is a letter dated March 19, 1998 and signed by Dr. David M. Elsom, DVM, Oahe, Veterinary Hospital, in which it is stated, among other things that:

> Oahe Veterinary Hospital provided Kevin Ackerman Kennels with veterinary services until June 4, 1996. During the several years of our association we had occasion to do several kennel inspections, in addition to the individual animal health care. On these visits we found conditions to be sanitary and within normal limits of animal husbandry.

Thus it is apparent from the aforesaid letter that there were veterinary services provided to the Respondent until June 4, 1996, which included the provisions for individual animal health care.

The Complainant has not sustained its burden of proof as to this allegation.

15. 9 C.F.R. § 3.1(b) provides as follows:

§ 3.1 Housing facilities, general.

. . .

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for clearing the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal

research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

Respondent is alleged to have violated the aforesaid regulations on May 31, 1995 and subsequently.

Specifically, Respondent was charged with failing to see that the animal areas inside of the housing facility were kept neat and free of clutter, including equipment, furniture, and stored material.

Neither the photographs nor the testimony supports this contention of Complainant which is given to a high degree of subjectiveness. Respondent maintains that he left things out he was currently using. The evidence does not show accumulations of trash, waste material, junk, weeds, or other discarded materials of such nature as contemplated by the regulations to be violative thereof.

16. 9 C.F.R. § 3.7(c) provides in part as follows:

§ 3.7 Compatible grouping.

. . .

(c) Puppies or kittens 4 months of age or less may not be housed in the same primary enclosure with adult dogs or cats other than their dams or foster dams, except when permanently maintained in breeding colonies;

The Respondent is alleged to have violated the aforesaid section of the regulations on October 17, 1995.

Complainant has not supported this allegation with adequate proof.

17. 9 C.F.R. § 3.1(e) and (f) provides as follows:

. . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and

spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets In the animal areas.

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the back flow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

The Respondent is said to have violated the aforesaid regulations in that the inspector found that the housing facilities were not equipped with disposal facilities and drainage systems that were constructed and operated so that animal waste and water were rapidly eliminated and animals stayed dry. There was algae-filled standing water; the sewer had overflown. Holes under and around the runs needed to be filled to eliminate standing water and waste.

The housing facilities were not equipped with disposal facilities and drainage systems that were constructed and operated so that animal waste and water was rapidly eliminated and the animals could stay dry. The pens and shelters were full of ice, melting snow, and water. There were large accumulations of feces in the runs, run wire, and between the top and bottom enclosures and under raised wire runs.

Supplies of food were not stored in a manner that protected them from spoilage, contamination, and vermin infestation. Feed was stored in a pickup box trailer which was missing the end gate, allowing feed sacks to get wet, although none was found to be wet. In addition, it was found that toxic substances (bottles of bleach) were improperly stored in animal areas.

With respect to the "toxic" substances alleged to be bleach, the inspector did not ascertain the contents, which Respondent indicated was milk for the puppies. There is some doubt that the storage of food supplies, although not perfect, rose to the degree of violations.

The evidence does support Complainant's contention with respect to violation of the regulation pertaining to drainage and waste disposal. Accordingly, Respondent is found to have willfully violated section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and section 3.1(e) and (f).

18. 9 C.F.R. § 3.4(b) provides as follows:

§ 3.4 Outdoor housing facilities

. . .

(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal In the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

(1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;

(2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;

(3) Be provided with a wind break and rain break at the entrance; and

(4) Contain clean, dry, bedding material if the ambient temperature is below 50° F (10° C). Additional clean, dry bedding is required when the temperature is 35° F (1.7° C) or lower.

The Respondent is said to have violated the aforesaid regulations on various occasions in that housing facilities for dogs were not structurally sound and

maintained in good repair so as to protect the animals from injury, contain the animals securely, and provide necessary shelter. Doors to shelters were broken; shelters had holes in the sides and tops and windows were broken out; a patch had torn away from a wall, leaving sharp and jagged metal exposed; strapping had torn away, also leaving sharp and jagged metal exposed; supports holding runs outside a trailer had torn away; and a pen had broken wire floor.

The requirements of the aforesaid regulations set forth that dogs in outdoor housing facilities must be provided with adequate protection from the elements.

Dogs in outdoor housing facilities were not provided with adequate protection from the elements. Not only was there standing water and ice in the pens, but within the shelters; shelters were broken and in bad repair and were lacking doors to provide protection from wind, rain, and snow. Also, the outdoor housing facilities for dogs did not contain shelter structures large enough to allow each animal to sit, stand, and lie in a normal manner, and to turn about freely. Primary enclosures for dogs were not constructed so that they provide sufficient space.

Respondent willfully violated section 2.100(a) of the regulation (9 C.F.R. § 2.100(a)) and section 3.4(b) of the standards (9 C.F.R. § 3.4(b)).

19. There is sufficient evidence of record to sustain willful violation relating to the structure of the housing facilities for the dogs, 9 C.F.R. § 3.1(a), and the compatible grouping requirement found in 9 C.F.R. § 3.7.

20. The Complainant's principal concern relating to 9 C.F.R. § 2.75, relating to records, is that the Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals. This has been noted *supra*. The acquisition records did not show the date acquired, source, age, or identification number. Disposition records did not show age, description, and sex. On one inspection, some dogs had lost identification tags and dogs with tattoos that could not be seen or read needed to be re-identified. Also, cage cards for weaned puppies (not individually identified) needed the Dams Identification number. On another inspection, at least fifteen dogs need identification and the records of animals on hand lacked identification numbers for at least nine dogs. Acquisition records did not show the source of two dogs. Disposition records were said to be incomplete because the required form provides one line for each animal but multiple animals were recorded on a single line, resulting in the absence of some of the information on identification of the animals. The absence of information would constitute a violation, not the recording of multiple entries on one line. The Respondent maintained he did not have the necessary forms. On another inspection the Respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals inasmuch as the records of animals on hand did not show the identification numbers of at least ten dogs, nor

the date they arrived on the premises. Also, the records of sales were lacking required information on the buyers, such as license numbers and vehicle license plate numbers and state of issuance.

Based on the evidence of record it is necessary to find that Respondent was in willful violation of 9 C.F.R. § 2.75.

21. 9 C.F.R. § 2.126 provides:

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

The regulations require that Respondent allow the inspectors to inspect his premises. With respect to the attempted inspection Investigator Larry Neustel testified relating thereto, including the fact that he took an affidavit from Mr. Borchert on March 19, 1996, with respect to the attempted inspection of the Ackerman facility. (Tr. 129). It appears that the investigators, Mr. Neustel and Mr. Borchert, went to the Respondent's facility in the morning and he was not available and they indicated that although he did not appear to be on the premises they thought that he was because his truck was in the driveway. This is an unsubstantiated inference. The inspectors returned at a later time and the Respondent indicated that he wanted to wait for an inspection until either his lawyer or the sheriff arrived. The inspectors declined to do that and indicated that in the absence of the sheriff or his lawyer the Respondent declined inspection. However, it is noteworthy that notwithstanding their statement that Respondent declined inspection they made a number of observations such as they observed that

it needed to be cleaned; that there was a buildup of feces in the runs both on the ground and wire run; and there was a buildup out in front of the runs and in the runs themselves on the north side of the building. The inspectors could see further states of uncleanliness as well as other matters which normally would be within the scope of inspection. So they certainly at least achieved a partial inspection.

Respondent contends he did not refuse to have his premises inspected but sought to delay it pending arrival of the sheriff or his attorney. The evidence shows that when the two government officials returned later in the afternoon of the day in question, they saw the Respondent in the yard, from which he went into his house. When they knocked on the door Respondent answered and wanted to know what the inspectors wanted. They "told him [Mr. Ackerman] we were there to do an inspection and he refused the inspection." (Tr. 39). The manner in which he refused the inspection is not clearly set forth. When he was told they wanted to inspect the facility he said he wanted to contact his attorney and that they would have to wait until his attorney arrived before they could inspect. Respondent then later advised that if his attorney was not there he wanted to have the sheriff there. Mr. Neustel indicated that they told Respondent: "We were not going to wait for the sheriff to come and Mr. Borchert and I then left." (Tr. 131). Notwithstanding the fact that the inspectors indicated they could not make an inspection, nevertheless, they testified that while they were at Respondent's facility on the day referenced they did make a number of observations as to the condition of Respondent's premises. However, under applicable regulations, the APHIS inspectors were entitled to a full inspection.

The provisions of the applicable regulations did not require the inspectors to wait for Respondent's attorney or the sheriff. Thus, they were denied access for inspection of the property.

The persuasive evidence of record shows that Respondent willfully violated section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations in not permitting an inspection as required.

With respect to the affidavit of Mr. Borchert taken by Mr. Neustel relative to Mr. Ackerman's utilization of the bobcat, as can be seen from the evidence of record, it appears that the Respondent was on his bobcat attempting to remove feces and debris from various areas when the two inspectors put on their boots and approached the Respondent. It was at that time that they claimed that the Respondent's bobcat brushed against the leg of one of them. I am discounting this incident because the Respondent did not approach the inspectors, they are the ones who walked towards him and placed themselves in front of the bobcat. They were the ones who went to Mr. Ackerman who was on a bobcat and they walked down to him and "* * * in his line of pushing to get him to stop and talk to us." Thus, the

Respondent did not approach the government inspectors, they approached him while he was operating the bobcat. As the result thereof, Mr. Borchert testified that Mr. Ackerman "* * * just kind of eased his bobcat against my foot and leg to show me that he was going to drive away if I didn't step out of the road." (Tr. 39). Although I have found that inspection was refused, I have discounted the bobcat incident where the inspectors walked toward and in front of the bobcat. How they placed themselves with respect to the utilization of the machine, how far the machine was from them, the extent of the so-called brushing, and any other matters which could be relevant to a determination as to whether or not this incident took place and if so the extent thereof, is not apparent in the record and accordingly no finding of fact had been made with respect thereto and it has not been considered a factor in arriving at the sanction herein.

Discussion

The evidence of the violations is based largely on the written reports of the inspector, which reports were made a part of the evidence herein. To some extent there is corroboration by way of photographs and by the testimony of the inspector's supervisor who was present at one inspection and also by a senior investigator who was present at another inspection and an attempted inspection. Thus, the inspection reports are the focal point of the Complainant's case.

Summarily stated, the Respondent maintains that there was a deficiency in the evidence presented because the inspector did not have present recall and simply relied upon reading what was already set forth in the inspection reports; that the violations alluded to were the result of subjective judgment on the part of the inspector; that with respect to certain violations there was not a sufficient definition of various items in the regulations to determine whether or not there was a violation; and that such violations were not supported by the published regulations. Additionally, Respondent maintains, correctly so, that in no instance did the inspector observe any injured or sick animals.

As concerns certain specifics detailed by the inspector, it is further contended by the Respondent that by reason of the fact that the inspector did not measure any of the dogs, it could not be determined whether or not they had sufficient space. The inspector testified that he did not measure the cages or the dogs. Instead, he relied upon a "wire" count. Respondent also maintains that by reason of work projects, working tools and such were left out but that did not preclude the observance of the facilities as being neat and orderly in manner. With respect to the allegations of toxic substances being in the animal area (Clorox bottles) the Respondent maintains that they contained milk and that the inspector never

checked to see what was in the bottles. Further, the Respondent contends he did not prevent an inspection of his facilities but requested that a lawyer and a sheriff be present at the time of inspection.

With respect to another one of the Respondent's contentions, it is deserving of more than passing moment. The Respondent identified several instances when Inspector Borchert, wrote alleged violations on the Agency's copy which did not appear on the copies given to Respondent. That is to say, the copy given to Respondent did not reflect all of the alleged violations which Mr. Borchert subsequently added to the Agency's copy. Although Complainant seeks to explain this away, nevertheless, in evaluating the concerns of this case, I am disregarding those statements which appeared on the Agency's copy, of which the Respondent had no knowledge. The Complainant argues that the added statements can be viewed in the context of the remainder of the reports. For the purposes of this Decision the added statements are being disregarded.

The instances identified where there were additional statements put on the Agency's copy that were not reflected on the Respondent's copy relate to the inspection report of June 6, 1994 (CX 6) wherein Inspector Borchert added a reference to "accumulations of feces and hair along outside of wash down gutters at front of enclosures" to Item 14, Waste Disposal. On the inspection report of July 5, 1994, Inspector Borchert added under Item 11, Condition and Site, a reference to a need to remove barn swallows. (EX B; CX 7, p. 2). Inspector Borchert also added a reference to an accumulation of hair under Item 14, Waste Disposal. (EX B; CX 7, p. 2). Furthermore, Inspector Borchert added Item 36, Pest Control: "many flys [sic] present at time of inspection which need to be controlled by pest control program."

On the inspection report of February 28, 1994, Inspector Borchert added under Item 10, Structure and Construction, a reference to "enclosure wire which allows dogs heads to pass through it." (EX F, CX 5, p. 2). In the same inspection report, Inspector Borchert added to Item 39, Social Grouping, noting that large breed puppies needed to be separated from small breed puppies. (EX C). Apparently this was not regarded as a deficiency. (EX 5, p. 1). Complainant's Exhibit 9 notes another instance where Inspector Borchert added a notation to the Agency's copy which was not put on the Respondent's copy relating to the fact that in the prior two weeks there had been sixty inches of snow and that "there [sic] sewage system has caved in."

Fundamental standards of fairness require that the Respondent not be held accountable for alleged violations which were subsequently written in on the Agency's copies of the inspection reports and of which the Respondent had no knowledge. The Complainant maintains that the additional data written in by the

inspector actually were covered under other items of violations. However, to the extent that any reliance had been placed upon these additional notations, such reliance has been misplaced at least in this Decision. It is noteworthy that although the Complainant seeks to mitigate the significance of the added statements, nevertheless, Complainant acknowledges: "This should not have occurred." (Complainant's brief, p. 21).

Another aspect of this proceeding is reflected in the record and relates to the manner in which Respondent (and others) viewed the inspector involved who wrote up the violations. Although his supervisor testified he regarded the inspector as one of his better inspectors, the supervisor did acknowledge that he had received complaints about him from two or three other licensees in both North and South Dakota and that such complaints were also directed to congressional persons in those various States. Dr. Mammeli indicated he met with the congressional representatives who were satisfied with Dr. Mammeli's explanations and since then he has not received anymore complaints. (Tr. 155).

I have carefully reviewed the entire record herein. It is apparent that the Complainant's case is premised principally upon the written reports made by the inspector during his various inspections. To the extent feasible, I have eliminated certain of the allegations as not having been substantiated by convincing proof or even a preponderance of the proof. Some of the elements set forth in the reports were not sufficiently specific and did not identify the alleged violation in such terms as one could determine whether or not such violation in fact existed. I believe this process of closely examining the reports was necessary in view of the presence of evidence in the transcript that this was an inspector against whom numerous complaints had been filed, various breeders had submitted affidavits which were admitted into evidence over objection, and who had been the subject of complaints to his superior as well as to certain congressional persons. Respondent Exhibit No. L is a statement from Dean Bahr, a government employee working for the United States Department of Agriculture, as an Agriculture Credit Officer for the Farm Service Agency. His affidavit relates to his opinion of Inspector Donovan Borchert as being an unfair inspector and of engaging in unprofessional conduct which appeared to be undue harassment. Therefore, to the extent appropriate, I have eliminated those allegations which would appear to be so minimal as to not be in violation or, which had not been sufficiently identified as related to the Respondent's facility.

However, I am convinced, and there is a preponderance of evidence to substantiate the violations I have found. The Respondent 's facility did lack certain cleanliness and housekeeping requirements as set forth in the regulations. Moreover, such conditions appeared to be of a chronic nature and were repetitive

violations during this rather lengthy period of inspections. In addition, I believed the deficiencies in the structural aspects of the facilities used to house the dogs were proven. It appears that Respondent became overwhelmed with the amount of work required for the proper maintenance of his facility. However, there is no indication of injury to the animals and there is appropriate indication that the Respondent did have a good faith desire to see that his animals were well-cared for. He apparently was not able to reach the level of compliance required by APHIS' regulations.

Respondent maintains that he could not have willfully violated any of the regulations inasmuch as the dogs were pets to him and he loved and cared for them with all his heart, that they were just like family and children to him.

Even if what Respondent maintains is true with respect to his care of the animals for which there was no evidence of injury, nevertheless the Respondent's actions fall within the legal definition of willful, as that term is utilized in these administrative proceedings. It has been stated many times that a willful act is one which is done intentionally, irrespective of evil intent or is done with careless disregard of statutory requirements.

A violation is willful under the Administrative Procedure Act (5 U.S.C.§ 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[1]

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[1]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. USDA*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales C.o v. Block*, 708 F.2d 774, 777-778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-1906 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-896 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-1233 (1996), *appeal docketed*, Nos. 96-3558 and 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied, sub nom., Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v.* Glover Livestock Common Co., 411 U.S. 182, 187 n.5 (1973) ("'Willfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois*

(continued...)

Willfulness in the subject case is reflected by Respondent's violations which extended over a long-period of time. The act or omissions thereof which resulted in the violations were the result of intentional failure to comply with statutory requirements or a careless disregard thereof.

The Complainant maintain that the Respondent's refusal to allow an inspection was particularly willful. At the oral hearing testimony was given with respect to the circumstances of such alleged refusal. Although the Respondent attempts to explain the situation on brief, nevertheless, his declining to take the stand and set forth his own interpretation of events which transpired on that day mitigate against his contentions in regard thereto.

Mr. Bahr, who testified at the oral hearing, was vice-president of the Dakota Animal Breeders Association and had viewed numerous kennels, including that of the Respondent. The Complainant did not cross-examine this witness but rather on brief pointed out that his license was surrendered because of his inability to get along with Inspector Donovan Borchert. The essence of Mr. Bahr's testimony was that he believed Mr. Borchert was "a very unfair inspector." (Tr. 160). Also, that Mr. Bahr had seen various inspection reports for other kennels which reports were inconsistent from one kennel to another. "It appears to me that it makes a difference who you are and not what your kennel is like when Borchert does your inspection." (Tr. 160). Mr. Bahr testified that Mr. Borchert was very unprofessional as a government employee; that he engaged in undue harassment; and because of the actions of Mr. Borchert, Mr. Bahr surrendered his license. In the course of his testimony Mr. Bahr indicated that he had been to Respondent's kennel many times and that he had never seen any injured dogs and believed that

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[1](...continued)
Central R.R., 303 U.S. 239, 242-243 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'"

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

Respondent's kennel was always a "topnotch operation" and was very clean and that the Respondent displayed a great amount of concern for his dogs and the welfare thereof. Mr. Bahr indicated that on one or two occasions right after the Respondent's dairy barn burned down and he was having other problems, Mr. Bahr noticed a little bit of slackness on the part of fecal buildup and cleanliness but it in no way affected the dogs. From the testimony of Mr. Bahr, who had viewed many kennels, including that of the Respondent many times, it can be inferred that Mr. Bahr did not observe any outstanding conditions which would have warranted the extent of the alleged violations attributed to Respondent's facility by Inspector Borchert. I have given Mr. Bahr's testimony full credence. His demeanor was that of a truthful witness.

It was indicated by Dr. Elsom that he had done "several" kennel inspections of Respondent's facilities and found the conditions to be sanitary and within the normal limits of animal husbandry.

Another witness called by the Respondent was Mr. Greg Bommelman who is in partnership with Judy Hansen in Wild Wind Kennels. The testimony of Mr. Bommelman substantiated the admission made by Mr. Borchert that he, as a matter of practice, would write things down on the inspection report that went back to the Agency but of which the licensee had no knowledge. (Tr. 168). In other words he added additional data after the initial report had been given to the licensee. Mr. Bommelman had been at Respondent's kennel four times, during which he felt that the kennel was fine and that the dogs were healthy. "I came down twice to the kennel unannounced and I did not see any accumulation of feces that I thought was excessive." (Tr. 170). Mr. Bommelman had purchased dogs from the Respondent's facility and had he believed that the facility was in any way deficient, he would not have done so. (Tr. 172). Mr. Bommelman agreed with the veterinarian's assessment of the Respondent's facility and animal care. (Tr. 171-172). Mr. Bommelman's testimony was credible and worthy of belief.

With respect to the photographs presented by the Complainant Mr. Bommelman had an apt critique thereof: "This is a one time picture that you have taken and you have tried to create the worst possible condition that you can possibly get. Now, have you looked at the kennel conditions before this or after this?" (Tr. 174).

Mr. Bommelman further corroborated the opinion that some had of Inspector Borchert as one engaged in harassment and entrapment. Through Mr. Bommelman, Exhibit G was admitted into evidence being questionnaires which were sent out to licensees with respect to the conduct of Inspector Borchert. Although there are a number of responses in Exhibit G indicating difficulties which various persons experienced with Mr. Borchert, nevertheless, Mr. Bommelman indicated he did not get a lot of response because the breeders in North Dakota

were afraid of retaliations. (Tr. 169). Complainant would discredit the testimony of Mr. Bommelman because of his partnership with Judy Hansen who was doing business as Wild Wind Petting Zoo and was assessed a civil penalty and her license was suspended by Order issued in AWA Docket No. 96-0048 on January 30, 1998, from which an appeal has been taken. This fact alone, namely alleged noncompliance with the regulations, as set forth by the Complainant is not sufficient to detract from the credibility of the witness Mr. Bommelman nor of the witness Mr. Bahr. An observance of the demeanor and responsiveness of these individuals to the questions propounded to them leads one to the conclusion that their testimony is entitled to full credibility.

As previously noted, the overwhelming thrust of the Complainant's evidence consists of the written inspection reports which were made by Inspector Borchert, whom the Respondent, along with several other licensee breeders, viewed as unreasonable, dishonest, and bullying. It is not the purpose of this proceeding to go into the merits of such views. They are mentioned solely to indicate possible bias in the inspection reports, as contrasted to the testimony of Respondent's witnesses. There can be no other conclusion drawn from the evidence other than that Inspector Borchert and the Respondent did not view each other with mutual respect and understanding with respect to the requirements and enforcement of the applicable regulations. There was a lack of help and understanding as to the requirements of meeting the responsibilities of the regulations and a perception that same were not enforced with fairness and integrity.

It is incumbent upon the government to prove its case by a preponderance of the evidence. This has not been done with respect to certain allegations as noted herein. Nevertheless, there has been sufficient proof, through the utilization and introduction of the inspection reports, and the oral testimony, to conclude that the Respondent was in violation of numerous regulations. In the absence of affirmative refutation by the Respondent by credible evidence on behalf of the Respondent I am required to accept the inspection reports and testimony that were introduced into evidence. The Respondent's Proposed Findings of Fact consist to a large extent of argument relating to the Complainant's Proposed Findings of Fact. Except as noted above, the Respondent introduced little or no evidence to support his contentions and to refute the evidence adduced by the Complainant. Accordingly, many of his contentions are simply not supported by the evidence of record, even if they were correct. The Respondent chose not to introduce his own evidence in refutation other than as noted above through several exhibits and the testimony of Mr. Bahr and Mr. Bommelman. Without the Complainant's evidence being refuted by the Respondent I am bound to accept that evidence which is on the record herein. Accordingly, to the extent noted above I have made findings that

this Respondent was in violation of numerous regulations over a lengthy period of time.

Sanction

In imposing a sanction four factors must be taken into consideration: The size of Respondent's business, gravity of the violations, good faith and history of previous violations. The Complainant herein is seeking the imposition of a cease and desist order, permanent disqualification of the Respondent from being licensed or for a specified time of disqualification together with the imposition of the civil penalty of $25,000.00.

The Complainant produced a sanction witness who testified with respect to his opinion as to the severity of the violations. He indicated that several fell into the category of being severe violations, including the incident relative to the alleged failure to permit inspection and utilization of the Respondent of his bobcat tractor. Complainant maintains that Respondent's business is "relatively large" with about a 180 adult dogs and 60 to 100 puppies.

The size of Respondent's operation did not remain constant. The inspection report of October 12, 1993 (EX 2) indicates 59 dogs and 2 puppies; inspection report of January 24, 1994 (EX 4) indicates 105 dogs and 55 puppies; the inspection report of February 28, 1994 (EX 5) indicates 103 dogs and 60 puppies; the inspection report of June 1, 1994 (EX 6) indicates 138 dogs and 80 puppies; the inspection report of July 5, 1994 (EX 7) indicates 142 dogs and 75 puppies; the inspection report of February 13, 1995 (EX 8) indicates 163 dogs and 50 puppies; the inspection report of April 26, 1995 (EX 9) indicates 162 dogs and 45 puppies; the inspection report of May 31, 1995 (EX 10) indicates 162 dogs and 35 puppies; the inspection report of October 17, 1995 (EX 11) indicates 145 dogs and 61 puppies; and the inspection report of February 12, 1996 (EX 12) indicates 179 dogs and 57 puppies.

Although Complainant's sanction witness indicated he regarded Respondent's operation as "large," there is no indication in the record as to what Complainant regards as a "small," "medium" or "large" operation.

There is no real basis, other than opinion, for labeling Respondent's business as relatively large. It is more likely, it fell within the "medium" range and, at one time, was done in connection with Respondent's milking cows.

The Respondent has surrendered his license. The Respondent has no prior adjudicated violations against him. Notwithstanding the legal definition of willfulness, which has been set forth previously in this Decision, namely, that an act, if intentionally done, becomes willful for administrative proceedings,

nevertheless, there is sufficient testimony of evidence through Mr. Bahr and Mr. Bommelman that the Respondent did in fact act in good faith in attempting to take care of his dogs and puppies. Although the evidence shows deficiencies in regard thereto, nevertheless there was no evidence with respect to any injury to the dogs and it appears that the Respondent at all times had the welfare of the animals as a top concern. Therefore, with respect to the four factors to be considered under 7 U.S.C. § 2149, it appears to me that the size of the Respondent's business was medium, that he exhibited good faith toward his animals, and that there was no history of prior violations. Therefore, that leaves us with a evaluation of the Complainant's witness with respect to the gravity of the violations. Even though some of the violations were described by the Complainant's witness as being severe, nevertheless in the absence of injury or mistreatment of the dogs it appears that such violations had not accelerated or had not presented themselves as a harm to the animals.

Therefore, although the evidence does show numerous violations over an extended period of time, the purposes of the Act and the imposition of a penalty upon the Respondent can just as adequately be carried out through the imposition of a civil penalty lesser than the one recommended by the Complainant, namely $25,000.00. An evaluation of all the facts to be taken into consideration, as well as the surrounding circumstances of this proceeding, indicates that a civil penalty of $5,000.00 will carry out the purposes of the Act just as well, in addition to which a cease and desist order should be issued. This is a severe penalty for this Respondent.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to provide animals with adequate shelter from the elements;

(b) Failing to provide for the rapid elimination of excess water from housing facilities for animals;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(d) Failing to individually identify animals, as required;

(e) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required.;

(f) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(g) Failing to store supplies of food so as to adequately protect them against contamination;

(h) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(i) Failing to maintain primary enclosures for animals in a clean and sanitary condition; and,

(j) Failing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices.

2. Respondent is assessed a civil penalty of $5,000.00, which shall be paid by certified check made payable to the order of the Treasurer of the United States.

3. The Respondent is disqualified from becoming licensed for a period of three (3) years and continuing thereafter until and unless the Respondent demonstrates to APHIS that he is in full compliance with the Act, the regulations and standards issued thereunder, and this Order, including payment of the civil penalty assessed herein. The Respondent shall not, directly or indirectly as an independent contractor or through any corporate or other device, engage in any business for which a license is required under the Act without being licensed.

All the various requests, proposals and suggestions of the parties have been carefully considered and this Decision and Order are arrived at upon consideration of the entire record herein and on the record as a whole. This Respondent is admonished to take whatever actions are necessary to fully comprehend the broad scope of the cease and desist order herein.

This Decision and Order will become final thirty-five (35) days after service upon the parties unless there is an appeal to the Judicial Officer within thirty (30) days, all as more fully set forth in 7 C.F.R. §§ 1.131 *et seq.*, 1.145).

[This Decision and Order became final on December 21, 1998.-Editor]

In re: ANNA MAE NOELL AND THE CHIMP FARM, INC.
AWA Docket No. 98-0033.
Decision and Order filed January 6, 1999.

Default — Failure to file timely answer — Filing with hearing clerk — Federal Rules of Civil Procedure — Cease and desist order — License revocation — Civil penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein assessing a civil penalty of $25,000 against Respondents, revoking Respondents' Animal Welfare Act (Act) license, and directing Respondents to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondents' failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondents were provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondents due process. The Judicial Officer held that the age, ill health, and hospitalization of one of the Respondents and the lack of legal representation at the time the Complaint was served on Respondents are not bases for setting aside the Default Decision. Moreover, the Judicial Officer held that even if he found that Complainant would not be prejudiced by allowing Respondents to file a late answer and Respondents would be irreparably harmed by the denial of their request to set aside the Default Decision, those findings would not constitute bases for setting aside the Default Decision. The Federal Rules of Civil Procedure (FRCP) are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Act, in accordance with the Rules of Practice (7 C.F.R. §§ 1.130-.151); therefore Rule 60(b) of the FRCP, under which a court may relieve a party from judgment for, *inter alia*, excusable neglect, is not applicable to administrative proceedings conducted in accordance with the Rules of Practice.

Brian T. Hill, for Complainant.
Martin A. Pedata, St. Petersburg, Florida, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the Regulations and Standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 10, 1998.

The Complaint alleges that: (1) on November 15, 1995, Anna Mae Noell and the Chimp Farm, Inc. [hereinafter Respondents], violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140), sections 2.40, 2.75(b)(1), 2.100(a), 2.131(a)(1), 2.131(b)(1), and 2.131(c)(2) of the Regulations (9 C.F.R. §§ 2.40, .75(b)(1), .100(a), .131(a)(1), (b)(1), (c)(2)), and sections 3.75(a), 3.75(c)(1)(i)-(ii), 3.80(a)(1), 3.80(a)(2)(v), and 3.81 of the Standards (9 C.F.R. §§ 3.75(a), (c)(1)(i)-(ii), .80(a)(1), (a)(2)(v), .81) (Compl. ¶ II); (2) on October 9, 1996, Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40, .100(a)) and sections 3.53(a), 3.75(a), 3.75(c)(1)(i)-(ii), 3.75(f), 3.80(a)(2)(xi), 3.81, 3.84(d), 3.128, and 3.129 of the Standards (9 C.F.R. §§ 3.53(a), .75(a), (c)(1)(i)-(ii), (f), .80(a)(2)(xi), .81, .84(d), .128, .129) (Compl. ¶ III); (3) on July 22, 1997,

Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40 .100(a)) and sections 3.52(a), 3.75(a), 3.75(c), 3.75(e)-(f), 3.80(a)(1), 3.81, 3.84(d), and 3.125(a) and (c) of the Standards (9 C.F.R. §§ 3.52(a), .75(a), (c), (e)-(f), .80(a)(1), .81, .84(d), .125(a), (c)) (Compl. ¶ IV); and (4) on April 1, 1998, Respondents violated sections 2.40 and 2.100(a) of the Regulations (9 C.F.R. §§ 2.40 .100(a)) and sections 3.75(a), 3.75(c)(1)(i), 3.75(e), 3.80(a)-(b), 3.84(c)-(d), 3.125(c), and 3.131(c) of the Standards (9 C.F.R. §§ 3.75(a), (c)(1)(i), (e), .80(a)-(b), .84(c)-(d) .125(c), .131(c)) (Compl. ¶ V).

Respondents were served with the Complaint on August 13, 1998. Respondents failed to answer the Complaint within 20 days after service of the Complaint on Respondents, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On October 1, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Proposed Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. Also, on October 1, 1998, Respondents filed a letter, dated September 14, 1998 [hereinafter Answer], in which they denied the material allegations of the Complaint.

On November 3, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondents violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (2) issued a cease and desist order, directing that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed a civil penalty of $25,000 against Respondents jointly and severally; and (4) revoked Respondents' Animal Welfare Act license.

On December 3, 1998, Respondents appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On December 23, 1998, Complainant filed Complainant's Opposition to Motion by Respondents Anna Mae Noell and the Chimp Farm, Inc.[,] to Vacate Default [hereinafter

[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Complainant's Response]. On December 29, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

The Hearing Clerk served a copy of the Complaint and the Rules of Practice on Respondents on August 13, 1998. Respondents were informed in the letter of service which accompanied the Complaint and the Rules of Practice that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondents failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are deemed admitted for the purposes of this proceeding by Respondents' failure to file a timely answer, are adopted and set forth in this Decision and Order, *infra*, as Findings of Fact and Conclusions of Law.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact and Conclusions of Law

I

A. Respondent Anna Mae Noell is an individual whose mailing address is 4612 Alternate 19 North, Palm Harbor, Florida 34683. Respondent The Chimp Farm, Inc., is a Florida corporation and has the same mailing address as Anna Mae Noell.

B. At all times material to this proceeding, Respondents were licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations.

II

A. On November 15, 1995, the Animal and Plant Health Inspection Service [hereinafter APHIS] inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and

adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On November 15, 1995, APHIS inspected Respondents' premises and records and found that Respondents had failed to maintain complete records on the premises showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

C. On November 15, 1995, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Regulations specified in paragraph II(C)(1)-(3) of these Findings of Fact and Conclusions of Law:

1. Two chimpanzees named "Congo" and "Harry" were handled in a manner that caused unnecessary discomfort (9 C.F.R. § 2.131(a)(1));

2. During public exhibition, there was not sufficient distance and/or barriers between the animals and the general viewing public (9 C.F.R. § 2.131(b)(1)); and

3. A responsible, knowledgeable, and readily identifiable employee or attendant was not present at all times during periods of public contact (9 C.F.R. § 2.131(c)(2)).

D. On November 15, 1995, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph II(D)(1)-(6) of these Findings of Fact and Conclusions of Law:

1. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

2. Housing facilities for nonhuman primates contained excessive rust which affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

3. Housing facilities for nonhuman primates contained jagged edges or sharp points that might injure animals (9 C.F.R. § 3.75(c)(1)(ii));

4. Primary enclosures were not designed and constructed so as to be structurally sound for the species of nonhuman primates contained in them (9 C.F.R. § 3.80(a)(1));

5. Primary enclosures were not maintained so that they enabled the nonhuman primates to remain dry and clean (9 C.F.R. § 3.80(a)(2)(v)); and

6. Respondents failed to follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of nonhuman primates (9 C.F.R. § 3.81).

III

A. On October 9, 1996, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On October 9, 1996, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph III(B)(1)-(10) of these Findings of Fact and Conclusions of Law:

1. An enclosure for a brown bear was not constructed to allow sufficient space for normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128);

2. Food in the goat pen was not free from contamination and of sufficient nutritive value to maintain the animals in good health (9 C.F.R. § 3.129);

3. A primary enclosure for a rabbit was not structurally sound and maintained in good repair to protect the rabbit from injury (9 C.F.R. § 3.53(a));

4. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

5. Housing facilities for nonhuman primates contained excessive rust which affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

6. Housing facilities for nonhuman primates contained jagged edges or sharp points that might injure animals (9 C.F.R. § 3.75(c)(1)(ii));

7. The housing facility for a nonhuman primate (Sheila) was not equipped with drainage systems that operate to rapidly eliminate waste and water in order to keep the animal clean and dry (9 C.F.R. § 3.75(f));

8. An enclosure for a nonhuman primate (capuchin) did not provide sufficient space for the animal to make normal postural adjustments with freedom of movement (9 C.F.R. § 3.80(a)(2)(xi));

9. The environmental enhancement plan did not include specific provisions to address the social needs of the nonhuman primates (9 C.F.R. § 3.81); and

10. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

IV

A. On July 22, 1997, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On July 22, 1997, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph IV(B)(1)-(10) of these Findings of Fact and Conclusions of Law:

1. Housing facilities for goats were not structurally sound and maintained in good repair so as to contain the animals and protect them from injury (9 C.F.R. § 3.125(a));

2. Supplies of food were not adequately protected against deterioration and molding (9 C.F.R. § 3.125(c));

3. Rabbits were housed outdoors without an artificial cooling system with the atmospheric temperature exceeding 90 degrees Fahrenheit (9 C.F.R. § 3.52(a));

4. Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.75(a));

5. Housing facilities for nonhuman primates were not constructed in a manner which allowed the housing facilities to be readily cleaned and sanitized, and housing facilities for nonhuman primates in fact were not regularly cleaned and sanitized (9 C.F.R. § 3.75(c));

6. Supplies of food and bedding for nonhuman primates were not stored in a manner that protects them from spoilage, contamination, and vermin infestation (9 C.F.R. § 3.75(e));

7. Housing facilities for nonhuman primates were not equipped with properly constructed, installed, and maintained drains (9 C.F.R. § 3.75(f));

8. Primary enclosures for nonhuman primates were not designed and constructed or maintained so that they were structurally sound for the species contained in them (9 C.F.R. § 3.80(a)(1));

9. The environmental enhancement plan did not include specific provisions to address the social needs of the nonhuman primates (9 C.F.R. § 3.81); and

10. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being

of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

V

A. On April 1, 1998, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

B. On April 1, 1998, APHIS inspected Respondents' facility and found willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph V(B)(1)-(9) of these Findings of Fact and Conclusions of Law:

1. Supplies of food were not adequately protected against deterioration and molding (9 C.F.R. § 3.125(c));

2. The premises were not kept clean and in good repair so as to protect the animals from injury (9 C.F.R. § 3.131(c));

3. Housing facilities for nonhuman primates were not kept in good repair, in order to protect the animals from injury (9 C.F.R. § 3.75(a));

4. The surfaces of housing facilities contained excessive rust that prevented the required cleaning and sanitation and affected the structural strength of the surface (9 C.F.R. § 3.75(c)(1)(i));

5. Nonhuman primates' supply of food was not stored in a manner that protected it from spoilage and contamination (9 C.F.R. § 3.75(e));

6. Primary enclosures for nonhuman primates were not structurally sound and kept in good repair (9 C.F.R. § 3.80(a));

7. Primary enclosures for two adult chimpanzees did not meet the minimum space requirements (9 C.F.R. § 3.80(b));

8. The premises were not kept clean and in good repair in order to protect the nonhuman primates from injury (9 C.F.R. § 3.84(c)); and

9. Respondents failed to establish and maintain an effective program for the control of insects and other pests so as to promote the health and well-being of the nonhuman primates and reduce contamination (9 C.F.R. § 3.84(d)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The Order issued in this Decision and Order, *infra*, is authorized by the Animal Welfare Act and warranted under the circumstances.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents request in their Motion to Vacate Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Appeal Petition], filed December 3, 1998, that I vacate the Default Decision and allow Respondents to defend this matter (Appeal Pet. at unnumbered last page).

Sections 1.136(a) and (c), 1.139, and 1.141(a) of the Rules of Practice provide:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an

> answer may be filed. . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondents on August 13, 1998, with the Rules of Practice, clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 7.

Likewise, the letter from the Hearing Clerk, accompanying the Complaint and the Rules of Practice, expressly advises Respondents of the effect of failure to file a timely answer or deny any allegation in the Complaint, as follows:

> **CERTIFIED RECEIPT REQUESTED**
>
> August 10, 1998
>
> Ms. Anna Mae Noell
> and the Chi[m]p Farm, Inc.
> 4612 Alternate 19 North,
> Palm Harbor, Florida 34683
>
> Dear Sir/Madam:
>
> Subject: **In re: Anna Mae Noell, and the Chimp Farm, Inc., Respondents -**
> **AWA Docket No. 98-0033**
>
> Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.
>
> Also enclosed is a copy of the Rules of Practice which govern the conduct

> of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

August 10, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Anna Mae Noell and the Chimp Farm, Inc., at 1 (emphasis in original).

Respondents' Answer was due no later than September 2, 1998. Respondents filed their Answer on October 1, 1998,[2] 49 days after the Complaint was served on

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[2]Respondents contend that they filed an Answer on or about September 14, 1998 (Appeal Pet. at first unnumbered page). However, the record establishes that Respondents' Answer was filed at 3:30 p.m., October 1, 1998, as evidenced by the date and time stamped on the upper right-hand corner of Respondents' Answer by the Hearing Clerk. Section 1.136(a) of the Rules of Practice provides that "[w]ithin 20 days after the service of the complaint . . . the respondent shall *file with the Hearing Clerk* an answer signed by the respondent or the attorney of record in the proceeding" (7 C.F.R. § 1.136(a) (emphasis added)), and section 1.147(g) of the Rules of Practice provides that "[a]ny document . . . 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)). While Respondents dated their Answer "September 14, 1998[,]" a date typed on a pleading by the party filing the pleading does not constitute filing with the Hearing Clerk, as required by section 1.136(a) of the Rules of Practice. *Cf. In re Severin Peterson*, 57 Agric. Dec. ___ slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that unsuccessful attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997). Moreover, Respondents' Answer was due September 2, 1998. Therefore, even if I found that

(continued...)

Respondents and 29 days after Respondents' Answer was due. Respondents' failure to file a timely Answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)) and a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On October 1, 1998, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Proposed Default Decision and a Proposed Default Decision based upon Respondents' failure to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). A copy of the Complainant's Motion for Proposed Default Decision, a copy of the Complainant's Proposed Default Decision, and a letter dated October 1, 1998, from the Hearing Clerk were served on Respondents by certified mail on October 8, 1998. The October 1, 1998, letter from the Hearing Clerk, which accompanied a copy of Complainant's Motion for Proposed Default Decision and a copy of Complainant's Proposed Default Decision states, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> October 1, 1998
>
> Mr. [sic] Anna Mae Noell
> 44612 [sic] Alterante [sic] 19 North
> Palmer [sic] Harbor, Florida 34683
>
> Dear Mr. [sic] Noell:
>
> Subject: In re: Anna Mae Noell - Respondent - AWA Docket No. 98-00033 [sic]
>
> Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order, together with a copy of the Proposed Decision and Order Upon Admission of Fact by Reason of Default, which have been filed with this office in the above-captioned proceeding.
>
> In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and

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[2](...continued)
Respondents' Answer was filed on the date typed on the Answer by Respondents, Respondents' Answer would be late and the Default Decision would not be set aside.

three copies of objections to the Proposed Decision.

October 1, 1998, letter from Joyce A. Dawson, Hearing Clerk, to Anna Mae Noell.

Respondents failed to file objections to Complainant's Motion for Proposed Default Decision and Complainant's Proposed Default Decision within 20 days after service of the Motion for Proposed Default Decision and Proposed Default Decision on Respondents, as provided in 7 C.F.R. § 1.139, and on November 3, 1998, the ALJ filed the Default Decision, which was served on Respondents on November 9, 1998.

On December 3, 1998, Respondents filed their Appeal Petition in which they assert that they were not represented by counsel at the time they were served with the Complaint and that they were "not in a position to respond to the [C]omplaint within the time frame allotted by the [R]ules [of Practice]" because Ms. Noell was in the hospital, very ill, and 85 years of age on or about the time that Respondents were served with the Complaint (Appeal Pet. at unnumbered first page). Respondents contend that under the circumstances their failure to file a timely answer constitutes "excusable neglect" and not a willful violation of any rule or an effort to delay this proceeding (Appeal Pet. at unnumbered second page). Further, Respondents contend that Complainant would suffer no prejudice if Respondents were permitted to respond to the Complaint and that Respondents would suffer irreparable harm if their request to set aside the Default Decision is denied (Appeal Pet. at unnumbered second page).

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,[3] Respondents have shown no basis for

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[3]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*,

(continued...)

setting aside the Default Decision.[4] The Rules of Practice, a copy of which was

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[3](...continued)
40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[4]*See generally In re Conrad Payne*, 57 Agric. Dec. ___ (Dec. 8, 1998) (holding that the default decision was proper where respondent's first filing was 60 days after the complaint was served on respondent); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. ___ (Aug. 24, 1998) (holding that the default decision was proper where respondents filed an answer 23 days after they were served with the complaint); *In re Jack D. Stowers*, 57 Agric. Dec. __ (July 16, 1998) (holding that the default decision proper where respondent filed his answer 1 year and 12 days after the complaint was served on respondent); In *re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision proper where respondent's first filing was more than 8 months after the complaint was served on respondent); *In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding that the default decision was proper where respondent failed to file an answer); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re Spring Valley Meats, Inc.* (Decision as to Spring Valley Meats, Inc.), 56 Agric. Dec. 1704 (1997) (holding the default decision proper where respondents' first filing was 46 days after the complaint was served on respondents); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision proper where respondent's first filing was 126 days after the complaint was served on respondent); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision proper where respondent's first filing was filed 117 days after respondent's answer was due); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 135 days after respondent's answer was due); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision proper where respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on respondent); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision proper where respondent's first and only filing in the proceeding was filed 70 days after respondent's answer was due); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision proper where response to complaint was filed more than 9 months after service of complaint on respondent), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision proper where response to complaint was filed 43 days after service of complaint on respondent); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (holding the default order proper where a timely answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (holding the default order proper where a timely answer was not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default order proper where an answer was not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default order proper where an answer was not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (holding the default order proper where an answer was not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995
(continued...)

[4](...continued)
WL 523336 (6th Cir. 1995) (holding the default order proper where respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default order proper where timely answer was not filed); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default order proper where respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (holding the default order proper where answer was not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (holding the default order proper where an answer was not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (holding the default order proper where an answer was not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (holding the default order proper where an answer was not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (holding the default order proper where a timely answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (holding the default order proper where a timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (holding the default order proper where a timely answer was not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (holding the default order proper where a timely answer was not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (holding the default order proper where an answer was not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (holding the default order proper where an answer was not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (holding the default order proper where a timely answer was not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding the default order proper where a timely answer was not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (holding the default order proper where a timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding the default order proper where a timely answer was not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (holding the default order proper where a timely answer was not filed; Respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (holding the default order proper where a timely answer was not filed); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default order proper where a timely answer was not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (holding the default order proper where a timely answer was not filed; Respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (holding the default order proper
(continued...)

served on Respondents on August 13, 1998, with a copy of the Complaint, clearly provide that an answer must be filed within 20 days after service of the Complaint (7 C.F.R. § 1.136(a)). Respondents' first filing in this proceeding was filed October 1, 1998, 49 days after Respondents were served with the Complaint and 29 days after Respondents' Answer was due. Moreover, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed decision (7 C.F.R. § 1.139). Respondents did not file any objections to Complainant's Motion for Default Decision and Proposed Default Decision.

Further, the requirement in the Rules of Practice that Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely answer is necessary to enable USDA to handle its workload in an expeditious and economical manner. USDA's three administrative law judges frequently dispose of hundreds of cases in a year. In recent years, USDA's Judicial Officer has disposed of 30 to 50 cases per year.

Courts have recognized that administrative agencies "should be `free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[5] If Respondents were

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[4](...continued)
where a timely answer was not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (holding the default order proper where a timely answer was not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default order proper where a timely answer was not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (holding the default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (holding the default order proper where respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (holding the default order proper where a timely answer was not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (refusing to set aside the default order because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[5]*See Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (stating that absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (stating that the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962)
(continued...)

permitted to contest some of the allegations of fact after failing to file a timely answer, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

The record establishes that Respondents were provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondents waived their right to a hearing by failing to file a timely answer (7 C.F.R. §§ 1.139, .141(a)). Moreover, Respondents' failure to file a timely answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)).

The age, ill health, and hospitalization of one of the Respondents and the lack of legal representation at the time the Complaint was served on Respondents are not bases for setting aside the Default Decision issued in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Moreover, even if I found, as Respondents contend, that Complainant would not be prejudiced by allowing Respondents to file a late answer and that Respondents would be irreparably harmed by my denial of their request to set aside the Default Decision, those findings would not constitute bases for setting aside the Default Decision.[6]

Respondents cite a number of cases[7] as a basis for their contention that the Default Decision should be set aside because their failure to file a timely answer was the result of excusable neglect. All of the cases cited by Respondents concern

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[5](...continued)
(stating that administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

[6]*See In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting respondent's contention that complainant must allege or prove prejudice to complainant's ability to present its case, before an administrative law judge may issue a default decision; stating that the Rules of Practice do not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced complainant's ability to present its case).

[7]*FSLIC v. Kroenke*, 858 F.2d 1067 (5th Cir. 1988); *Wallace v. McManus*, 776 F.2d 915 (10th Cir. 1985); *United States v. United States Currency in the Sum of Three Hundred Ninety-Three Thousand Nine Hundred Sixty-Seven Dollars More or Less*, 775 F. Supp. 43 (E.D.N.Y. 1991); *United States v. United States Currency in the Amount of Seven Thousand Five Hundred Thirty-One Dollars*, 716 F. Supp. 92 (E.D.N.Y. 1989); *Hicks v. Secretary of the Air Force*, 594 F. Supp. 690 (D. Me. 1984); *Packard Press Corp. v. Com Vu Corp.*, 584 F. Supp. 73 (E.D. Pa. 1984); *United States v. Mutual Const. Corp.*, 3 F.R.D. 227 (E.D. Pa. 1943); *In re Penn Screw & Mach. Works, Inc.*, 48 B.R. 138 (Bankr. E.D. Pa. 1985).

motions filed under Rule 60(b) of the Federal Rules of Civil Procedure[8] and are inapposite.

Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.[9] Moreover, unlike

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[8]Rule 60(b)(1) of the Federal Rules of Civil Procedure provides, as follows:

> **Rule 60. Relief From Judgment or Order**
>
> . . . .
>
> (b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]

Fed. R. Civ. P. 60(b)(1).

[9]*See generally Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re United Foods, Inc.*, 57 Agric. Dec. ___, slip op. at 19-20 (Mar. 4, 1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 12 (Feb. 20, 1998) (Order Denying Pet. for Recons.)

(continued...)

Rule 60(b) of the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980). There is no basis for allowing Respondents to present matters by way of defense at this time.

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

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act and, in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(b) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and

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[9](...*continued*)
(stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure are not applicable to USDA's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before USDA).

assistance of a doctor of veterinary medicine;

(d) Failing to provide sufficient space to allow animals adequate freedom of movement;

(e) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated; and

(f) Failing to provide animals with wholesome and uncontaminated food.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a civil penalty of $25,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

The certified check or money order shall be forwarded to, and received by, Brian T. Hill within 65 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to AWA Docket No. 98-0033.

3. Respondents' license under the Animal Welfare Act and the Regulations is revoked, effective on the 65th day after service of this Order on Respondents.

In re: JAMES E. STEPHENS and WATER WHEEL EXOTICS, INC.
AWA Docket No. 98-0019.
Decision and Order filed May 5, 1999.

Veterinary care — Animal and food waste — Housing facilities — Water — Food — Pest control — Records — Inspection — Sanction — Preponderance of the evidence — Willful — License disqualification — Cease and desist order — Civil penalty — Correction of violations — Expert witness testimony.

The Judicial Officer affirmed the decision by Administrative Law Judge Edwin S. Bernstein that Respondents: (1) failed to provide veterinary care to animals in need of care (9 C.F.R. § 2.40); (2) failed to maintain complete records (7 U.S.C. § 2140; 9 C.F.R. § 2.75(b)(1)); (3) failed to permit

APHIS officials to conduct a complete inspection of the facility (7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a)); (4) failed to provide housing facilities for animals that were structurally sound and maintain housing facilities for animals in good repair (9 C.F.R. § 3.125(a)); (5) failed to store supplies of food so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c)); (6) failed to provide for the removal and disposal of animal and food wastes (9 C.F.R. § 3.125(d)); (7) failed to adequately ventilate indoor housing facilities (9 C.F.R. § 3.126(b)); (8) failed to provide adequate lighting in indoor housing facilities (9 C.F.R. § 3.126(c)); (9) failed to provide a suitable method to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c)); (10) failed to construct and maintain enclosures so as to provide sufficient space for each animal (9 C.F.R. § 3.128); (11) failed to provide animals with wholesome and uncontaminated food (9 C.F.R. § 3.129(a)); (12) failed to keep primary enclosures clean (9 C.F.R. § 3.131(a)); and (13) failed to establish and maintain an effective program for the control of pests (9 C.F.R. § 3.131(d)). The Judicial Officer reduced the civil penalty assessed by the ALJ based on the Judicial Officer's finding that Complainant failed to prove five of the alleged violations by a preponderance of the evidence. Respondents' violations were serious in that they exposed Respondents' animals to a risk of serious illness and death. Respondents' violations were also willful in that Respondents displayed a careless disregard of statutory and regulatory requirements over a 4-month period. The Judicial Officer held that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is not unfair or unjust and the civil penalty assessed was not excessive. The Judicial Officer held that the ALJ did not err when he allowed an expert in the field of care, handling, feeding, and nutritional requirements of exhibition animals to testify about conditions at Respondents' facility based upon observation of pictures of the conditions at Respondents' facility.

Robert A. Ertman, for Complainant.
Matthew A. Hartley, Sewickley, PA, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint on April 16, 1998.

The Complaint alleges that James E. Stephens and Water Wheel Exotics, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards. On May 11, 1998, Respondents filed Answer to Complaint in which they denied the material allegations of the Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing on October 6 and 7, 1998, in Pittsburgh, Pennsylvania. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Matthew A. Hartley, represented

Respondents.

On December 14, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]; on December 22, 1998, Respondents filed Respondents' Post Hearing Written Submissions; on December 29, 1998, Respondents filed Respondents Reply Brief; and on January 4, 1999, Complainant filed Complainant's Reply Brief.

On January 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards; (2) directed Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessed Respondents a $32,000 civil penalty; and (4) permanently disqualified Respondents from obtaining an Animal Welfare Act license (Initial Decision and Order at 7-12, 33-35).

On March 10, 1999, Respondents appealed to, and requested oral argument before, the Judicial Officer; on May 4, 1999, Complainant filed Complainant's Memorandum in Response to Appeal; and on May 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' request for oral argument and decision.

Respondents' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondents have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's Initial Decision and Order; except that I do not find that Complainant proved by a preponderance of the evidence[1] that on March 25, 1998, Respondents

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[1]The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 43 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 19 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 45-46 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56

(continued...)

violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a). Therefore, pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order, with modifications to reflect my finding that Complainant did not prove by a preponderance of the evidence that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998. Additional conclusions by the Judicial Officer follow the ALJ's discussion, as restated.

Complainant's exhibits are referred to as "CX", and the hearing transcript is referred to as "Tr."

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

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[1](...continued)
Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Julian J. Toney*, 54 Agric. Dec. 923, 971 (1995), *aff'd in part, rev'd in part, and remanded*, 101 F.3d 1236 (8th Cir. 1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

§ 2132. Definitions

When used in this chapter—

. . . .

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not[.]

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. . . . The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this

chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2132(h), 2140, 2146(a), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not.

. . . .

PART 2—REGULATIONS

. . . .

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinarian care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and

Provided, further, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

. . . .

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

. . . .

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

. . . .

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

. . . .

§ 2.129 Confiscation and destruction of animals.

(a) If an animal being held by a dealer, exhibitor, intermediate handler, or by a carrier is found by an APHIS official to be suffering as a result of the failure of the dealer, exhibitor, intermediate handler, or carrier to comply with any provision of the regulations or the standards set forth in

this subchapter, the APHIS official shall make a reasonable effort to notify the dealer, exhibitor, intermediate handler, or carrier of the condition of the animal(s) and request that the condition be corrected and that adequate care be given to alleviate the animal's suffering or distress, or that the animal(s) be destroyed by euthanasia. In the event that the dealer, exhibitor, intermediate handler, or carrier refuses to comply with this request, the APHIS official may confiscate the animal(s) for care, treatment, or disposal as indicated in paragraph (b) of this section, if, in the opinion of the Administrator, the circumstances indicate the animal's health is in danger.

. . . .

PART 3—STANDARDS

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

. . . .

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. The disposal facilities and any

disposal of animal and food wastes, bedding, dead animals, trash, and debris shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

. . . .

§ 3.126 Facilities, indoor.

. . . .

(b) *Ventilation.* Indoor housing facilities shall be adequately ventilated by natural or mechanical means to provide for the health and to prevent discomfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, fans, or air-conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation.

(c) *Lighting.* Indoor housing facilities shall have ample lighting, by natural or artificial means, or both, of good quality, distribution, and duration as appropriate for the species involved. Such lighting shall be uniformly distributed and of sufficient intensity to permit routine inspection and cleaning. Lighting of primary enclosures shall be designed to protect the animals from excessive illumination.

. . . .

§ 3.127 Facilities, outdoor.

. . . .

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

§ 3.128 Space requirements.

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

. . . .

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .126(a), .129(a); 3.125(a), (c)-(d) .126(b)-(c), .127(c), .128, .129(a), .131(a), (d).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Findings of Fact

1. Respondent James E. Stephens is an individual with a mailing address of RD 2, Box 297-A, 1034 Old Ridge Road, Avella, Pennsylvania 15312 (CX 57, CX 61; Tr. 17, 337).

2. Respondent Water Wheel Exotics, Inc., is a corporation and has the

same mailing address as Respondent James E. Stephens (CX 57, CX 61; Tr. 389-90).

3. During the period December 10, 1997, through March 30, 1998, Respondents were licensed and operating as an exhibitor as defined in the Animal Welfare Act and the Regulations and the actions of Respondent Water Wheel Exotics, Inc., were directed, managed, and controlled by Respondent James E. Stephens (CX 57, CX 58, CX 61; Tr. 389-90). Respondents are not currently licensed under the Animal Welfare Act.

4. From December 10, 1997, through March 30, 1998, Respondents' facility and animals were inspected by experienced veterinary medical officers and experienced animal care inspectors employed by the Animal and Plant Health Inspection Service [hereinafter APHIS], USDA. Respondents' animals were also examined by the chief veterinarian for the Cleveland Metro Park Zoo. (Tr. 14-19, 26-27, 56-61, 81-87, 265-68, 278-89.) These inspections revealed that Respondents were not in compliance with the Animal Welfare Act and the Regulations and Standards (CX 1-CX 53). After each inspection, APHIS employees informed Respondents that the inspections had disclosed violations of the Animal Welfare Act and the Regulations and Standards (Tr. 19, 85-86). APHIS employees prepared an inspection report after each inspection and gave Mr. Stephens a copy of the inspection report (Tr. 423). Each inspection report served as a written notice to Respondents that the APHIS employees found that certain items were not in compliance with the Animal Welfare Act and the Regulations and Standards (Tr. 88-89).

5. On December 10, 1997, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 1 at 3; Tr. 103-05).

6. On December 10, 1997, APHIS employees inspected Respondents' facility and records and found that Respondents had failed to maintain complete records showing the acquisition and disposition of animals (CX 1 at 2; Tr. 102-03).

7. On December 10, 1997, APHIS employees inspected Respondents' facility and animals (CX 1-CX 12; Tr. 91-115) and found that:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Indoor housing facilities did not have lighting sufficient to permit routine inspection and cleaning;

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required; and

G. An effective program for the control of pests was not established and maintained.

8. On February 9, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 13 at 4; Tr. 118-20).

9. On February 9, 1998, APHIS employees inspected Respondents' facility and animals (CX 13-CX 26; Tr. 116-42) and found that:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times;

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required; and

G. An effective program for the control of pests was not established and maintained.

10. On March 23, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 27 at 3; Tr. 153-55).

11. On March 23, 1998, APHIS employees inspected Respondents' facility and records and found that Respondents had failed to maintain complete records showing the acquisition and disposition of animals (CX 27 at 1; Tr. 144-45).

12. On March 23, 1998, APHIS employees inspected Respondents' facility and animals (CX 27-CX 41; Tr. 142-67) and found that:

A. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain

the animals;

B. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;

C. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin;

D. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals;

E. Animals were not provided with wholesome and uncontaminated food;

F. Primary enclosures were not kept clean, as required;

G. An effective program for the control of pests was not established and maintained; and

H. Enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.

13. On March 25, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 42 at 2; Tr. 170-71).

14. On March 25, 1998, Respondents refused to permit APHIS officials to conduct a complete inspection of Respondents' facility (CX 42 at 2; Tr. 171-72).

15. On March 25, 1998, APHIS employees inspected Respondents' facility and animals (CX 42-CX 47, Tr. 167-74) and found that:

A. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;

B. Animals were not provided with wholesome and uncontaminated food; and

C. An effective program for the control of pests was not established and maintained.

16. On March 30, 1998, APHIS employees inspected Respondents' facility and animals and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care (CX 48-CX 50; Tr. 174-77).

17. On March 30, 1998, Respondents refused to permit APHIS officials to conduct a complete inspection of Respondents' facility (CX 48; Tr. 177).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondents are an exhibitor as defined in the Animal Welfare Act and the Regulations.

3. On December 10, 1997, Respondents willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and by failing to provide veterinary care to animals in need of care.

4. On December 10, 1997, Respondents willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records showing the acquisition and disposition of animals.

5. On December 10, 1997, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

B. Indoor housing facilities did not have lighting sufficient to permit routine inspection and cleaning (9 C.F.R. § 3.126(c));

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

E. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

6. On February 9, 1998, Respondents willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and by failing to provide veterinary care to animals in need of care.

7. On February 9, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal and food wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

B. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.126(b));

C. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

D. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

E. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

8. On March 23, 1998, Respondents willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and by failing to provide veterinary care to animals in need of care.

9. On March 23, 1998, Respondents willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain complete records showing the acquisition and disposition of animals.

10. On March 23, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals (9 C.F.R. § 3.125(a));

B. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

C. Supplies of food were not stored so as to adequately protect the supplies of food against deterioration, molding, or contamination by vermin (9 C.F.R. § 3.125(c));

D. A suitable method was not provided to rapidly eliminate excess water from outdoor facilities for animals (9 C.F.R. § 3.127(c));

E. Animals were not provided with wholesome and uncontaminated

food (9 C.F.R. § 3.129(a));

F. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a));

G. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)); and

H. Enclosures for animals were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement (9 C.F.R. § 3.128).

11. On March 25, 1998, Respondents willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and by failing to provide veterinary care to animals in need of care.

12. On March 25, 1998, Respondents willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) by refusing to permit APHIS officials to conduct a complete inspection of Respondents' facility.

13. On March 25, 1998, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified below:

A. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.125(d));

B. Animals were not provided with wholesome and uncontaminated food (9 C.F.R. § 3.129(a)); and

C. An effective program for the control of pests was not established and maintained (9 C.F.R. § 3.131(d)).

14. On March 30, 1998, Respondents willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and by failing to provide veterinary care to animals in need of care.

15. On March 30, 1998, Respondents willfully violated section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) by refusing to permit APHIS officials to conduct a complete inspection of Respondents' facility.

Discussion

I. Jurisdiction

In Respondents' Answer to Complaint, Respondents admitted the jurisdictional allegations contained in paragraphs I(A) and I(C) of the Complaint. Respondents denied the portion of the allegation contained in paragraph I(B) of the Complaint that Water Wheel Exotics, Inc., is a corporation. However, at the hearing, Mr. Stephens testified that Water Wheel Exotics, Inc., was a corporation and that he was the only owner (Tr. 389-90). Therefore, jurisdiction is not an issue in this proceeding.

II. The Violations of the Animal Welfare Act and the Regulations and Standards

I found the testimony of Complainant's witnesses to be credible. I was particularly impressed with the testimonies of Drs. Norma Jean Harlan, Kurt Hammel, and Albert Lewandowski. I found them to be thorough and consistent in testifying, and I believe they testified truthfully. The only witness that Respondents presented to dispute the alleged violations, with the exception of the failure to allow inspection violations, was Respondent James E. Stephens. He did not deny many of the allegations in the Complaint and where he disputed Complainant's witnesses, I found him less credible than Complainant's witnesses.

1. The APHIS Inspection on December 10, 1997

On December 10, 1997, an experienced veterinary medical officer, Dr. Harlan, inspected Respondents' facility and found that Respondents' facility did not comply with the Animal Welfare Act and the Regulations and Standards (CX 1-CX 12; Tr. 81-115). Dr. Harlan testified in detail to her normal inspection procedure (Tr. 83-85). She testified further that she had an opportunity to review the December 10, 1997, inspection report (CX 1) with Respondents as part of the process of educating and communicating with Animal Welfare Act licensees (Tr. 85-87, 91). Dr. Harlan testified that she observed the following deficiencies:

a. Failure to store food properly

Dr. Harlan testified that she observed deer carcasses for the large cats stored on

the ground uncovered and exposed to the elements (CX 1 at 1, CX 2; Tr. 91-92, 106). She also observed hay that was wet and exposed to the weather (CX 1 at 1, CX 3; Tr. 93, 107). Finally, she observed outdated dairy products being stored at room temperature in open barrels and open barrels of feed (CX 1 at 1, CX 6; Tr. 93-94, 108-09). Dr. Harlan characterized a failure to store food properly as a serious deficiency because food is one of the major elements of animal care. Dr. Harlan also testified that a failure to store food properly risks contamination and deterioration of the food and that contaminated or deteriorated food fed to animals could impair the health of the animals. Dr. Harlan discussed Respondents' failures to store food properly with Mr. Stephens and instructed him on how food should be stored. (Tr. 92-94.)

Mr. Stephens testified that he picked up the deer carcasses the night before the inspection and the following morning he put them on the ground until he returned at 10 a.m. (Tr. 338-39). He stated that he usually butchers carcasses within 8 hours after finding them and if he feels a carcass is "not right," he does not feed the carcass to Respondents' animals. (Tr. 339-40.) Mr. Stephens claimed that he would not feed the dairy products to Respondents' animals if the dairy products were bad (Tr. 394). However, he acknowledged that there was "bad hay" (Tr. 358-60).

When Dr. Albert Lewandowski, the chief veterinarian for the Cleveland Metro Park Zoo, was asked about Respondents' deer carcass storage practices, he responded:

> A. This is the storage? I mean, it looks to me like they're laying in the middle of the road. I mean, if I were feeding carcasses, and there's nothing wrong with feeding fresh carcass, it should be refrigerated. It should be cleaned. I wouldn't have it laying in the middle of the aisle.
>
> It appears that there's massive fecal contamination. It also appears that some of these bodies are a little less than fresh. You can see some drying of the eyes and some glazing. You can see a couple of these carcasses. They are wet, but they also look as though they've been sitting for awhile. As they sit, they get slimy. It has a sheen that would indicate that, and they're laying in what looks to be a manure contaminated driveway. I mean, this isn't -- this is no way to keep food.

Tr. 290.

Dr. Lewandowski also testified that the dairy products should have been refrigerated if they were going to be fed to the animals and should not be fed 2 days

past the expiration date (Tr. 291-92).

b. Failure to remove and dispose of animal and food wastes

Dr. Harlan testified that she observed open barrels of waste in the lower garage area (CX 1 at 1, CX 5; Tr. 94) and six deer carcasses lying in the alleyway in the cat area (CX 2; Tr. 95). She characterized a failure to remove and dispose of waste as a significant deficiency because proper waste disposal is a key component of good animal husbandry in order to avoid disease transmission (Tr. 95). She instructed Mr. Stephens to dispose of the waste in a safe manner away from the animals (Tr. 95).

Mr. Stephens testified that he did not have the ability to remove the open barrels of waste in the lower garage area and could not get to the pit in which he disposes of bad deer carcasses (Tr. 357, 359). However, Mr. Stephens never offered any specific explanations for his inability to dispose of animal and food waste on December 10, 1997.

c. Failure to have ample lighting in an indoor housing facility

Dr. Harlan testified that she observed inadequate lighting in the upper barn behind the house (CX 1 at 1; Tr. 95). She testified further that this condition made examination of a black pig without using a flashlight difficult. Dr. Harlan told Mr. Stephens to repair any broken lights so he could examine Respondents' animals daily. (Tr. 96.) Mr. Stephens acknowledged that in cold weather some of Respondents' neon lights do not work. He agreed that Dr. Harlan did identify one light that was not working. (Tr. 358.)

d. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed camels in an enclosure having difficulty reaching their food and water because the enclosure was full of mud and muck (CX 1 at 2, CX 7; Tr. 96-97). She was concerned that this condition could affect the camels' health and asked Mr. Stephens to move the camels to a dryer enclosure (Tr. 97-98). Dr. Harlan also observed that many of the large cat pens had standing water in them (CX 8; Tr. 98).

Dr. Lewandowski testified about the methods Respondents could have employed to improve the drainage in their animal housing facilities. He also testified regarding the importance of proper drainage in maintaining an animal's health and preventing the transmission of diseases. (Tr. 295-99.)

Mr. Stephens acknowledged that there were drainage problems at Respondents' facility (Tr. 345-48, 352).

e. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed a carcass being quartered and a quarter of the carcass being dragged through the dirt into the cat enclosure to provide feed for the big cats (CX 1 at 2; Tr. 98). She testified that the meat was very contaminated. Dr. Harlan characterized carcasses dragged through dirt as totally unacceptable as feed because any number of diseases can be transmitted by contaminated meat which could kill the animals. (Tr. 98.) She also testified that there were other feeding problems at Respondents' facility (CX 1 at 2, CX 6, CX 9). Dr. Harlan instructed Mr. Stephens as to methods by which to provide wholesome and uncontaminated food to Respondents' animals (Tr. 99).

Mr. Stephens did not refute Dr. Harlan's testimony on these specific feeding issues. In fact, Mr. Stephens acknowledged that dragging carcasses to the cat enclosure was inappropriate (Tr. 393).

f. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed numerous animal enclosures that were in need of cleaning (CX 1 at 2, CX 10; Tr. 99-100, 111-12). She testified further that the failure to clean enclosures was a significant deficiency that could affect the animals' health (Tr. 100). Dr. Harlan told Mr. Stephens that the enclosures needed to be cleaned immediately and maintained in a clean condition (Tr. 101). Photographs taken during the December 10, 1997, inspection clearly show enclosures that were in need of cleaning (CX 10; Tr. 111-12).

g. Failure to provide adequate pest control

Dr. Harlan testified that she observed several large, fresh rodent holes in the lower barn, the upper barn, and the big cat area (CX 1 at 2, CX 11; Tr. 101-02). Dr. Harlan was concerned for the health of Respondents' animals because rodents can transmit diseases to the animals. She told Mr. Stephens that he needed to start filling in the rodent holes so that he could determine if he was eliminating the rodents. (Tr. 101-02.) Mr. Stephens acknowledged that Respondents had difficulty controlling rodents (Tr. 356).

h. Failure to maintain proper records

Dr. Harlan testified that when she examined Respondents' records there was information required to be kept by the Regulations concerning the source of animals that was not recorded in Respondents' records (CX 1 at 2; Tr. 102). In addition, one of the two tiger cubs listed as being born was not at Respondents' facility and its disposition was not recorded in Respondents' records (CX 1 at 2; Tr. 102).

Mr. Stephens acknowledged that Respondents' records did not contain the required information (Tr. 356-57). Mr. Stephens did not address the disposition of the tiger cub.

i. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several problems with veterinary care at Respondents' facility. There was a goat with an abscess on its right jaw (CX 12 at 1; Tr. 104); a yak whose fur was heavily crusted with burrs and mats (CX 12 at 2-3; Tr. 104); a tiger named "Timberland" that was limping and very sensitive on both front paws (Tr. 104); and a reindeer that was very thin and in need of hoof trimming (CX 12 at 3-6; Tr. 104). Dr. Harlan characterized the failure to provide veterinary care to animals in need of care as a serious deficiency and instructed Mr. Stephens to seek veterinary care for the animals and to clip the yak (Tr. 105).

Mr. Stephens testified that the tiger named "Timberland" had been treated by Respondents' veterinarian, Dr. Sheperd (Tr. 369). This self-serving testimony does not overcome Complainant's substantial and credible evidence. Dr. Sheperd did not appear as a witness for Respondents, and Respondents could not produce any records indicating that the tiger had been treated (Tr. 10, 403).

2. <u>The APHIS Inspection on February 9, 1998</u>

On February 9, 1998, Dr. Harlan inspected Respondents' facility and found that the facility did not comply with the Regulations and Standards (CX 13-CX 26; Tr. 116-42).

a. Failure to provide adequate ventilation

Dr. Harlan testified that there were extremely strong ammonia levels in the basement holding area (CX 13 at 1; Tr. 117). She instructed Mr. Stephens that the ventilation needed to be improved to reduce the ammonia levels (CX 13 at 1).

Mr. Stephens acknowledged that Dr. Harlan did find ammonia levels in the basement holding area, but asserted that he has taken steps to prevent the ventilation problem (Tr. 362).[2]

b. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed a young bison in the lower barn that had an excessive number of burrs and knots in its coat (CX 13 at 4, CX 26 at 1-3; Tr. 118). She also observed that the tiger named "Timberland" was still limping and that Mr. Stephens had not conferred with Respondents' veterinarian on the tiger's current condition (CX 13 at 4; Tr. 118-19). Finally, Dr. Harlan observed three reindeer that were thin and in need of hoof trimming (CX 13 at 4, CX 26 at 4-6; Tr. 119).

Mr. Stephens testified that the tiger named "Timberland" was being treated by Respondents' veterinarian, Dr. Sheperd (Tr. 369). However, Dr. Sheperd did not appear at the hearing, and Respondents were unable to produce any records indicating that the tiger had been treated.

c. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed that Respondents were feeding brewer's grain to the hoof stock (CX 13 at 2; Tr. 120). She was concerned because brewer's grain lacks the energy content that animals need (CX 13 at 2; Tr. 120). Dr. Harlan also observed that the quality of the hay in the camel, llama, and calf pens, and one reindeer pen, was extremely poor (CX 13 at 2, CX 19; Tr. 121, 135-36). Dr. Harlan observed several carcasses being fed to the large cats that were black and not fresh (CX 13 at 3, CX 20; Tr. 121, 136-37). Finally, Dr. Harlan observed pigs being fed spoiled, clotted milk (CX 13 at 3, CX 21; Tr. 122, 137).

Mr. Stephens testified that he was mixing brewer's grain with another type of grain (Tr. 359, 368). Respondents did not offer corroborating evidence to support Mr. Stephens' assertion. Mr. Stephens acknowledged that Respondents fed "bad hay" to the animals (Tr. 360). Mr. Stephens did not find anything wrong with the carcasses that Respondents fed to the large cats (Tr. 410-11). The photographs indicate otherwise (CX 20). Finally, Mr. Stephens claimed that he does not feed spoiled, clotted milk to the pigs (Tr. 394). Again, the photographs indicate

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[2]"[T]he subsequent correction of a condition not in compliance with the standards has no bearing on the existence of a violation . . . ." *See In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 809637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

otherwise (CX 21).

d. Failure to remove and dispose of animal and food wastes

Dr. Harlan testified that she observed a very large pile of manure and debris 15 feet from the upper barn (CX 13 at 2, CX 16; Tr. 123, 132-33). Dr. Harlan was concerned because the manure pile is a haven for rodents, which can carry diseases to Respondents' animals at the facility (Tr. 123). Dr. Harlan also observed open barrels of waste in the large cat area (CX 13 at 2, CX 15 at 1; Tr. 124-25, 131-32).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

e. Failure to store food properly

Dr. Harlan testified that she observed carcasses being stored on the ground and exposed to the weather (CX 13 at 2; Tr. 123-24). She also observed meat in freezers that was not protected against spoilage and toxic chemicals stored on a freezer (CX 13 at 2; Tr. 125-26, 131).

Mr. Stephens acknowledged that Respondents had contaminated meat in the freezer (Tr. 367). However, he did not grasp the potential hazards associated with storing food in close proximity to toxic chemicals (Tr. 366-68). Mr. Stephens testified that he does not store carcasses on the ground, but they have to go somewhere (Tr. 393). This testimony illustrates Mr. Stephens inconsistent statements concerning the care and housing of Respondents' animals.

f. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed two camels standing in deep mud (CX 13 at 3, CX 17; Tr. 126, 133-34). She was concerned because camels are desert animals whose feet are not designed for mud (CX 17; Tr. 126, 133-34). Dr. Harlan also observed standing water and mud in several large cat pens (CX 13 at 3, CX 18; Tr. 126-27, 134-35).

Mr. Stephens acknowledged that there were drainage problems at Respondents'

facility (Tr. 345-48, 352).

g. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed several pens that were in need of cleaning (CX 13 at 3, CX 18, CX 20, CX 21, CX 23, CX 24; Tr. 127-29, 134-36, 139). The photographs taken during the February 9, 1998, inspection clearly show a failure to adequately clean animal enclosures (CX 18, CX 20, CX 21, CX 23, CX 24).

h. Failure to provide adequate pest control

Dr. Harlan testified that she observed evidence of rodent activity in the lower barn, the upper barn, and the big cat area (CX 13 at 3, CX 25; Tr. 129, 139-40). Dr. Harlan was concerned because the steps Respondents had taken to control the rodent activity were insufficient for the size of Respondents' facility (Tr. 130).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

3. The APHIS Inspection on March 23, 1998

On March 23, 1998, Dr. Harlan inspected Respondents' facility and found that the facility did not comply with the Animal Welfare Act and the Regulations and Standards (CX 27-CX 41; Tr. 142-65).

a. Failure to maintain proper records

Dr. Harlan testified that the deaths of several of Respondents' animals were not recorded in Respondents' records (CX 27 at 1; Tr. 144). Respondents also had animals in the facility that were not recorded in Respondents' records (Tr. 144-45).

Mr. Stephens did not dispute the recordkeeping deficiencies identified during the March 23, 1998, inspection.

b. Failure to have structurally sound housing facilities

Dr. Harlan testified that she observed broken wires in the liger pen and loose metal sheets and exposed nails in the llama shelter (CX 27 at 1-2, CX 34, CX 35; Tr. 146-47, 161-63).

Mr. Stephens acknowledged that there were broken wires in the liger pen which he repaired (Tr. 377-78). He did not address the loose metal sheets and exposed

nails in the llama shelter.

c. Failure to provide adequate space for animals

Dr. Harlan testified that she observed two tiger cubs in an enclosure that had inadequate space (CX-27 at 2, CX 39; Tr. 147-48, 164, 248-49).

Mr. Stephens acknowledged that the two tiger cubs were in an enclosure that did not provide adequate space (Tr. 396).

Dr. Lewandowski testified that even if the tiger cubs were placed in the enclosure depicted in CX 39 temporarily while their primary enclosures were being cleaned, the enclosure depicted in CX 39 was too small and he would have put the cubs in a larger temporary enclosure (Tr. 303-04).

d. Failure to store food properly

Dr. Harlan observed a bottle of bleach stored with the feed storage containers in the lower barn (CX 27 at 2; Tr. 148). Dr. Harlan also observed problems with three freezers, the most serious of which was the one in the upper garage which had badly decayed and decomposing meat in it (CX-27 at 2, CX 36; Tr. 148-49, 163).

Mr. Stephens acknowledged that Respondents had contaminated meat in the freezer (Tr. 367).

e. Failure to remove and dispose of animal waste

Dr. Harlan testified that the large pile of manure located by the upper barn that was cited during the February 9, 1998, inspection had not been removed (CX 27 at 2, CX 37; Tr. 149-50, 163-64).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

f. Failure to provide adequate drainage for housing facilities

Dr. Harlan testified that she observed two Watusi cattle that could not reach

their food or water without wading through deep mud (CX 27 at 2, CX 38; Tr. 150, 164).

Mr. Stephens acknowledged that there were drainage problems at Respondents' facility (Tr. 345-48, 352).

g. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed the feed for the camels and some other hoof stock that was exposed to the weather (CX 27 at 3; Tr. 151). Dr. Harlan was concerned because continued exposure to weather causes the feed to become moldy and contaminated (Tr. 151).

Dr. Lewandowski testified concerning some of Respondents' poor feeding practices and what Respondents could have done to improve them (Tr. 299-300).

h. Failure to adequately clean animal enclosures

Dr. Harlan testified that she observed feces on the top of the shelter in one tiger pen (CX 27 at 3, CX 40; Tr. 152, 164-65). She also observed a pig pen that was in need of cleaning (CX 27 at 3, CX 41 at 1; Tr. 152, 165). The photographs taken during the March 23, 1998, inspection clearly show enclosures that were not kept clean (CX 40, CX 41 at 1).

i. Failure to provide adequate pest control

Dr. Harlan testified that she observed several rodent holes in the lower barn feed storage room (CX 27 at 3, CX 41 at 2; Tr. 152-53, 165). She testified further that Respondents' pest control activities were insufficient to keep the rodent population at a minimal level (Tr. 153).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

j. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several goats and a llama that were in need of hoof trimming (CX 27 at 3, CX 33; Tr. 153, 159-61). She also observed that the tiger named "Timberland" was still limping and that Mr. Stephens had no records indicating that the animal was examined or treated by a veterinarian (CX 27 at 3; Tr. 153-54). Two of the three reindeer that were identified on the February 9, 1998, inspection as being very thin had died, and the surviving reindeer was very

thin and in need of immediate veterinary care (CX 27 at 3, CX 28 at 1, CX 32; Tr. 154-56, 159). Finally, Dr. Harlan observed a camel that was extremely thin and in need of immediate veterinary care (CX 27 at 3, CX 28 at 1, CX 31; Tr. 154-56, 158-59). Dr. Harlan was so concerned for the animals' health that she served a Notice of Intent to Confiscate Animals on Respondents (CX 27 at 5-6, CX 28; Tr. 155-57).

Mr. Stephens testified that he did not think anything was wrong with the camel. He thought the animal was in rut. (Tr. 417.) However, he failed to confirm his belief with a veterinarian because he thought that if he called the veterinarian every time something was wrong, the veterinarian would think he was "half nuts" (Tr. 417). Mr. Stephens testified that he sought veterinary care for the reindeer (Tr. 365). However, Respondents' veterinarian did not appear as a witness at the hearing, and Respondents did not produce any records indicating that the reindeer had received care.

Dr. Lewandowski testified that the photographs taken of the camel and reindeer showed the camel to be in a very debilitated condition and the reindeer to be in a critical state requiring intensive care (CX 31, CX 50; Tr. 285-87).

4. The APHIS Inspection on March 25, 1998

On March 25, 1998, Dr. Harlan inspected Respondents' facility and found violations of the Animal Welfare Act and the Regulations and Standards (CX 42-CX 47, CX 51; Tr. 167-74).

a. Failure to remove and dispose of animal waste

Dr. Harlan testified that the large pile of manure located by the upper barn that was cited during the February 9, 1998, and March 23, 1998, inspections had not been removed (CX 42 at 1, CX 45; Tr. 168-69).

Mr. Stephens testified that Respondents have had a manure pile for 8 or 10 years and never had a problem with it (Tr. 371-72). He also testified that waste disposal depends on what day it is and how the weather is (Tr. 361).

Dr. Lewandowski testified that a manure pile of the size maintained by Respondents would have an impact on Respondents' entire facility (Tr. 312). He also testified that rats and mice gravitate to manure piles because they are warm and that there were plenty of rats and mice and evidence of rats and mice in the areas in which Respondents housed the male Bactrian camel and reindeer (Tr. 313).

b. Failure to provide adequate pest control

Dr. Harlan testified that she observed fresh rodent holes in the lower barn feed storage room (CX 42 at 1, CX 47; Tr. 169, 174).

Mr. Stephens acknowledged that Respondents' pest control program was "[m]aybe not really effective" (Tr. 360).

c. Failure to provide wholesome and uncontaminated food

Dr. Harlan testified that she observed baler twine mixed with the hay in the reindeer's pen (CX 42 at 1, CX 46; Tr. 170, 173-74). She testified that many animals do eat string, and if the animal had ingested the string, it could cause serious intestinal damage and lead to the animal's death (Tr. 170). Mr. Stephens agreed with Dr. Harlan that the string was in the animal feed and that it should not have been in the animal feed (Tr. 397).

d. Failure to provide adequate veterinary care

Dr. Harlan testified that she observed several goats and a llama that were cited as in need of hoof trimming during the March 23, 1998, inspection that were still in need of hoof trimming (CX 42 at 2; Tr. 170). She also observed some sheep that were in need of hoof trimming (Tr. 170). In addition, Dr. Harlan was very concerned about the condition of the one surviving reindeer and the male camel (Tr. 171). Although the animals had been examined, Mr. Stephens was not providing veterinary care to the animals that were in critical condition (CX 42 at 2, CX 44; Tr. 171-73).

Mr. Stephens testified that sometimes he makes mistakes and sometimes he does not get around to trimming Respondents' animals' hooves (Tr. 369-70). He admitted that not trimming Respondents' animals' hooves could cause injury to their health (Tr. 370). He testified further that he thought the camel was eating, but did not think anything was wrong with the camel because he thought the camel was in rut (Tr. 374, 417). Mr. Stephens did not take any steps to confirm that the camel was in rut (Tr. 417).

Dr. Lewandowski testified that he conducted an examination of the camel and reindeer during the March 25, 1998, inspection (CX 43; Tr. 281). He testified that both animals were in extremely poor condition (Tr. 282). The humps on the camel were so severely depleted of fat that both of the camel's humps were flattened laterally against the side of his body (Tr. 283). Dr. Lewandowski stated that the camel "was in very, very poor condition" (CX 31; Tr. 283, 285-86), and the

reindeer was in worse condition than the camel (CX 50; Tr. 283-84, 286-87).

e. Failure to allow APHIS to conduct a complete inspection

Dr. Harlan testified that, during the March 25, 1998, inspection, Mr. Stephens returned home and informed her that she could not complete the inspection (CX 42 at 2, CX 51; Tr. 171-72).

Mr. Stephens testified that he agrees with the regulation that authorizes APHIS officials to inspect an exhibitor's facility, but he believed that Dr. Harlan was harassing him by coming back to view the condition of Respondents' animals (Tr. 421). I disagree. Dr. Harlan specifically denied having any animosity towards Mr. Stephens or engaging in any acts of harassment against him (Tr. 247), and I am unable to conclude that Dr. Harlan was harassing Respondents.

5. The APHIS Inspection on March 30, 1998

On March 30, 1998, Dr. Harlan inspected Respondents' facility and found violations of the Animal Welfare Act and the Regulations (CX 48-CX 50, CX 52, CX 53; Tr. 174-88).

a. Failure to allow APHIS to conduct a complete inspection

Dr. Harlan testified that Mr. Stephens would not permit her to conduct a complete inspection of Respondents' facility (CX 48, CX 52; Tr. 176-77). Mr. Stephens limited Dr. Harlan's inspection to examination of the camel and reindeer (CX 48, CX 52; Tr. 175-77).

Mr. Stephens testified that he agrees with the regulation that authorizes APHIS officials to inspect an exhibitor's facility, but he believed that Dr. Harlan was harassing him by coming back to view the condition of Respondents' animals (Tr. 421). Dr. Harlan specifically denied having any animosity towards Mr. Stephens or engaging in any acts of harassment against him (Tr. 247), and I am unable to conclude that Dr. Harlan was harassing Respondents.

b. Failure to provide adequate veterinary care

Dr. Harlan testified that the camel remained very thin to the point of emaciation (CX 48 at 1, CX 49; Tr. 175, 178-79). The reindeer was very thin with rapid respirations that were very shallow (CX 48 at 1, CX 50; Tr. 176, 179).

III. Sanctions

The record establishes that Respondents were given notice of the deficiencies at their facility and ample opportunity to correct them (CX 1, CX 13, CX 27-CX 30, CX 42, CX 48, CX 51, CX 52). APHIS employees conducted or attempted to conduct five inspections of Respondents' facility during the period December 10, 1997, through March 30, 1998. During each inspection, APHIS employees pointed out deficiencies to Mr. Stephens and made recommendations on corrections (CX 1, CX 13, CX 27-CX 30, CX 42, CX 48, CX 51, CX 52). After each inspection, APHIS employees prepared an inspection report and gave Respondents a copy of the inspection report (Tr. 423). Each inspection report served as a written notice to Respondents that the APHIS employees found that certain items were not in compliance with the Animal Welfare Act and the Regulations and Standards (Tr. 88-89). APHIS employees discussed the Animal Welfare Act with Mr. Stephens and spent time educating him as to the requirements of the Animal Welfare Act and the Regulations and Standards (Tr. 85).

I find that the APHIS employees who testified regarding their inspections of Respondents' facility were credible and did not exaggerate and their testimonies were often supported by photographs.

An act is "willful" under the Administrative Procedure Act (5 U.S.C. § 558(c)) if the violator "(1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). The record establishes that Respondents' violations of the Animal Welfare Act and the Regulations and Standards were willful.

Respondents' chronic failure to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months presents an obvious and careless disregard of the statutory and regulatory requirements. When an Animal Welfare Act licensee disregards statutory and regulatory requirements over such a period of time, the licensee's violations are clearly willful.

The 34 willful violations committed by Respondents warrant a substantial sanction. All of Respondents' violations are regarded as serious by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Tr. 321). Many of Respondents' violations exposed their animals to the risk of serious illness and death.

Section 19(b) of the Animal Welfare Act, with respect to the assessment of a civil penalty, provides, as follows:

> The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

With regard to the size of Respondents' business, the evidence shows that Respondents have a business of significant size (Tr. 53). Mr. Stephens testified that Respondents have between 120 and 150 animals and that Respondents exhibit elephants, camels, reindeer, alpacas, llamas, potbellied pigs, lions, tigers, cougars, and numerous other animals (Tr. 338, 370). In 1997, Mr. Stephens earned $20,000 from his exhibition activities (Tr. 384-86).

The gravity of Respondents' violations is clearly evident. For example, Respondents' failures to provide veterinary care for the animals in need of care are very serious violations (Tr. 321). Respondents chronically failed to comply with the Animal Welfare Act and the Regulations and Standards during the period December 10, 1997, through March 30, 1998 (Tr. 321-22). Moreover, during the March 25, 1998, and March 30, 1998, inspections, Mr. Stephens refused to allow APHIS officials to conduct a complete inspection of Respondents' facility, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). Respondents' refusals to allow APHIS officials to complete inspections of their facility are very serious violations because they thwart the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act.

Respondents' conduct over a period of almost 4 months reveals consistent disregard for, and unwillingness to, abide by the requirements of the Animal Welfare Act and the Regulations and Standards. As Dr. Goldentyer, Eastern Regional Director, Division of Animal Care, APHIS, USDA, testified, "[i]t's also serious because the facility was given opportunities to comply and did not." (Tr. 321.)

An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act. The record in this proceeding establishes that Respondents committed 34 violations of the Animal Welfare Act and the Regulations and Standards.

The administrative officials responsible for administration of the Animal Welfare Act and day-to-day supervision of the Animal Welfare program recommend that I order that Respondents cease and desist from violating the Animal Welfare Act and the Regulations and Standards, assess Respondents a $32,000 civil penalty, and permanently disqualify Respondents from obtaining an Animal Welfare Act license (Complainant's Brief at 19-22). USDA's current

sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[3]

The administrative officials base their sanction recommendation on the 39 violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint. I reject their recommendation of a $32,000 civil penalty and assess only a $27,800 civil penalty because I find that Complainant failed to prove five of the violations alleged in the Complaint.

The purpose of an administrative sanction is deterrence rather than punishment. This case involves serious violations and chronic noncompliance with the Animal Welfare Act and the Regulations and Standards. APHIS employees made numerous attempts to educate Mr. Stephens to the requirements of the Animal Welfare Act and the Regulations and Standards. Mr. Stephens was recalcitrant and refused to comply with the Animal Welfare Act and the Regulations and Standards over a period of almost 4 months. Congress enacted the Animal Welfare Act and

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[3]*In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 91 (Dec. 14, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 67-68 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

charged the Secretary of Agriculture with enforcing it. USDA has limited resources available for enforcement of the Animal Welfare Act and relies heavily on the deterrent effect disciplinary proceedings and sanctions have on regulated individuals (Tr. 319-20, 322). The sanctions recommended by administrative officials, as modified to reflect my finding that Complainant failed to prove five of the violations alleged in the Complaint, are necessary to dissuade Respondents and others from committing the same or similar violations.

Section 19(b) of the Animal Welfare Act authorizes the assessment of a maximum civil penalty of $2,500 per violation (7 U.S.C. § 2149(b)). Therefore, under the Animal Welfare Act, Respondents could be assessed a maximum of $85,000 for Respondents' 34 violations of the Animal Welfare Act and the Regulations and Standards.

I agree with Complainant that, in addition to the assessment of a civil penalty, Respondents should be ordered to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and should be permanently disqualified from obtaining an Animal Welfare Act license.[4]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise four issues in Respondents' Appeal to the Judicial Officer [hereinafter Appeal Petition]. First, Respondents contend that the ALJ's permanent disqualification of Respondents from obtaining an Animal Welfare Act license is unfair and unjust. In support of their contention, Respondents assert that there are no similar cases in which a person was permanently disqualified from obtaining an Animal Welfare Act license, Respondents were cited for violating the veterinary care requirements only with respect to five animals (three reindeer, one camel, and one tiger), APHIS did not confiscate any of Respondents' animals, Respondents attempted to correct all of the violations found by APHIS employees, and none of Respondents' violations rise to willful defiance of USDA. (Appeal Pet. at 1-2.)

I disagree with Respondents' contention that their permanent disqualification from obtaining an Animal Welfare Act license is unfair and unjust. Respondents' assertion that there are no similar cases in which a respondent was permanently disqualified from obtaining an Animal Welfare Act license is incorrect. In the past, USDA has permanently disqualified dealers and exhibitors from obtaining Animal Welfare Act licenses or permanently revoked dealers' and exhibitors' Animal

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[4]See *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-45 (Nov. 18, 1998).

Welfare Act licenses for the kind of violations that I find Respondents committed.[5]

Further, Respondents' assertion that they were cited for failure to provide veterinary care for only five animals is incorrect. Respondents failed to provide veterinary care to the following animals in need of veterinary care, in violation of section 2.40 of the Regulations (9 C.F.R. § 2.40): (1) on December 10, 1997, a yak, a tiger, and a reindeer (CX 1 at 3); (2) on February 9, 1998, a bison, a tiger, and three reindeer (CX 13 at 4); (3) on March 23, 1998, several goats, a llama, a tiger, a reindeer, and a camel (CX 27 at 3); (4) on March 25, 1998, several goats, a llama, several sheep, a camel, and a reindeer (CX 42 at 2); and (5) on March 30, 1998, a camel and a reindeer (CX 48 at 1).

I agree with Respondents' assertion that APHIS did not confiscate their animals. However, the record reveals that during the March 23, 1998, inspection of Respondents' facility, two APHIS veterinary medical officers, Drs. Harlan and Hammel, examined a reindeer and a camel which they found met the requirements in 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.129(a) for confiscation (CX 28 at 1, CX 29 at 1) and that Drs. Harlan and Hammel issued a Notice of Intent to Confiscate Animals (CX 27 at 5-6). Moreover, APHIS' failure to confiscate Respondents' animals is not a basis for finding that permanent disqualification of Respondents from obtaining an Animal Welfare Act license is unfair and unjust.

The record does not establish that Respondents "attempted" to correct all of the violations found by APHIS employees. Even if I found that Respondents had successfully corrected all of the violations immediately after they were identified by APHIS employees, a correction does not eliminate the fact that the violation

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[5]*See, e.g.*, *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (assessing a $20,000 civil penalty against the respondent and permanently disqualifying the respondent from obtaining an Animal Welfare Act license for 33 violations of the Animal Welfare Act and the Regulations); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (assessing a $200,000 civil penalty against the respondent and revoking the respondent's Animal Welfare Act license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (assessing a $3,000 civil penalty against the respondent and permanently disqualifying the respondent from obtaining an Animal Welfare Act license for three violations of the Animal Welfare Act and the Regulations); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (assessing a $26,000 civil penalty against the respondent and revoking the respondent's Animal Welfare Act license for 51 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

occurred.[6]

Finally, while I am uncertain of the meaning of Respondents' assertion that none of their violations "rise to the level of willful defiance of USDA," I find that Respondents' 34 violations of the Animal Welfare Act and the Regulations and Standards were willful.[7]

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[6]*In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, No. 98-3100 (3d Cir. 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

[7]An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 95 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 32 (Nov. 18, 1998); *In re Richard Lawson*, 57 Agric. Dec. ___, slip op. at 71-72 (Oct. 15, 1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or

(continued...)

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[8] While there is no provision in the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151) authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[9] and there are numerous instances

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[7](...continued)
not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondents' violations would still be found willful.

[8]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[9]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-41 (Nov. 18, 1998); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); (continued...)

in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[10] Therefore, the ALJ's permanent disqualification of Respondents from obtaining an Animal Welfare Act license was warranted in law.

Moreover, Respondents' permanent disqualification from obtaining an Animal Welfare Act license is not unfair and unjust. This case involves extremely serious, willful violations of the Animal Welfare Act and the Regulations and Standards by Respondents who have not displayed good faith. Respondents have a history of previous violations of the Animal Welfare Act and the Regulations and Standards.[11]

The permanent disqualification of Respondents from obtaining an Animal Welfare Act license was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Complainant's Brief at 21) and is in accord with USDA's sanction policy, which is set forth in *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Second, Respondents contend that the ALJ erroneously allowed Dr. Lewandowski to testify "beyond the bounds of his personal experience and beyond

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[9](...continued)
In re Mary Bradshaw, 50 Agric. Dec. 499, 507 (1991).

[10]See *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed at the time the order imposing the sanction was issued); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying the respondents from obtaining an Animal Welfare Act license for 2 years where the respondents had previously voluntarily terminated their Animal Welfare Act license and were not licensed on the date the disqualification order was issued); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for 1 year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for 1 year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

[11]The ongoing pattern of violations of the Animal Welfare Act and the Regulations and Standards during the period of December 10, 1997, through March 30, 1998, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

the bounds of the testimony referred to on the witness list" (Appeal Pet. at 3). Respondents allege that Dr. Lewandowski's testimony that was beyond the bounds of his personal observations harmed Respondents and contend that the civil penalty assessed against Respondents and the permanent disqualification of Respondents from obtaining an Animal Welfare Act license, should be modified to "reinstatement of license" (Appeal Pet. at 3).

Specifically, Respondents contend that the ALJ's denial of two objections (Tr. 288, 306) are error. First, Respondents objected to a question posed by Complainant's counsel to Dr. Lewandowski regarding CX 2 (pictures of deer carcasses in Respondents' large cat area taken during the December 10, 1997, inspection of Respondents' facility), as follows:

[BY MR. MARTIN:]

Q. Doctor, you have testified here today that you are familiar with the proper methods of caring for and feeding exhibition animals?

[BY DR. LEWANDOWSKI:]

A. Yes.

Q. I was wondering if you could take a look at some photographs, and I would like to ask you for your opinion --

A. Sure.

Q. -- concerning those photographs. Would you please take a look at Complainant's Exhibit CX-2, please?

A. Two?

Q. Two. In particular, I would like you to look at photographs --

MR. HARTLEY: Excuse me. I would like to object to this testimony as it goes outside the scope of his affidavit if this is regarding feeding of tigers and lions. He did not write any affidavit regarding the feeding of tigers and lions and cats.

MR. MARTIN: Your Honor, the witness has testified that he has

extensive experience in the care, handling, feeding, nutrition of exhibition animals, and I think as long as we have this witness here who obviously has a lot of expertise that he could share with the Court, I think we should get his opinion concerning some of the methods that were employed at Mr. Stephens' facility because Mr. Hartley has raised the issue that USDA is taking extreme interpretations of some of these regulations.

JUDGE BERNSTEIN: I do not think this witness is limited to any affidavit that he may have submitted in the scope of his testimony.

MR. HARTLEY: Okay. Then I would like to voir dire him regarding his experience with cats just real quick.

JUDGE BERNSTEIN: All right.

He is going to ask you some questions about your experience.

THE WITNESS: Okay.

VOIR DIRE EXAMINATION

BY MR. HARTLEY:

Q. What education do you have regarding exotic animals, including lions and tigers?

A. As I mentioned before, my training was in zoo and wildlife medicine, exotic animal medicine, at the University of Pennsylvania and the Philadelphia Zoo.

The Philadelphia Zoo at that time maintained approximately 30 cats ranging in size from the small exotic cats, such as ocelot, all the way through jaguar, leopard, lions and tigers.

The zoo in Detroit, we maintained --

Q. I am sorry. So you were involved in maintenance and treatment of those animals?

A. Oh, yes.

MR. HARTLEY: That is all the questions I have.

JUDGE BERNSTEIN: Are you satisfied --

MR. HARTLEY: Yes.

JUDGE BERNSTEIN: -- that he has expertise in this field?

MR. HARTLEY: Yes, I am. Yes.

JUDGE BERNSTEIN: Okay. Continue, Mr. Martin.

DIRECT EXAMINATION RESUMED

Tr. 287-89.

Section 1.141(h)(2)(i) of the Rules of Practice (7 C.F.R. § 1.141(h)(2)(i)) provides that if a party objects to the admission of any evidence and the administrative law judge overrules the objection, an automatic exception will follow. However, based on Respondents' counsel's voir dire examination of Dr. Lewandowski and the colloquy between the ALJ and Respondents' counsel after the voir dire examination (Tr. 289), I find that Respondents withdrew the objection at Tr. 288.

Nonetheless, Respondents again objected to Dr. Lewandowski's testimony regarding some of the photographs taken of Respondents' facility during the December 10, 1997, and March 23, 1998, inspections of Respondents' facility and Dr. Lewandowski's testimony regarding proper animal facility operation,[12] as follows:

> MR. HARTLEY: Again, I would request that his testimony regarding all the photographs and what he feels a farm should be like to be stricken, being that we were not given prior notice of his testimony regarding those

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[12]Complainant's counsel elicited testimony from Dr. Lewandowski regarding the following photographs: CX 2 at 1-2, CX 5, CX 6 at 3-4, CX 7, CX 8, CX 9 at 1, CX 12 at 2-3, CX 37, and CX 39. Dr. Lewandowski testified as to whether the photographs depicted the proper operation of an animal facility and the proper care of animals and the methods by which to improve animal facility operation and animal care. (Tr. 289-304.)

issues.

JUDGE BERNSTEIN: I have considered your application, and it is denied.

MR. HARTLEY: Okay.

JUDGE BERNSTEIN: We are here to make a complete record, and to that end I have accepted his testimony on the issues.

MR. HARTLEY: Okay.

Tr. 306.

The record reveals that Dr. Lewandowski did not participate in the December 10, 1997, and March 23, 1998, inspections of Respondents' facility. Further, Dr. Lewandowski's participation in the March 25, 1998, inspection was limited to an examination of the condition of Respondents' adult male Bactrian camel and adult female reindeer and the feed that Respondents provided to the male Bactrian camel (CX 43; Tr. 281-87, 307-08). However, the record reveals that Dr. Lewandowski is an expert in the field of care, handling, feeding, and nutritional requirements of exhibition animals, such as Respondents' animals (Tr. 279-81). Respondents offered to stipulate that Dr. Lewandowski is a veterinary care expert (Tr. 280) and agreed with the ALJ that Dr. Lewandowski is an expert "regarding exotic animals, including lions and tigers" (Tr. 289) and an expert with respect to the "other matters" at issue in the proceeding (Tr. 294-95).

The Administrative Procedure Act provides, with respect to the admission of evidence, that:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

. . . .

(h) *Evidence*—(1) *In general*. . . .

. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Dr. Lewandowski's expert testimony regarding the conditions depicted in photographs taken at Respondents' facility during the December 10, 1997, and March 23, 1998, inspections of Respondents' facility is material, relevant, not unduly repetitious, and the type of evidence upon which responsible persons are accustomed to rely. Therefore, I do not find that the ALJ erred by allowing Dr. Lewandowski to testify about conditions at Respondents' facility on December 10, 1997, and March 23, 1998, based upon Dr. Lewandowski's observation of pictures of conditions at Respondents' facility on December 10, 1997, and March 23, 1998.

Third, Respondents contend that the ALJ's findings of fact and conclusions of law are error. Specifically, Respondents contend that the ALJ erroneously found that Respondents failed to provide animals with wholesome and uncontaminated food and that the ALJ erroneously found that Respondents failed to provide veterinary care to animals in need of care on February 9, 1998. (Appeal Pet. at 4.)

The ALJ concluded that Respondents failed to provide animals with wholesome and uncontaminated food on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, in violation of section 3.129(a) of the Standards (9 C.F.R. § 3.129(a)) (Initial Decision and Order at 3-6, 8-11; Findings of Fact Nos. 7E, 9E, 12E, 15E; Conclusions of Law Nos. 5E, 7E, 10E, 13E). Respondents contend that the ALJ based his conclusions that Respondents violated 9 C.F.R. § 3.129(a) on findings that Respondents fed road kill that was not fit for consumption to their animals. Respondents assert that the evidence establishes that Respondents obtained road kill to feed to their animals, but did not feed their animals any road kill that was not fit for consumption.

Respondents are correct that there is some evidence that Respondents examined the road kill that they obtained and disposed of at least some of the road kill that was decomposing and not fit for consumption by their animals (Tr. 339-40). However, the record establishes that on February 9, 1998, Respondents fed their animals carcasses that were decomposing and not wholesome (CX 20 at 3-4; Tr.

121, 136).

In any event, the ALJ did not base his conclusions that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, March 23, 1998, and March 25, 1998, on the state of decomposition of carcasses which Respondents fed to their animals (Initial Decision and Order at 15-16, 23, 25), and the ALJ's conclusion that Respondents violated 9 C.F.R. § 3.129(a) on February 9, 1998, is based only in part on Dr. Harlan's observation that "several carcasses being fed to the large cats . . . were black and not fresh" (Initial Decision and Order at 19). Therefore, I find that Respondents' assignment of error regarding the ALJ's conclusions that on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, Respondents violated 9 C.F.R. § 3.129(a), is misplaced. Complainant proved by a preponderance of the evidence that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998. Even if I found that Respondents examined each road kill carcass and did not feed any decomposing carcass to their animals, that finding would not be a basis for concluding that the ALJ's conclusions that Respondents violated 9 C.F.R. § 3.129(a) on December 10, 1997, February 9, 1998, March 23, 1998, and March 25, 1998, were error.

Respondents also contend that the ALJ's conclusion that on February 9, 1998, Respondents failed to provide veterinary care to animals in need of care, in violation of 9 C.F.R. § 2.40, is error. Specifically, Respondents contend that the ALJ ignored the "admission" on CX 13 that the reindeer did receive veterinary care and that the violations either did not occur or were not as severe as stated by the ALJ. (Appeal Pet. at 4.)

While CX 13 does state that Respondents' reindeer had been examined by a veterinarian on December 22, 1997, CX 13 also states that the reindeer, as well as other animals, were in need of veterinary care, as follows:

> **Category IV: Non-compliant item(s) previously identified that have not been corrected.**
>
> . . . .
>
> 2.40(b) Veterinary Care - Lower barn - there was a goat with an abscess on the right jaw. This needs examined and treated by the facility veterinarian. Note: this goat is improved[.]
>
> There was a yak in the lower barn with an excessive number of burrs and mats caught in its coat. It needs clipped to remove this debris. This animal is improved but, there is a young bison in the lower barn who now needs a large mat of burrs and knots removed.
>
> Large cat area - Tiger (Timberland) was tender on his front paws. He

> favors the left one more, but is sensitive on both. Needs examined by the veterinarian.
> All three reindeer were thin and in need of hoof trimming. The hind feet were especially long. The veterinarian that cares for the hoof stock did not examine the goat or reindeer until 12/22/97 - correction date was 12/11/97. The veterinarian for the big cats did not examine the tiger "Timberland" he prescribed treatment over the phone. Mr. Stephens indicated that he treated the animal for about ten days after our last inspection on 12/10/97. Mr Stephens has not gotten back to his vet to inform him that the cat continues to limp.

CX 13 at 4.

Further, Dr. Harlan testified regarding the veterinary care violations which she observed on February 9, 1998, as follows:

> [BY MR. MARTIN:]
>
> Q. Any other veterinary care deficiencies?
>
> [BY DR. HARLAN:]
>
> A. Yes, there were. We noted that -- we examined not only the animals that were -- we examined all the animals present, obviously, for veterinary care, but we made a special note of the animals that had been previously cited, to see how they had been treated and what was going on with them.
>
> As everything was not corrected on this, we listed the items that were improved as part of the non-compliance for category, a repeat non-compliance, so that we could identify the ones that still needed to be taken care of and that were still in non-compliance. So, the items that were, that Water Wheel Exotics was given credit for was the goat with the abscess on the right jaw. There was evidence that this animal was improved and was looking better. The yak in the lower barn had been clipped. There was another animal, though, in exactly the same condition with excessive build up of burrs in his coat, which was a young bison who also now needed to be clipped.
>
> The tiger, Timberland, was tender on his front paws and continued to be tender at this inspection and was favoring the left one, again, more.

We did talk to Mr. Stephens about this and he did indicate that it had been examined, or had not been examined, but Dr. Sheperd had prescribed treatment over the phone on 12/10, but he had not reported back to the veterinarian that the animal was still limping as of that time on February 9.

The three reindeer that we saw that day were all still very thin and still in need of hoof trimming. So, the veterinary care provisions remained unchanged.

Q. Doctor, how would you characterize those deficiencies?

A. Very serious for the animal's sake. The tiger, Timberland, for at least two months at this point, was still limping and very sore on his front feet, and had yet to be examined by a veterinarian. The three reindeer, there was no evidence of any work up or exam by the veterinarian to determine why they were thin and what was going wrong with them. They still had not had their feet trimmed, which would make them more comfortable and able to get around. Obviously, one animal had been clipped, but there was another animal in the exact same condition that now needed to be clipped.

It was an observed pattern of difficulties of the animals, with no real improvement occurring for the benefit of the animal.

The only real improvement was the abscess on the goat.

Q. And, did you express your concerns to Mr. Stephens?

A. Yes, I did.

Q. What did you tell him?

A. I told him again that these animals needed to be promptly examined by a veterinarian, appropriate work up for the reindeer that were thin to find out why and proper treatment needed to be provided to Timberland, the tiger with the sore feet. He needed to be examined, needed to have a determination of what was causing the tenderness and limping on those front feet.

Tr. 118-20.

Further still, pictures taken during the February 9, 1998, inspection of Respondents' facility depict the need for care of the bison's coat (CX 26 at 1-3), a thin reindeer (CX 26 at 4), and reindeer in need of hoof trimming (CX 26 at 4-6).

Mr. Stephens testified that the tiger, "Timberland," was being treated by a veterinarian, Dr. Sheperd (Tr. 369), but Dr. Sheperd did not testify, and Respondents did not produce any records indicating that the tiger had been treated. Moreover, Mr. Stephens agreed with Dr. Harlan's finding that the hoofs of the three reindeer needed trimming (Tr. 369).

I find that Complainant proved by a preponderance of the evidence that on February 9, 1998, Respondents failed to provide veterinary care to animals in need of care, in violation of 9 C.F.R. § 2.40, and the ALJ's conclusion that Respondents violated 9 C.F.R. § 2.40 on February 9, 1998, is not error.

Moreover, except with respect to the ALJ's conclusions that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998, I disagree with Respondents contention that the ALJ's findings of fact and conclusions of law are error. The ALJ bases his conclusion that Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 25, 1998, on Respondents' violation of each of these provisions of the Standards on the immediately preceding inspection, March 23, 1998, and Respondents' refusal to allow APHIS officials to conduct a complete inspection on March 25, 1998, to determine if these violations had been corrected (Initial Decision and Order at 27-28).

Complainant, as proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.[13] Complainant introduced no evidence which proves that Respondents' violations of 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 23, 1998, continued on March 25, 1998. Respondents' refusal to allow APHIS employees to complete the inspection of Respondents' facility on March 25, 1998, and the APHIS employees' inability on March 25, 1998, to determine if Respondents' violations of 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a) on March 23, 1998, had been corrected, is not proof that on March 25, 1998, Respondents violated 9 C.F.R. §§ 3.125(a), (c), .127(c), .128, and .131(a).

Fourth, Respondents contend that the civil penalty assessed by the ALJ against Respondents was excessive given the fact that Respondents' violations were not

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[13]See note 1.

severe and the financial state of Respondents. Respondents request that "the Judicial Officer . . . remove the fine." (Appeal Pet. at 4.)

While I have reduced the civil penalty assessed by the ALJ against Respondents, the reduction in the civil penalty is only based on my disagreement with the ALJ's conclusion that Respondents committed at least 39 violations of the Animal Welfare Act and the Regulations and Standards. However, I do not find that the ALJ's assessment of a $32,000 civil penalty against Respondents, based on the ALJ's finding of at least 39 violations, was "excessive," and I find no basis upon which to "remove" the civil penalty.

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[14] The Secretary of Agriculture has authority to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act or the Regulations and Standards (7 U.S.C. § 2149(b)); therefore, the ALJ's assessment of a $32,000 civil penalty against Respondents, based on the ALJ's finding of at least 39 violations of the Animal Welfare Act and the Regulations and Standards, was warranted in law.

Moreover, I disagree with Respondents' contention that the civil penalty assessed by the ALJ is excessive. This case involves extremely serious, willful violations of the Animal Welfare Act and the Regulations and Standards by Respondents who have not displayed good faith. Moreover, Respondents have a history of previous violations of the Animal Welfare Act and the Regulations and Standards.[15]

The civil penalty assessed by the ALJ was recommended by the administrative officials charged with the responsibility for achieving the congressional purpose of the Animal Welfare Act (Complainant Brief at 19-22) and is in accord with USDA's sanction policy, which is set forth in *In re S.S. Farms Linn County, Inc., supra*, 50 Agric. Dec. at 497.

Moreover, the civil penalty assessed by the ALJ against Respondents is well within the range of civil penalties assessed in these kinds of cases. USDA consistently imposes significant civil penalties for violations of the Animal Welfare Act and the Regulations and Standards.[16] I have reduced the $32,000 civil penalty

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[14]See note 8.

[15]See note 11.

[16]*See, e.g., In re Anna Mae Noell*, 58 Agric. Dec. ___ (Jan. 6, 1999) (imposing a $25,000 civil penalty and a revocation of license for 43 violations of the Animal Welfare Act and the Regulations

(continued...)

[16](...continued)
and Standards); *In re Judie Hansen*, 57 Agric. Dec. ___ (Dec. 14, 1998) (imposing a $4,300 civil penalty and a 30-day license suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (imposing a $20,000 civil penalty and permanent disqualification from obtaining a license for 33 violations of the Animal Welfare Act and the Regulations); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (imposing a $13,500 civil penalty and a 2-year disqualification from obtaining a license for 16 violations of the Animal Welfare Act and the Regulations and Standards); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a $2,000 civil penalty and a 7-day license suspension for 20 violations of the Animal Welfare Act and the Regulations and Standards); *In re John D. Davenport*, 57 Agric. Dec. 189 (1998) (imposing a $200,000 civil penalty and a revocation of license for 103 violations of the Animal Welfare Act and the Regulations and Standards), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (imposing a $1,500 civil penalty for one violation of the Regulations), *appeal docketed*, No. 98-70807 (9th Cir. July 10, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419 (1997) (imposing a $7,500 civil penalty and a 40-day license suspension for 15 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 98-3100 (3d Cir. Dec. 21, 1998) (unpublished); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (imposing a $3,000 civil penalty and permanent disqualification from obtaining a license for three violations of the Animal Welfare Act and the Regulations); *In re Dora Hampton*, 56 Agric. Dec. 1634 (1997) (Modified Order) (imposing a $10,000 civil penalty and permanent disqualification from obtaining a license for 13 violations of the Regulations and the Standards); *In re Fred Hodgins*, 56 Agric. Dec. 1242 (1997) (imposing a $13,500 civil penalty and a 14-day license suspension for 54 violations of the Animal Welfare Act and the Regulations and Standards), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Julian J. Toney*, 56 Agric. Dec. 1235 (1997) (Decision and Order on Remand) (imposing a $175,000 civil penalty and license revocation for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997) (imposing a $51,250 civil penalty and a 60-day license suspension for 75 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Patrick D. Hoctor*, 56 Agric. Dec. 416 (1997) (Order Lifting Stay Order and Decision and Order) (imposing a $1,000 civil penalty and a 15-day license suspension for eight violations of the Animal Welfare Act and the Regulations and Standards); *In re John Walker*, 56 Agric. Dec. 350 (1997) (imposing a $5,000 civil penalty and a 30-day license suspension for 10 violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (imposing a $26,000 civil penalty and a 10-year disqualification from obtaining a license for 32 violations of the Animal Welfare Act and the Regulations and Standards); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997) (imposing a $26,000 civil penalty and a revocation of license for 51 violations of the Animal Welfare Act and the Regulations and Standards), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (imposing a $2,500 civil penalty and a 1-year disqualification from obtaining a license for one violation of the Regulations and one violation of the cease and desist provisions of a Consent Decision); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107 (1996) (imposing a $6,750 civil penalty and 45-day license suspension for 36 violations of the Animal Welfare Act and the Regulations and Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (imposing a $5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act and the Regulations and Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (imposing a $2,000 civil penalty and 60-day license suspension for 24
(continued...)

assessed by the ALJ to $27,800 only because I find that Respondents committed 34 violations of the Animal Welfare Act and the Regulations and Standards, rather than at least 39 violations found by the ALJ.

Finally, a respondent's financial state is not a factor that is required by section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) to be considered in determining the amount of the civil penalty to assess against the respondent for violations of the Animal Welfare Act or the Regulations and Standards.[17] Therefore, Respondents' financial state is not relevant to the amount of the civil penalty assessed by the ALJ.

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

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[16](...continued)
violations of the Animal Welfare Act and the Regulations and Standards); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135 (1986) (imposing a $15,300 civil penalty and license revocation for numerous violations of the Regulations and the Standards); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840 (1985) (imposing a $1,000 civil penalty and license revocation for 10 violations of the Regulations and a previously issued cease and desist order), *appeal dismissed*, 786 F.2d 1168 (8th Cir.)(Table), *cert. denied*, 476 U.S. 1108 (1986).

[17]The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. *See In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 94 (Dec. 14, 1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 16 n.1 (Nov. 18, 1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating that a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to maintain a written program of adequate veterinary care under the supervision of a veterinarian and failing to provide adequate veterinary care to animals in need of care;

(b) Failing to provide a suitable method for the removal and disposal of animal and food wastes from the facility;

(c) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury and contain the animals securely;

(d) Failing to store food so as to adequately protect the food against deterioration, molding, or contamination by vermin;

(e) Failing to clean primary enclosures for animals, as required;

(f) Failing to establish and maintain an effective program for the control of pests;

(g) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(h) Failing to provide a method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to provide sufficient space for animals in enclosures;

(j) Failing to maintain records of the acquisition and disposition of animals, as required;

(k) Failing to provide animals with wholesome and uncontaminated food;

(*l*) Failing to adequately ventilate indoor housing facilities for animals; and

(m)Failing to allow APHIS officials to conduct complete inspections of all animals and facilities.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a civil penalty of $27,800, which is hereby suspended: *Provided, That* Respondents, after notice and opportunity for a hearing, are not found to have violated the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for the period of disqualification from becoming licensed under the Animal Welfare Act and the Regulations imposed in paragraph 3 of this Order.

3. Respondents are permanently disqualified from obtaining a license under

the Animal Welfare Act and the Regulations. The disqualification provision of this Order shall become effective upon service of this Order on Respondents.

4. Notwithstanding paragraph 3 of this Order, in order to facilitate the provision of care to Respondents' animals during the period of disqualification, Respondents may sell any animals which are under their control on the effective date of the disqualification provision of this Order. Respondents shall notify APHIS in writing at least 10 days prior to any sale and shall specify the species and identification number of each animal to be sold, the location of each animal to be sold, the prospective buyer of each animal to be sold, the time that each animal to be sold will be moved, and the method of transportation of each animal to be sold. This information shall be provided to: Dr. Elizabeth Goldentyer, Regional Director, Eastern Region; USDA, APHIS, ANIMAL CARE; 2568 A Riva Road, Suite 302, Annapolis, Maryland 21401-7400 (Telephone number: (410) 571-8692). This paragraph of the Order does not modify the disqualification of Respondents from becoming licensed under the Animal Welfare Act and the Regulations, as provided in paragraph 3 of this Order, in any other manner and shall not be construed as allowing Respondents to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

In re: JAMES E. STEPHENS and WATER WHEEL EXOTICS, INC.
AWA Docket No. 98-0019.
Order Denying Petition for Reconsideration filed June 18, 1999.

Petition for reconsideration — Expert witness testimony — Sanction — License disqualification.

The Judicial Officer denied Respondents' Petition for Reconsideration. The Judicial Officer held that: (1) Dr. Lewandowski's expert testimony regarding the conditions at Respondents' facility on December 10, 1997, solely based upon Dr. Lewandowski's observation of pictures which were taken of conditions at Respondents' facility during the December 10, 1997, inspection was proper; (2) that the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is warranted in law (7 U.S.C. § 2151) and justified by the facts in the proceeding; and (3) there was no basis for modifying the Order issued in *In re James E. Stephens*, 58 Agric. Dec. ___ (May 5, 1999).

Robert A. Ertman, for Complainant.
Matthew A. Hartley, Sewickley, Pennsylvania, for Respondents.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint on April 16, 1998.

The Complaint alleges that James E. Stephens and Water Wheel Exotics, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards. On May 11, 1998, Respondents filed Answer to Complaint in which they denied the material allegations of the Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing on October 6 and 7, 1998, in Pittsburgh, Pennsylvania. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Matthew A. Hartley, represented Respondents.

On December 14, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]; on December 22, 1998, Respondents filed Respondents' Post Hearing Written Submissions; on December 29, 1998, Respondents filed Respondents Reply Brief; and on January 4, 1999, Complainant filed Complainant's Reply Brief.

On January 29, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondents committed at least 39 willful violations of the Animal Welfare Act and the Regulations and Standards; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents a $32,000 civil penalty; and (4) permanently disqualifying Respondents from obtaining an Animal Welfare Act license (Initial Decision and Order at 7-12, 33-35).

On March 10, 1999, Respondents appealed to the Judicial Officer; on May 4, 1999, Complainant filed Complainant's Memorandum in Response to Appeal; and on May 5, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On May 5, 1999, I issued a Decision and Order: (1) concluding that Respondents committed 34 willful violations of the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents a $27,800 civil penalty; and (4) permanently disqualifying

Respondents from obtaining a license under the Animal Welfare Act and the Regulations. *In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 17-22, 67-70 (May 5, 1999).

On May 24, 1999, Respondents filed Respondents' Petition for Reconsideration of the Judicial Officer's Decision [hereinafter Petition for Reconsideration]; on June 4, 1999, Complainant filed Complainant's Memorandum in Response to Petition for Reconsideration; and on June 7, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the May 5, 1999, Decision and Order.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. § 2151.

Respondents raise four issues in their Petition for Reconsideration. First, Respondents contend my finding that Respondents withdrew their objection to Dr. Lewandowski's testimony is error, and the case should be remanded for hearing (Pet. for Recons. at 1-2).

Respondents objected to a question posed by Complainant's counsel to Dr. Lewandowski regarding Complainant's Exhibit 2 (pictures of deer carcasses in Respondents' large cat area taken during the December 10, 1997, inspection of Respondents' facility), as follows:

[BY MR. MARTIN:]

Q. Doctor, you have testified here today that you are familiar with the proper methods of caring for and feeding exhibition animals?

[BY DR. LEWANDOWSKI:]

A. Yes.

Q. I was wondering if you could take a look at some photographs, and I would like to ask you for your opinion --

A. Sure.

Q. -- concerning those photographs. Would you please take a look at Complainant's Exhibit CX-2, please?

A. Two?

Q. Two. In particular, I would like you to look at photographs --

MR. HARTLEY: Excuse me. I would like to object to this testimony as it goes outside the scope of his affidavit if this is regarding feeding of tigers and lions. He did not write any affidavit regarding the feeding of tigers and lions and cats.

MR. MARTIN: Your Honor, the witness has testified that he has extensive experience in the care, handling, feeding, nutrition of exhibition animals, and I think as long as we have this witness here who obviously has a lot of expertise that he could share with the Court, I think we should get his opinion concerning some of the methods that were employed at Mr. Stephens' facility because Mr. Hartley has raised the issue that USDA is taking extreme interpretations of some of these regulations.

JUDGE BERNSTEIN: I do not think this witness is limited to any affidavit that he may have submitted in the scope of his testimony.

MR. HARTLEY: Okay. Then I would like to voir dire him regarding his experience with cats just real quick.

JUDGE BERNSTEIN: All right.

He is going to ask you some questions about your experience.

THE WITNESS: Okay.

VOIR DIRE EXAMINATION

BY MR. HARTLEY:

Q. What education do you have regarding exotic animals, including lions and tigers?

A. As I mentioned before, my training was in zoo and wildlife medicine, exotic animal medicine, at the University of Pennsylvania and the Philadelphia Zoo.

The Philadelphia Zoo at that time maintained approximately 30 cats ranging in size from the small exotic cats, such as ocelot, all the way through jaguar, leopard, lions and tigers.

The zoo in Detroit, we maintained --

Q. I am sorry. So you were involved in maintenance and treatment of those animals?

A. Oh, yes.

MR. HARTLEY: That is all the questions I have.

JUDGE BERNSTEIN: Are you satisfied --

MR. HARTLEY: Yes.

JUDGE BERNSTEIN: -- that he has expertise in this field?

MR. HARTLEY: Yes, I am. Yes.

JUDGE BERNSTEIN: Okay. Continue, Mr. Martin.

DIRECT EXAMINATION RESUMED

Tr. 287-89.

Section 1.141(h)(2)(i) of the Rules of Practice (7 C.F.R. § 1.141(h)(2)(i)) provides that if a party objects to the admission of any evidence and the administrative law judge overrules the objection, an automatic exception will follow. However, based on Respondents' counsel's voir dire examination of Dr. Lewandowski and the colloquy between the ALJ and Respondents' counsel after the voir dire examination, I found that Respondents withdrew the objection at Tr. 288. *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 55.

Even if my finding that Respondents withdrew their objection at Tr. 288 is error, the error does not prejudice Respondents because, as I stated in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 55-57, the ALJ properly allowed Dr. Lewandowski's expert testimony regarding the conditions at Respondents' facility on December 10, 1997, solely based upon Dr. Lewandowski's observation of pictures which were taken of conditions at Respondents' facility during the December 10, 1997, inspection.

Second, Respondents contend the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is not supported by the facts and law, and Respondents' Animal Welfare Act license can only be suspended (Pet. for Recons. at 2-3).

A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[1] While there is no provision in

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[1]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 9 (Mar. 15, 1999); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order

(continued...)

the Animal Welfare Act that explicitly states that the Secretary of Agriculture is authorized to disqualify a person from becoming licensed, section 21 of the Animal Welfare Act (7 U.S.C. § 2151) authorizes the issuance of an order disqualifying an unlicensed violator from becoming licensed because of violations of the Animal Welfare Act, the Regulations, or the Standards,[2] and there are numerous instances in which the Secretary of Agriculture has exercised the authority to disqualify unlicensed violators from becoming licensed under the Animal Welfare Act.[3] Therefore, the permanent disqualification of Respondents from obtaining an Animal Welfare Act license is warranted in law.

Moreover, as fully explicated in *In re James E. Stephens, supra*, the permanent disqualification of Respondents from obtaining an Animal Welfare license is justified by the facts.

Respondents also assert that they were licensed under the Animal Welfare Act

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[1](...continued)
Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (1998) (Table), 1998 WL 863340 (2d Cir.), *cert. denied*, 119 S.Ct. 1575 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[2]*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 40-41 (Nov. 18, 1998); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 165 n.3 (1996); *In re James Petersen*, 53 Agric. Dec. 80, 86 (1994); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

[3]See *In re David M. Zimmerman*, 57 Agric. Dec. ___ (Nov. 18, 1998) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed at the time the order imposing the sanction was issued); *In re Richard Lawson*, 57 Agric. Dec. ___ (Oct. 15, 1998) (disqualifying the respondents from obtaining an Animal Welfare Act license for 2 years where the respondents had previously voluntarily terminated their Animal Welfare Act license and were not licensed on the date the disqualification order was issued), *appeal docketed*, No. 99-1476 (4th Cir. Apr. 13, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998) (imposing a 7-day suspension of the respondent's Animal Welfare Act license, but stating that if the respondent is not licensed when the order is issued, the respondent is disqualified from becoming licensed under the Animal Welfare Act for 7 days); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (permanently disqualifying the respondent from obtaining an Animal Welfare Act license where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (disqualifying the respondent from obtaining an Animal Welfare Act license for 1 year where the respondent was not licensed when the violations occurred or on the date the disqualification order was issued); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (prohibiting the respondents from obtaining an Animal Welfare Act license for 1 year where the respondents were not licensed when the violations occurred or on the date the disqualification order was issued).

during the inspections that are the subject of this proceeding. Respondents contend that, based on their status as an Animal Welfare Act licensee at the time the alleged violations occurred, permanent disqualification from becoming licensed under the Animal Welfare Act is not an appropriate sanction. (Pet. for Recons. at 2.)

I disagree with Respondents' contention that permanent disqualification from obtaining an Animal Welfare Act license is not appropriate because Respondents were licensed under the Animal Welfare Act during the inspections that are the subject of this proceeding. The Secretary of Agriculture's authority, under section 21 of the Animal Welfare Act (7 U.S.C. § 2151), to disqualify a violator from obtaining an Animal Welfare Act license is not affected by the violator's status as an Animal Welfare Act licensee at the time of an inspection or at the time the violator commits violations of the Animal Welfare Act.[4]

Third, Respondents request that I modify the Decision and Order to allow Respondents to notify the United States Department of Agriculture after the sale of their animals. Respondents contend that, without such a modification, Respondents will not be able to sell their animals to exhibitors and that the United States Department of Agriculture will not be harmed by receiving notice of a sale after the sale. (Pet. for Recons. at 3.)

Paragraph 4 of the Order in *In re James E. Stephens, supra*, provides that, notwithstanding Respondents' permanent disqualification from obtaining an Animal Welfare Act license, Respondents may sell any animals which are under their control on the date they are disqualified from obtaining an Animal Welfare Act license, but Respondents must notify the Animal and Plant Health Inspection Service in writing at least 10 days prior to any sale. *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 69-70.

The record establishes that Respondents committed serious, willful violations of the Animal Welfare Act and the Regulations and Standards over a period of 4 months. Many of Respondents' violations exposed Respondents' animals to the risk of serious illness and death. Respondents' sale of their animals may facilitate the proper care of Respondents' animals, and I do not want to impede Respondents' sale of their animals which are regulated under the Animal Welfare Act. Nonetheless, in order to ensure that any regulated animals which Respondents sell are handled in accordance with the Animal Welfare Act and the Regulations and Standards, I

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[4]Respondents make inconsistent statements regarding their status as an Animal Welfare Act licensee at the time I issued the May 5, 1999, Decision and Order (Pet. for Recons. at 2). However, the record establishes that Respondents did not renew their Animal Welfare Act license in 1998, and Respondents' Animal Welfare Act license expired on July 15, 1998 (Complainant's Exhibit 59, Complainant's Exhibit 60, and Tr. 323-26).

find that the Animal and Plant Health Inspection Service must be notified prior to the sale. Further, I find that Respondents' assertion that the required 10-day notice will prevent Respondents from selling their animals to exhibitors is speculative, and I find no basis for modifying paragraph 4 of the Order issued in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. 69-70.

Fourth, Respondents state that they make all arguments previously raised in Respondents' Appeal to the Judicial Officer, filed March 10, 1999, and request that "the fines be removed and that the Judicial Officer sign[] an order allowing . . . Respondents to obtain an [Animal Welfare Act] license" (Pet. for Recons. at 3). For the reasons set forth in *In re James E. Stephens, supra*, and except as explained in *In re James E. Stephens, supra*, 58 Agric. Dec. ___, slip op. at 62-63, 65-66, Respondents' arguments in Respondents' Appeal to the Judicial Officer are rejected, and I find no basis for the modification of the Order in *In re James E. Stephens, supra*.

For the foregoing reasons and the reasons set forth in *In re James E. Stephens, supra*, Respondents' Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[5]

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[5]*In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 9 (May 25, 1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 7 (May 6, 1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re*

(continued...)

Respondents' Petition for Reconsideration was timely filed and automatically stayed the May 5, 1999, Decision and Order. Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed May 5, 1999, is reinstated, with allowance for time passed.

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

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

(a) Failing to maintain a written program of adequate veterinary care under the supervision of a veterinarian and failing to provide adequate veterinary care to animals in need of care;

(b) Failing to provide a suitable method for the removal and disposal of animal and food wastes from the facility;

(c) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury and contain the animals securely;

(d) Failing to store food so as to adequately protect the food against deterioration, molding, or contamination by vermin;

(e) Failing to clean primary enclosures for animals, as required;

(f) Failing to establish and maintain an effective program for the control of pests;

(g) Failing to construct and maintain housing facilities for animals so that sufficient lighting is provided;

(h) Failing to provide a method for the rapid elimination of excess water from housing facilities for animals;

(i) Failing to provide sufficient space for animals in enclosures;

(j) Failing to maintain records of the acquisition and disposition of animals, as required;

(k) Failing to provide animals with wholesome and uncontaminated food;

(*l*) Failing to adequately ventilate indoor housing facilities for animals; and

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[5](...continued)
Andershock Fruitland, Inc., 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

(m)Failing to allow Animal and Plant Health Inspection Service officials to conduct complete inspections of all animals and facilities.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a civil penalty of $27,800, which is hereby suspended: *Provided, That* Respondents, after notice and opportunity for a hearing, are not found to have violated the Animal Welfare Act or the Regulations and Standards issued under the Animal Welfare Act for the period of disqualification from becoming licensed under the Animal Welfare Act and the Regulations imposed in paragraph 3 of this Order.

3. Respondents are permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations. The disqualification provision of this Order shall become effective upon service of this Order on Respondents.

4. Notwithstanding paragraph 3 of this Order, in order to facilitate the provision of care to Respondents' animals during the period of disqualification, Respondents may sell any animals which are under their control on the effective date of the disqualification provision of this Order. Respondents shall notify the Animal and Plant Health Inspection Service, in writing, at least 10 days prior to any sale and shall specify the species and identification number of each animal to be sold, the location of each animal to be sold, the prospective buyer of each animal to be sold, the time that each animal to be sold will be moved, and the method of transportation of each animal to be sold. This information shall be provided to: Dr. Elizabeth Goldentyer, Regional Director, Eastern Region; USDA, APHIS, ANIMAL CARE; 2568 A Riva Road, Suite 302, Annapolis, Maryland 21401-7400 (Telephone number: (410) 571-8692). This paragraph of the Order does not modify the disqualification of Respondents from becoming licensed under the Animal Welfare Act and the Regulations, as provided in paragraph 3 of this Order, in any other manner and shall not be construed as allowing Respondents to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: SWECK'S, INC.
EAJA-FSA Docket No. 99-0003.
Decision and Order filed March 22, 1999.

EAJA application — Statutory time limits — Prevailing party — Filing.

The Judicial Officer affirmed Hearing Officer James R. Holman's denial of an award of fees and other expenses sought by Applicant under the Equal Access to Justice Act (EAJA). The Judicial Officer held that the National Appeals Division's Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, which was not issued within the time limits provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2), was, nonetheless, the final National Appeals Division determination in *In re Sweck's, Inc.*, Case No. 98000135E, and effective. See generally *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). Based on the Director Review Determination, the Judicial Officer concluded that Applicant did not succeed on any significant issue or achieve any benefit which Applicant sought in *In re Sweck's, Inc.*, Case No. 98000135E; therefore, Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, and Applicant's request for fees and other expenses allegedly incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, must be denied.

Robert L. Purcell, for Respondent.
Gregory A. Andrews, Johnston, Iowa, for Applicant.
Initial decision issued by James R. Holman, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Sweck's, Inc. [hereinafter Applicant], instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Eastern Regional Office, on July 28, 1998. The National Appeals Division assigned Applicant's EAJA Application to James R. Holman, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], for his consideration (Letter from Norman G. Cooper to Guy R. Swecker, dated August 14, 1998).

Applicant alleges in its EAJA Application that: (1) it was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, an adversary adjudication in which Applicant appealed an adverse decision by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding Applicant's eligibility for 1996 AMTA program payments; (2) Respondent's position in *In re*

Sweck's, Inc., Case No. 98000135E, was not substantially justified; and (3) Applicant incurred fees and other expenses of $34,190 in connection with its appeal of Respondent's adverse decision.

Respondent filed Farm Service Agency's Opposition to Request for EAJA Fees and Other Expenses, which states: (1) Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified; (3) Applicant did not claim any "fees and other expenses" as that term is used in the Equal Access to Justice Act; and (4) Applicant did not file a statement of net worth or an itemized statement of the time expended in *In re Sweck's, Inc.*, Case No. 98000135E, and the rate at which fees and other expenses were computed.

On or about November 12, 1998, Applicant filed a document entitled "In Support of the Request of Sweck's Inc. for Fees and Other Expenses Under the Equal Access to Justice Act [EAJA]"; on or about December 2, 1998, Respondent filed a document entitled "Answer to Application for EAJA Fees and Expenses"; and on or about December 3, 1998, Applicant filed a document entitled "Response to Farm Service Agency's Opposition to Sweck's Inc. Request for Equal Access to Justice Act Fees and other Expenses".

On December 30, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; and (2) denied Applicant's request for fees and other expenses under the Equal Access to Justice Act (Initial Decision and Order at 4).

On February 2, 1999, Applicant appealed to the Judicial Officer.[1] On March 3, 1999, Respondent filed Farm Service Agency's Response to Petition for Review, and on March 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful review of the record in this proceeding, I agree with the Hearing Officer's Initial Decision and Order. Therefore, while I restate the Initial

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[1]I note that the Hearing Officer states that appeal petitions must be filed with the Office of the Judicial Officer (Initial Decision and Order at 6). However, as provided in section 1.145(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.145(a)), appeal petitions must be filed with the Hearing Clerk. See generally, *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer constitutes filing with the Hearing Clerk).

Decision and Order, I adopt the Hearing Officer's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Hearing Officer's Initial Decision and Order, as restated.

Applicable Statutory Provisions

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees

and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated. . . .;

(C) "adversary adjudication" means (i) an adjudication under

section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E) (1994 & Supp. III 1997).

HEARING OFFICER'S INITIAL DECISION AND ORDER (AS RESTATED)

HISTORICAL INFORMATION

On November 12, 1997, Respondent issued an adverse decision in which Respondent determined that Applicant had not provided sufficient documentation to substantiate that Applicant was actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program. Applicant requested a record review of Respondent's adverse decision, pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14). On March 11, 1998, the Hearing Officer issued an Appeal Determination in which he found that Respondent's determinations that Applicant was not actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program, were error. *In re Sweck's, Inc.*, Case No. 98000135E (Appeal Determination).

On April 7, 1998, the Acting Administrator, Farm Service Agency, United States Department of Agriculture [hereinafter Acting Administrator], requested that the Director, National Appeals Division, United States Department of Agriculture [hereinafter Director], review the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. On June 25, 1998, the Director reversed the Hearing Officer, holding that Applicant failed to meet its burden of showing by a preponderance of the evidence that Respondent's November 12, 1997, decision was erroneous. *In re Sweck's, Inc.*, Case No. 98000135E (Director Review Determination).

On July 28, 1998, Applicant filed an EAJA Application for fees and expenses allegedly incurred in connection with its appeal of Respondent's November 12, 1997, adverse decision, and Respondent filed a timely response opposing Applicant's EAJA Application. During a teleconference conducted on October 22, 1998, Applicant declined the opportunity for a hearing and requested a determination on Applicant's EAJA Application, based on a review of the record.

STATEMENT OF THE CASE

The Equal Access to Justice Act and the EAJA Rules of Practice provide that a decision concerning an applicant's eligibility for an award of fees and other expenses incurred by that party in connection with an adversary adjudication must be based on the record of the adversary adjudication. Therefore, this Decision and Order is based on the record in *In re Sweck's, Inc.*, Case No. 98000135E, and Applicant's and Respondent's filings in this proceeding.

Three issues are relevant to this proceeding: (1) was Applicant the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) if Applicant was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, was Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, substantially justified; and (3) if Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was not substantially justified, may the fees and expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, be awarded to Applicant under the Equal Access to Justice Act.

Respondent argues, based on the June 25, 1998, Director Review Determination, that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E. Respondent contends that, under 7 U.S.C. § 6999, the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, is the final National Appeals Division determination and reviewable only by a United States district court of competent jurisdiction and that the Hearing Officer has no authority to review or reverse the Director Review Determination.

Applicant contends that it is the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, in that the Hearing Officer's March 11, 1998, Appeal Determination was in Applicant's favor and the Appeal Determination became final because the Director Review Determination was issued more than 10 days after receipt of the request for review by the Acting Administrator, in violation of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002).

Section 278(b) of the Department of Agriculture Reorganization Act of 1994 provides that the Director's determination on review of a hearing officer's determination is the final National Appeals Division determination and provides

time limits within which the Director shall issue the final National Appeals Division determination, as follows:

§ 6998. Director review of determinations of hearing officers

. . . .

(b) Determination of Director

The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director shall issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. However, if the Director determines that the hearing record is inadequate, the Director may remand all or a portion of the determination for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. The Director shall complete the review and either issue a final determination or remand the determination not later than—

(1) 10 business days after receipt of the request for review, in the case of a request by the head of an agency for review; or

(2) 30 business days after receipt of the request for review, in the case of a request by an appellant for review.

7 U.S.C. § 6998(b).

Similarly, section 11.9(d)(1) of the National Appeals Division Rules of Procedure provides that the Director's determination is the final National Appeals Division determination and provides time limits within which the Director will issue the final National Appeals Division determination, as follows:

§ 11.9 Director review of determinations of Hearing Officers.

. . . .

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as

may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

7 C.F.R. § 11.9(d)(1)-(2).

On April 7, 1998, the Director received the Acting Administrator's request for review of the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. The Director did not issue a final determination in *In re Sweck's, Inc.*, Case No. 98000135E, until June 25, 1998. Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides any consequence for the Director's issuance of a final determination more than 10 business days after receipt of an agency head's request for review. Moreover, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a hearing officer's determination becomes the final National Appeals Division determination, if the Director issues a final determination more than 10 business days after receipt of an agency head's request for review.

Therefore, the June 25, 1998, Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, which is adverse to Applicant, was the final National Appeals Division determination, and Respondent, not Applicant, was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.

The finding that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, is dispositive of Applicant's EAJA Application because a prerequisite to an award of fees and other expenses incurred in connection with an adversary adjudication is that the party seeking the award must have been the

prevailing party in the adversary adjudication (5 U.S.C. § 504(a)(1)). Thus, the issues of whether Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified and whether the fees and expenses, which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, may be awarded under the Equal Access to Justice Act, are moot.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Respondent was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.
2. Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E.
3. Applicant is not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504), to fees and other expenses that it alleges it incurred in connection with *In re Sweck's, Inc.*, 98000135E.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Applicant raises one issue in its Request for Review by the Office of the Judicial Officer [hereinafter Appeal Petition].

Applicant contends that the Director is required by 7 U.S.C. § 6998(b)(1) to issue a final determination not later than 10 business days after receipt of an agency head's request for review and that the Director Review Determination, issued in *In re Sweck's, Inc.*, Case No. 98000135E, is ineffective because it was not issued timely.

I agree with Applicant that the Director failed to issue the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, within the time provided in 7 U.S.C. § 6998(b)(1). The record establishes that the Director received the Acting Administrator's request for review of the Hearing Officer's Appeal Determination on April 7, 1998. Pursuant to 7 U.S.C. § 6998(b)(1), the Director was required to issue a final determination or remand the determination not later than 10 business days after receipt of the Acting Administrator's request for review; viz., not later than April 21, 1998. The Director did not issue the Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, until June 25, 1998.

However, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a final determination by the Director more than 10 business days after receipt of an agency head's request for review, is ineffective. Moreover, neither the Department of

Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that a hearing officer's determination becomes the final National Appeals Division determination, if the Director issues a final determination more than 10 business days after receipt of an agency head's request for review.

Unless a statute specifies that the consequence of a failure by a government official to meet a deadline for issuance of a decision is that the decision is ineffective, noncompliance with the timing provision does not render the decision ineffective.[2] Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure specifies a consequence for noncompliance with the time limit for issuance of the Director's final determination. Therefore, I find that the Director's noncompliance with the time limit had no effect on the June 25, 1998, Director Review Determination issued in *In re Sweck's, Inc.*, Case No. 98000135E.

Moreover, based on the June 25, 1998, Director Review Determination, I find that Applicant did not succeed on any significant issue or achieve any benefit which Applicant sought in *In re Sweck's, Inc.*, Case No. 98000135E. Therefore, Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E,[3]

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[2]See generally *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (stating that Supreme Court has long recognized that many statutory requisitions intended for the guide of officers in the conduct of business devolved on them do not limit their power or render its exercise in disregard of the requisitions ineffectual; the Supreme Court has held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not ordinarily impose their own sanctions); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (rejecting the contention that there must be a punitive sanction for the government's deviation from statutory time limits); *Brock v. Pierce County*, 476 U.S. 253, 261-62 (1986) (holding that the Secretary of Labor does not lose power to recover misused Comprehensive Employment Training Act funds after the 120-day statutory period for issuing a final determination has expired); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489-90 (1997) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 164-65 (1995) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision).

[3]See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that plaintiffs may be considered *prevailing parties* for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit); *SEC v. Comserv Corp.*, 908

(continued...)

and Applicant's request for fees and other expenses allegedly incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, should be denied.

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

Order

Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's Inc.*, Case No. 98000135E, is denied.

In re: SWECK'S, INC.
EAJA-FSA Docket No. 99-0003.
Order Denying Petition for Reconsideration filed May 6, 1999.

Petition for reconsideration — EAJA application — Statutory time limits — Jurisdiction.

The Judicial Officer denied Applicant's Petition for Reconsideration. The Judicial Officer held that the Director of the National Appeals Division had jurisdiction to issue a Director Review Determination in *In re Sweck's, Inc.*, Case No. 98000135E, even though the Director did not issue the Director Review Determination within the time limit provided in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2)(i).

Robert L. Purcell, for Respondent.
Gregory A. Andrews, Johnston, Iowa, for Applicant.
Initial decision issued by James R. Holman, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Sweck's, Inc. [hereinafter Applicant], instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the

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[3](...continued)
F.2d 1407, 1413 n.6 (8th Cir. 1990) (stating that whether a party is a *prevailing party* for the purposes of award of fees and expenses under the Equal Access to Justice Act turns on whether the party achieved some of the benefit sought by the party and whether the action was a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief); *Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir. 1987) (stating that for purposes of the Equal Access to Justice Act, a *prevailing party* is one who ultimately succeeds on the merits); *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218, 1220-21 (8th Cir. 1984) (stating that to be a *prevailing party* for purposes of the Equal Access to Justice Act, it is enough if a party succeeds on any significant issue which achieves some of the benefit the party sought in bringing the suit).

Department (7 C.F.R. §§ 1.180-.203) by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Eastern Regional Office, on July 28, 1998. The National Appeals Division assigned Applicant's EAJA Application to James R. Holman, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], for his consideration (Letter from Norman G. Cooper to Guy R. Swecker, dated August 14, 1998).

Applicant alleges in its EAJA Application that: (1) it was the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E, an adversary adjudication in which Applicant appealed an adverse decision by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], regarding Applicant's eligibility for 1996 AMTA program payments; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was not substantially justified; and (3) Applicant incurred fees and other expenses of $34,190 in connection with its appeal of Respondent's adverse decision.

Respondent filed Farm Service Agency's Opposition to Request for EAJA Fees and Other Expenses, which states: (1) Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) Respondent's position in *In re Sweck's, Inc.*, Case No. 98000135E, was substantially justified; (3) Applicant did not claim any "fees and other expenses" as that term is used in the Equal Access to Justice Act; and (4) Applicant did not file a statement of net worth or an itemized statement of the time expended in *In re Sweck's, Inc.*, Case No. 98000135E, and the rate at which fees and other expenses were computed.

On or about November 12, 1998, Applicant filed a document entitled "In Support of the Request of Sweck's Inc. for Fees and Other Expenses Under the Equal Access to Justice Act [EAJA]"; on or about December 2, 1998, Respondent filed a document entitled "Answer to Application for EAJA Fees and Expenses"; and on or about December 3, 1998, Applicant filed a document entitled "Response to Farm Service Agency's Opposition to Sweck's Inc. Request for Equal Access to Justice Act Fees and other Expenses."

On December 30, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which the Hearing Officer: (1) found that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; and (2) denied Applicant's request for fees and other expenses under the Equal Access to Justice Act (Initial Decision and Order at 4).

On February 2, 1999, Applicant appealed to the Judicial Officer. On March 3, 1999, Respondent filed Farm Service Agency's Response to Petition for Review, and on March 4, 1999, the Hearing Clerk transmitted the record of the proceeding

to the Judicial Officer for decision.

On March 22, 1999, I issued a Decision and Order: (1) finding that Applicant was not the prevailing party in *In re Sweck's, Inc.*, Case No. 98000135E; (2) concluding that Applicant is not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504), to fees and other expenses that it alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E; and (3) denying Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E. *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 11, 14 (Mar. 22, 1999).

On April 8, 1999, Applicant filed Petition for Reconsideration of the Judicial Officer [hereinafter Petition for Reconsideration]; on May 4, 1999, Respondent filed a response to Applicant's Petition for Reconsideration; and on May 6, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the March 22, 1999, Decision and Order.

Applicant raises one issue in its Petition for Reconsideration. Applicant contends that the Director, National Appeals Division, United States Department of Agriculture [hereinafter Director], had no jurisdiction to issue the June 25, 1998, Director Review Determination, in *In re Sweck's, Inc.*, Case No. 98000135E, because the Director Review Determination was issued more than 10 business days after receipt of a request for review by the Acting Administrator, Farm Service Agency, United States Department of Agriculture [hereinafter Acting Administrator].

On November 12, 1997, Respondent issued an adverse decision in which Respondent determined that Applicant had not provided sufficient documentation to substantiate that Applicant was actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program. Applicant requested a record review of Respondent's adverse decision, pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14). On March 11, 1998, the Hearing Officer issued an Appeal Determination in which he found that Respondent's determinations that Applicant was not actively engaged in farming in 1996 and that Applicant must refund 1996 payments made to Applicant under the AMTA program, were error. *In re Sweck's, Inc.*, Case No. 98000135E (Appeal Determination).

On April 7, 1998, the Acting Administrator requested that the Director review the Hearing Officer's March 11, 1998, Appeal Determination in *In re Sweck's, Inc.*, Case No. 98000135E. On June 25, 1998, the Director reversed the Hearing Officer, holding that Applicant failed to meet its burden of showing by a preponderance of the evidence that Respondent's November 12, 1997, decision was

erroneous. *In re Sweck's, Inc.*, Case No. 98000135E (Director Review Determination).

Section 278(b) of the Department of Agriculture Reorganization Act of 1994 provides that the Director's determination on review of a hearing officer's determination is the final National Appeals Division determination and provides time limits within which the Director shall issue the final National Appeals Division determination, as follows:

§ 6998. Director review of determinations of hearing officers

. . . .

(b) Determination of Director

The Director shall conduct a review of the determination of the hearing officer using the case record, the record from the evidentiary hearing under section 6997 of this title, the request for review, and such other arguments or information as may be accepted by the Director. Based on such review, the Director shall issue a final determination notice that upholds, reverses, or modifies the determination of the hearing officer. However, if the Director determines that the hearing record is inadequate, the Director may remand all or a portion of the determination for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing. The Director shall complete the review and either issue a final determination or remand the determination not later than—

(1) 10 business days after receipt of the request for review, in the case of a request by the head of an agency for review; or

(2) 30 business days after receipt of the request for review, in the case of a request by an appellant for review.

7 U.S.C. § 6998(b).

Similarly, section 11.9(d) of the National Appeals Division Rules of Procedure provides that the Director's determination is the final National Appeals Division determination and provides time limits within which the Director will issue the final National Appeals Division determination, as follows:

§ 11.9 Director review of determinations of Hearing Officers.

. . . .

(d) *Determination of Director.* (1) The Director will conduct a review of the determination of the Hearing Officer using the agency record, the hearing record, the request for review, any responses submitted under paragraph (c) of this section, and such other arguments or information as may be accepted by the Director, in order to determine whether the decision of the Hearing Officer is supported by substantial evidence. Based on such review, the Director will issue a final determination notice that upholds, reverses, or modifies the determination of the Hearing Officer. The Director's determination upon review of a Hearing Officer's decision shall be considered to be the final determination under this part and shall not be appealable. However, if the Director determines that the hearing record is inadequate or that new evidence has been submitted, the Director may remand all or a portion of the determination to the Hearing Officer for further proceedings to complete the hearing record or, at the option of the Director, to hold a new hearing.

(2) The Director will complete the review and either issue a final determination or remand the determination not later than—

(i) 10 business days after receipt of the request for review, in the case of a request by the head of an agency; or

(ii) 30 business days after receipt of the request for review, in the case of a request by an appellant.

7 C.F.R. § 11.9(d)(1)-(2).

Neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure specifies a consequence for the Director's failure to comply with the time limit for issuance of a final determination. Moreover, neither the Department of Agriculture Reorganization Act of 1994 nor the National Appeals Division Rules of Procedure provides that the Director lacks jurisdiction to issue a final determination more than 10 business days after receipt of an agency head's request for review.

A statutory timing provision merely intended as a guide for a government official's conduct of business neither limits that government official's power nor renders ineffectual that government official's exercise of power in disregard of the

statutory timing provision.[1] Therefore, I find that the Director's failure to comply with the time limit in 7 U.S.C. § 6998(b)(1) and 7 C.F.R. § 11.9(d)(2)(i) had no effect on the Director's jurisdiction to issue a final decision in *In re Sweck's, Inc.*, Case No. 98000135E.

For the foregoing reasons and the reasons set forth in the Decision and Order filed March 22, 1999, *In re Sweck's, Inc.*, 58 Agric. Dec. ___ (Mar. 22, 1999), Applicant's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[2]

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[1]*See generally United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (stating that Supreme Court has long recognized that many statutory requisitions intended for the guide of officers in the conduct of business devolved on them do not limit their power or render its exercise in disregard of the requisitions ineffectual; the Supreme Court has held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not ordinarily impose their own sanctions); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (rejecting the contention that there must be a punitive sanction for the government's deviation from statutory time limits); *Brock v. Pierce County*, 476 U.S. 253, 261-62 (1986) (holding that the Secretary of Labor does not lose power to recover misused Comprehensive Employment Training Act funds after the 120-day statutory period for issuing a final determination has expired); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489-90 (1997) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 164-65 (1995) (stating that even if the 120-day statutory deadline for issuance of a final decision had not been met, the Forest Resources Conservation and Shortage Relief Act of 1990 does not state that noncompliance with the deadline is fatal to approval of a sourcing application; therefore, the Judicial Officer's failure to meet the deadline would not have an effect on the Judicial Officer's final decision).

[2]*In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric.

(continued...)

Applicant's Petition for Reconsideration was timely filed and automatically stayed the March 22, 1999, Decision and Order. Therefore, since Applicant's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed March 22, 1999, is reinstated, with allowance for time passed.

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

Order

Applicant's request, under the Equal Access to Justice Act, for fees and other expenses which Applicant alleges it incurred in connection with *In re Sweck's, Inc.*, Case No. 98000135E, is denied.

In re: PAUL W. THOMAS and LEONA THOMAS.
EAJA-FSA Docket No. 99-0004.
Decision and Order filed June 15, 1999.

EAJA application — Substantially justified — Complete and timely application — Fees and expenses.

The Judicial Officer reversed Hearing Officer Byron Bennes' award of $2,392.50 to Equal Access to Justice Act (EAJA) Applicants. The EAJA Applicants were prevailing parties in an adversary adjudication captioned *In re Paul W. Thomas*, Case No. 98000848W. The Judicial Officer held that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified, but that Applicants failed to file a complete and timely Equal Access to Justice Act application. Further, the Judicial Officer found that Applicants failed to adequately document fees that they allegedly incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, and that no award could be made under the Equal Access to Justice Act for interest payments, lost spring wheat, lost income from calves, and the loss of a down payment for, and discount on, a drill.

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[2](...continued)
Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Margit Halvorson Williams, for Respondent.
Applicants, Pro se.
Initial decision issued by Byron Bennes, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a $76,000 emergency loan and Applicants' $175,515 subordination request [hereinafter loan application]; (2) Applicants incurred fees and expenses of $83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of $83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or in the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer [hereinafter Applicants' Response], in which Applicants: (1) contend that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified should not be an issue in this proceeding; (2) contend that if any part of Applicants' request for relief is denied because the relief is not available under the Equal Access to Justice Act, the denial should not result in denial of those aspects of Applicants' request for relief that may be awarded under the Equal Access to Justice Act; and (3) admit that their EAJA Application did not include a written verification, as required by section 1.190(e) of the EAJA Rules of Practice (7 C.F.R. § 1.190(e)). Attached to Applicants' Response are documents which

Applicants contend support their EAJA Application and the following statement signed by Paul W. Thomas and dated December 29, 1998:

> This is a written affirmation under penalty of perjury that all the information provided in the application and all accompanying material is true and complete to the best of my belief.

On January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture [hereinafter the Hearing Officer], issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants $2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal [hereinafter Applicant's Appeal Response]; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful review of the record in this proceeding, I disagree with the Hearing Officer's finding that Applicants filed a complete and timely EAJA Application and with the Hearing Officer's award of $2,392.50 to Applicants. Therefore, I reverse the Hearing Officer's Initial Decision and Order and deny Applicants' request, under the Equal Access to Justice Act, for fees and other expenses which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Applicable Statutory Provision

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law

judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication;

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. . . .

. . . .

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E), (c)(1) (1994 & Supp. III 1997).

THE ADVERSARY ADJUDICATION THAT IS THE BASIS FOR APPLICANTS' EAJA APPLICATION

On January 23, 1998, Applicants filed a loan application pursuant to 7 C.F.R. pt. 1945, subpart D. On May 13, 1998, Respondent issued an adverse decision in which Respondent denied Applicants' loan application. Respondent's denial was based upon Respondent's determination that Applicants failed to submit a feasible farm and home plan, as required. Subsequently, Applicants submitted a revised farm and home plan to Respondent, and on June 3, 1998, Respondent found that Applicants' revised farm and home plan was not feasible and denied Applicants' loan application. (Letter dated June 3, 1998, from Respondent to Applicants.)

On June 5, 1998, Applicants appealed Respondent's June 3, 1998, adverse decision pursuant to the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. §§ 6991-7002) and the National Appeals Division Rules of Procedure (7 C.F.R. §§ 11.1-.14) (Letter dated June 5, 1998, from Paul Thomas to Mr. Jordon). On July 14, 1998, the Hearing Officer conducted a hearing in Bismarck, North Dakota, regarding Applicants' appeal of Respondent's adverse decision. At the close of the hearing, the Hearing Officer closed the hearing record; however, Applicants subsequently submitted additional documents to the National Appeals Division, Western Regional Office, and on August 11, 1998, the Hearing Officer re-opened the hearing record to receive the additional documents and allow the parties to provide additional information to, and answer questions posed by, the Hearing Officer. On August 25, 1998, the Hearing Officer closed the hearing record. (Notice of Re-opening the Hearing Record and Request for Information.)

On September 15, 1998, the Hearing Officer issued an Appeal Determination

in which he found that one of the two revised farm and home plans which Applicants filed after the July 14, 1998, hearing "would be considered a feasible plan as required by the regulations" and that Respondent's denial of Applicants' loan application was error (Appeal Determination at 9). Neither Applicants nor Respondent requested that the Director, National Appeals Division, United States Department of Agriculture, review the Hearing Officer's Appeal Determination, and the Hearing Officer's Appeal Determination became final (Notice of Conclusion of Appeal).

APPLICANTS' EAJA APPLICATION

Applicants contend that: (1) they were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) their EAJA Application was complete and timely filed; and (4) they are entitled to an award of $83,469 for fees and other expenses which they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) contends that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) contends that Applicants' EAJA Application was not timely filed and not complete; and (4) contends that the fees and expenses, which Applicants allege that they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, cannot be awarded to Applicants under the Equal Access to Justice Act.

APPLICANTS WERE THE PREVAILING PARTIES IN *IN RE PAUL W. THOMAS*, CASE NO. 98000848W

The Hearing Officer found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8), and Applicants and Respondent agree that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Applicants' EAJA Application; Respondent's Answer at 1). I agree with the Hearing Officer, Applicants, and Respondent that the record in *In re Paul W. Thomas*, Case No. 98000848W, establishes that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W.

RESPONDENT'S POSITION IN *IN RE PAUL W. THOMAS*, CASE NO. 98000848W, WAS NOT SUBSTANTIALLY JUSTIFIED

Applicants contend that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified should not be an issue in this proceeding because Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Applicants' Response; Applicants' Appeal Response). Applicants cite no authority for their contention.

The Equal Access to Justice Act provides that an agency that conducts an adversary adjudication shall award to the prevailing party, fees and other expenses incurred by that party in connection with the adversary proceeding, "unless the adjudicative officer . . . finds that the position of the agency was substantially justified. . . . " (5 U.S.C. § 504(a)(1).) Legislative history applicable to the Equal Access to Justice Act specifically states that there is no presumption that an agency's position was not substantially justified, simply because the agency lost the adversary proceeding, as follows:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing. Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953,

4989-90.[1]

Therefore, I conclude that whether Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified, is an issue in this Equal Access to Justice Act proceeding.

A decision regarding whether an agency's position in an adversary adjudication is substantially justified must be based upon the record of the adversary adjudication for which fees and other expenses are sought (5 U.S.C. § 504(a)(1)).[2] The test of whether an agency's position is substantially justified is one of reasonableness in law and in fact, and the agency bears the burden of showing the substantial justification of its position.[3]

Applicants applied for an emergency loan in accordance with 7 C.F.R. §§ 1945.151-.200 and were required to file a "feasible plan." Title 7, Code of Federal Regulations, § 1945.154, provides that "[a] feasible plan is one which meets the requirements of subpart B of part 1924 of this chapter." Title 7, Code of Federal Regulations, pt. 1924, subpart B, addresses the requirements for a feasible plan, as follows:

> **§ 1924.56 Farm business planning.**
>
> The automated Farm and Home Plan system is the primary tool used by the Agency to evaluate loan feasibility and prospects for achieving financial viability. Other manual or automated business planning systems may be used with the consent of the Agency.
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> . . . .

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[1]*See also Cornella v. Schweiker*, 728 F.2d 978, 982 (8th Cir. 1984) (stating that the fact that the government lost the case does not raise a presumption that its position was not substantially justified).

[2]*See also Smith v. NTSB*, 992 F.2d 849, 851-52 (8th Cir. 1993); *In re Ronald L. Wieczorek*, 57 Agric. Dec. ___, slip op. at 8 (Dec. 17, 1998).

[3]*See, e.g., Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Smith v. NTSB*, 992 F.2d 849, 852 (8th Cir. 1993); *Koss v. Sullivan*, 982 F.2d 1226, 1229 (8th Cir. 1993); *SEC v. Comserv Corp.*, 908 F.2d 1407, 1411-12 (8th Cir. 1990); *Derickson Company, Inc. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985); *Wheat v. Heckler*, 763 F.2d 1025, 1028-29 (8th Cir. 1985); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984); *Cornella v. Schweiker*, 728 F.2d 978, 982 (8th Cir. 1984); *Foley Const. Co. v. United States Army Corps of Engineers*, 716 F.2d 1202, 1204 (8th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

(b) *Documentation and revision of plans.* Individuals must submit a farm business plan to the Agency, upon request, for loan approval and servicing purposes. An individual may request the assistance of the Agency official, as needed, in completing the plan. Farm business plans will be based only on accurate, verifiable information. If the Agency official and the individual cannot reach agreement, on the farm business plan, then the Agency will make loan approval and servicing determinations based on the Agency's separate, revised farm business plan. The individual will have the right to appeal any resulting adverse decision.

(1) Historical information will be used as a guide to evaluate the feasibility of projected farm business plans. Individuals must provide the Agency with their previous 5-year production history, if available. Positive and negative trends, mutually agreed upon changes and improvements, and current input prices, will be taken into consideration when arriving at reasonable projections.

. . . .

(iii) This paragraph applies when an accurate projection cannot be made because the individual's production history in any or all of the previous 5 years has been substantially affected by a disaster that has been declared by the President or designated by the Secretary of Agriculture. This paragraph also applies to those individuals who would have had a qualifying physical or production loss, as defined in § 1945.154(a), from such a disaster, but who were not located in a designated or declared disaster area.

(A) If the individual's disaster years yields are less than the county average yields, county average yields will be used for those years. If county average yields are not available, State average yields will be used.

(B) In calculating a baseline average yield, the individual may exclude the production year with the lowest actual or county average yield, providing the individual's yields were affected by disasters at least 2 of the 5 years.

7 C.F.R. § 1924.56(b)(1).

The Hearing Officer found that Applicants' farm is located in Sioux County, North Dakota, which was included in the disaster declarations for the years 1993 through 1997, and Applicants were eligible to use county average yields and exclude the year with the lowest actual yield or county average yield in accordance with 7 C.F.R. § 1924.56(b)(1)(iii)(A)-(B) (Appeal Determination at 3, 5-6).

Respondent used Applicants' "past record of production and financial management" to determine whether Applicants' farm and home plan was feasible.

Respondent did not use county average yields or exclude the year with the lowest actual yield or county average, as provided in 7 C.F.R. § 1924.56(b)(1)(iii)(A)-(B). (Letter dated June 3, 1998, from Respondent to Applicants.) Therefore, Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified.

APPLICANTS DID NOT FILE A TIMELY OR COMPLETE EAJA APPLICATION

Applicants are required to file their EAJA Application in accordance with 5 U.S.C. § 504 and the EAJA Rules of Practice. The Equal Access to Justice Act requires that a party seeking an award of fees and other expenses shall, within 30 days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under 5 U.S.C. § 504, and the amount sought, including an itemized statement from an attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party seeking an award must also allege that the position of the agency was not substantially justified. (5 U.S.C. § 504(a)(2).)

The Equal Access to Justice Act requires each agency to establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses (5 U.S.C. § 504(c)(1)). The EAJA Rules of Practice are the uniform procedures for the submission and consideration of the award of fees and other expenses under the Equal Access to Justice Act established by the United States Department of Agriculture.

Section 1.193(a) of the EAJA Rules of Practice (7 C.F.R. § 1.193(a)) provides that an Equal Access to Justice Act application may be filed no later than 30 days after the final disposition of the adversary adjudication. The final disposition of *In re Paul W. Thomas*, Case No. 98000848W, occurred not later than October 26, 1998 (Notice of Conclusion of Appeal). Applicants filed an incomplete EAJA Application on October 19, 1998, and as of the date of the issuance of this Decision and Order, have not filed a complete Equal Access to Justice Act application.

Section 1.190(e) of the EAJA Rules of Practice requires that each Equal Access to Justice Act application must be accompanied by a verification, as follows:

§ 1.190 Contents of application.

. . . .

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It also shall contain or be accompanied by a written verification under oath or affirmation under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

7 C.F.R. § 1.190(e).

Applicants' EAJA Application, filed October 19, 1998, neither contained a written verification nor was accompanied by a written verification. Applicants admit that the verification under oath or affirmation required by 7 C.F.R. § 1.190(e) "may have been overlook [sic]" and state that the National Appeals Division "did not inform [Applicants] that this part of the application was missed" (Applicants' Response).

The National Appeals Division has no obligation to inform Applicants that section 1.190(e) of the EAJA Rules of Practice (7 C.F.R. § 1.190(e)) requires Applicants to include a written verification with their EAJA Application. Moreover, the EAJA Rules of Practice are published in the *Federal Register*; thereby constructively notifying Applicants of the requirement for a written verification.[4]

Applicants attached a written verification to Applicants' Response, which was filed on January 11, 1999, after the 30-day deadline for filing their EAJA Application.

Section 1.192(a)-(c) of the EAJA Rules of Practice requires that each Equal Access to Justice Act application must be accompanied by documentation of fees and expenses for which an Equal Access to Justice Act award is sought and an affidavit, as follows:

§ 1.192 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party,

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[4]*FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976).

stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c).

Applicants' EAJA Application was not accompanied by an affidavit from their agent, Ms. Patsy Otto. Moreover, the copies of monthly billing statements from Applicants' agent's employer, the North Dakota Agricultural Mediation Service, which accompanied Applicants' EAJA Application, do not include the monthly amounts Applicants were billed for their agent's services.

On January 11, 1999, after the 30-day deadline for filing their EAJA Application, Applicants filed a written statement by Ms. Otto, and copies of monthly billing statements from the North Dakota Agricultural Mediation Service, which include monthly amounts Applicants were billed for services. Ms. Otto's written statement reads in its entirety, as follows:

December 31, 1998

Paul Thomas
Box 31
Cannon Ball, ND 58528

Dear Mr. Thomas;

Enclosed are signed copies of the billings from October 1997 to current November 1998. North Dakota Agriculture Mediation Services charges at a rate of $15 per hour.

It is required by our office to document all calls, office visits, and paper work, which I completed for you on an ongoing basis.

If you need any additional information please let me know.

Sincerely,
/s/
Patsy Otto
AMS:Negotiator

Each copy of the billing statements referenced by Ms. Otto and filed by Applicants on January 11, 1999, states "I hereby certify that the above accurately reflects the hours and expenses incurred on behalf of the Ag. Mediation Service" and the certification is signed by Ms. Otto.

An affidavit is a sworn statement in writing made under oath or on affirmation before a person having authority to administer the oath or affirmation.[5] Neither

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[5]*See generally, e.g.*, Merriam Webster's Collegiate Dictionary 20 (10th ed. 1997):

affidavit . . . *n* . . . a sworn statement in writing made esp. under oath or on affirmation before an authorized magistrate or officer.

The Oxford English Dictionary, vol. I, 216 (2d ed. 1991):

affidavit. . . . A statement made in writing, confirmed by the maker's oath, and intended to be used as judicial proof.

Black's Law Dictionary 58 (6th ed. 1990):

Affidavit. . . . A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

Bouvier's Law Dictionary 158 (3d ed. 1914):

AFFIDAVIT. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.

See also, e.g., *Egger v. Phillips*, 710 F.2d 292, 311 n.19 (7th Cir.) (stating that a declaration that is not sworn before an officer authorized to administer oaths is, by definition, not an affidavit; the fact that a declarant recites that the statements are made under penalty of perjury does not transform an unsworn statement into an affidavit), *cert. denied*, 464 U.S. 918 (1983); *Amtorg Trading Corp. v.*

(continued...)

Ms. Otto's unsworn written statement nor Ms. Otto's certification on copies of North Dakota Agricultural Mediation Service's monthly billings is an affidavit.[6]

Applicants state that they were unaware of the requirement that their EAJA Application must include an affidavit from their agent, as follows:

1. Ms. Halvorson states that I did not submit an Affidavit with my application. I am not an attorney and I tried my best to complete the application with all the appropriate documents. I had my attorney Mr. Arlen Ruff review the application I submitted. Being this was the first application Mr. Ruff or I was submitting I thought we had submitted all the documents necessary for a complete application. I also thought all of the documents I was submitting were truthful. I was unaware that I needed an affidavit for anyone submitting

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[5](...continued)
United States, 71 F.2d 524, 530 (C.C.P.A. 1934) (citing with approval the definition of *affidavit* in Black's Law Dictionary (3d ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath); *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654, 658 (N.D. Ca. 1994) (stating that an affidavit must be confirmed by oath or affirmation); *Adkins v. Mid-America Growers*, 141 F.R.D. 466, 469 (N.D. Ill. 1992) (stating that what separates affidavits from simple statements is the certification; the requirement is not trivial for it subjects the affiant to perjury penalties if falsely made); *In re Central Stamping & Mfg. Co.*, 77 F. Supp. 331, 332 (E.D. Mich. 1948) (citing with approval the definition of *affidavit* in Bouvier's Law Dictionary: a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath or affirmation); *In re Johnston*, 220 F. 218, 220 (S.D. Cal. 1915) (stating that the general definition of the term *affidavit* is a written declaration under oath; therefore, it has been held that, in order for an affidavit to be valid for any purpose, it must be sworn to); *Mitchell v. National Surety Co.*, 206 F. 807, 811 (D. N.M. 1913) (stating that it is a matter inherent in the affidavit that it must be under oath); *Crenshaw v. Miller*, 111 F. 450, 451 (M.D. Ala. 1901) (stating that an affidavit is a voluntary, ex parte statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it); *United States v. Glasener*, 81 F. 566, 568 (S.D. Cal. 1897) (stating that the word *affidavit* is defined by Webster to be "a sworn statement in writing"); *Baldin v. Calumet National Bank (In re Baldin)*, 135 B.R. 586, 600 (Bankr. N.D. Ind. 1991) (citing with approval the definition of *affidavit* in Black's Law Dictionary (6th ed.): a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath or affirmation).

[6]*Cf. Robbins v. United States*, 345 F.2d 930, 932 (9th Cir. 1965) (stating that a statement that is not notarized, but contains a recital that it is made under penalty of perjury is not an affidavit); *Williams v. Pierce County Bd. of Comm'rs*, 267 F.2d 866, 867 (9th Cir. 1959) (per curiam) (stating that a document is not an affidavit if there is no certificate that the affiant took any oath or swore to his statement); *Brady v. Blue Cross and Blue Shield of Texas, Inc.*, 767 F. Supp. 131, 135 (N.D. Tex. 1991) (stating that an acknowledgment is not an affidavit because it contains no jurat).

> information that it was truthful and correct. When I received notice that my application was complete, I felt all of the necessary information was provided which was necessary for the application.

Applicants' Appeal Response.

The EAJA Rules of Practice are published in the *Federal Register*; thereby constructively notifying Applicants of the requirement for an affidavit from their agent.[7] Applicants must comply with the EAJA Rules of Practice. Applicants' contention that they are exempt from the requirements in the EAJA Rules of Practice because they are not attorneys and because the EAJA Application which they filed on October 19, 1998, was the first Equal Access to Justice Act application that Applicants and Applicants' attorney had ever filed, is without merit.

The Hearing Officer found that Applicants' EAJA Application did not include written verification, as required by 7 C.F.R. § 1.190(e), and did not include an affidavit from Applicants' agent, as required by 7 C.F.R. § 1.192(b). Further, the Hearing Officer found that the copies of the billing statements submitted with Applicants' EAJA Application were unsigned, did not reflect who provided the services, and did not show the amounts Applicants were billed for services. (Initial Decision and Order at 3.) Nonetheless, the Hearing Officer concluded "the Applicants [sic] application for fees and expenses are [sic] deemed complete" (Initial Decision and Order at 4).

The Hearing Officer cites two bases for his conclusion that Applicants' EAJA Application is complete. First, the Hearing Officer found that on January 11, 1999, Applicants filed a written verification, as required by 7 C.F.R. § 1.190(e), and signed billing statements indicating the monthly amounts billed to Applicants. I agree with the Hearing Officer that on January 11, 1999, Applicants filed a written verification and signed billing statements showing monthly amounts billed to Applicants by the North Dakota Agricultural Mediation Service. However, I find that Applicants' January 11, 1999, filings do not comply with the requirement in the Equal Access to Justice Act and the EAJA Rules of Practice that an Equal Access to Justice Act application must be filed within 30 days of a final disposition in the adversary adjudication (5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a)).

Some courts allow applicants for awards under the Equal Access to Justice Act

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[7]See note 4.

to supplement timely-filed applications after the 30-day deadline.[8] These courts consider Equal Access to Justice Act applications that are completed by supplementation after the time for filing the application. While Applicants in this proceeding filed an incomplete EAJA Application before the 30-day deadline, Applicants' EAJA application is still incomplete because Applicants have not filed an affidavit from their agent, as required by 7 C.F.R. § 1.192(b). Thus, Applicants' EAJA Application, even as supplemented by their January 11, 1999, filing, remains incomplete and cannot be considered.

Second, the Hearing Officer found that Applicants may have been confused and misled by the EAJA Rules of Practice and the National Appeals Division Rules of Procedure, as follows:

> A review of all applicable regulations pertaining to Equal Access To Justice Applications reveals a lack of clarity and misleading information. Departmental regulations found at 7 CFR 1.180 et seq, advise that the regulations relating to EAJA applications are limited to the listed organizations. The National Appeals Division is not a listed organization. This matter is further confused by the fact that the NAD regulations advise that EAJA is not applicable or available to appellants within the National Appeals Division. The Eighth Circuit Court of Appeals in LANE vs. USDA, 120 F.3d 106 (1997), ruled that EAJA at 5 U.S.C. § 504 was applicable; however, Departmental regulations have not been modified or updated to reflect the current status of the law. This lack of action may have led to confusion concerning what is required in filing an EAJA application.
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> The Agency urges the NAD to take form over substance, overlook confusion caused by inconsistent regulations and take a very restrictive view of what constitutes a timely and complete application. This Division has chosen to follow an approach that recognizes the potential for confusion, takes substance over form and a procedure that provides

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[8]*See, e.g.*, *Bazalo v. West*, 150 F.3d 1380, 1383 (Fed. Cir. 1998) (stating that a party, who alleged in a timely Equal Access to Justice Act application that he was a prevailing party, could supplement his filing after the 30-day time limitation to set forth an explicit statement of his net worth and thereby complete his Equal Access to Justice Act application); *Dunn v. United States*, 775 F.2d 99, 104 (3d Cir. 1985) (stating that so long as a fee-petition is filed within the 30-day period, the court may consider the petition and may, absent prejudice to the government or noncompliance with court orders for timely completion of the fee determination, permit supplementation).

fundamental fairness and due process. Therefore, the Applicants application for fees and expenses are deemed complete.

Initial Decision and Order at 3-4.

Applicants did not conform their EAJA Application to the requirements of the EAJA Rules of Practice, but the record is clear that Applicants were neither confused nor misled, either by the EAJA Rules of Practice or by the National Appeals Division Rules of Procedure. Applicants knew, at least by the date of their first filing in this proceeding, that the EAJA Rules of Practice are applicable to this proceeding.[9]

THE FEES AND EXPENSES CLAIMED BY APPLICANTS ARE NOT ALLOWABLE UNDER THE EQUAL ACCESS TO JUSTICE ACT

Fees and expenses, which may be awarded under the Equal Access to Justice Act, include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (5 U.S.C. § 504(b)(1)(A)).

Applicants requested an award of $83,469 for fees and expenses which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (EAJA Application). Specifically, Applicants contend that they are entitled to an award for five categories of fees and other expenses which they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. First, Applicants contend that they are entitled to an award of $5,130 for professional fees billed by the North Dakota Agricultural Mediation Service (EAJA Application). However, Applicants also allege that the North Dakota Agricultural Mediation Service provided 114 hours of services to Applicants "at the rate of $15 per hour for a total charge of $1,710" (EAJA Application) and admit that the $5,130 listed as professional fees on their EAJA Application is error (Applicants' Response).

The monthly billing statements filed by Applicants on January 11, 1999, establish that the North Dakota Agricultural Mediation Service billed Applicants for 173 hours of professional services at a rate of $15 per hour for a total of $2,595. However, the Hearing Officer found that the adversary proceeding commenced

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[9]*See, e.g.*, Applicants' contention in their EAJA Application that they are eligible for award for expenses based on the criteria in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

when Applicants' loan application was denied by the County Committee, and the Hearing Officer denied Applicants' request for an award of $202.50 billed by the North Dakota Agricultural Mediation Service for professional services rendered in October 1997, prior to the denial of Applicants' loan application by the County Committee. Hence, the Hearing Officer awarded Applicants $2,392.50 based on the monthly billing statements sent to Applicants by the North Dakota Agricultural Mediation Service for 159.5 hours of professional services provided to Applicants during the period November 1997 through November 1998. (Initial Decision and Order at 7.)

Even if I had found that Applicants filed a timely and complete EAJA Application, I would not have awarded Applicants $2,392.50 based on the monthly billing statements filed by Applicants. As an initial matter, the adversary adjudication for which Applicants seek an award began no earlier than June 3, 1998, when Respondent issued the adverse determination which became the subject of the adversary adjudication in question, *In re Paul W. Thomas*, Case No. 98000848W. Therefore, I would have denied Applicants' request for an award of fees billed by the North Dakota Agricultural Mediation Service for services prior to June 3, 1998. Moreover, the North Dakota Agricultural Mediation Service billing statements and Ms. Otto's December 31, 1998, written statement, filed January 11, 1999, do not establish that all of the services rendered by the North Dakota Agricultural Mediation Service during the period June 3, 1998, through November 20, 1998, were provided in connection with *In re Paul W. Thomas*, Case No. 98000848W.

Second, Applicants request an award of $20,614 for the additional interest they contend they will be required to pay to their creditors and suppliers. Third, Applicants request an award of $35,100 because they lost at least 12 bushels of spring wheat per acre because they were unable to fertilize or spray. Fourth, Applicants request an award of $17,625 for lost income on 150 calves that they had planned to purchase and sell. Fifth, Applicants request an award of $5,000 for a forfeited down payment for, and a lost discount on, a drill. Applicants assert that the additional interest payments, the lost spring wheat, the lost income on 150 calves, and the lost down payment for, and discount on, a drill resulted from Respondent's denial of Applicants' loan application. (EAJA Application.)

The Hearing Officer denied Applicants' request for an award for additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill, based on the Hearing Officer's conclusion that an award for these alleged additional interest payments and losses is not permitted under the Equal Access to Justice Act or the EAJA Rules of Practice (Initial Decision and Order at 6-7).

I agree with the Hearing Officer's denial of Applicants' request for an award for alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill. The Equal Access to Justice Act provides that an agency that conducts an adversary adjudication shall award to the prevailing party fees and other expenses incurred in connection with that adversary adjudication, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust (5 U.S.C. § 504(a)(1)). Legislative history applicable to the Equal Access to Justice Act makes clear that the fees and other expenses for which an award may be made under the Equal Access to Justice Act relate only to certain costs of litigation, as follows:

PURPOSE OF THE BILL

> The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. . . .
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> . . . .

STATEMENT

> Under present law in the United States, each party is responsible for the payment of his own attorney fees and other expenses incurred during litigation. The "American rule," however, has both common law and statutory exceptions.
>
> . . . .

> The bill makes a second significant change in the existing law regarding attorney fees by establishing a general statutory exception for an award of fees against the Government. Under this exception certain parties who prevail in adversary adjudications or civil actions brought by or against the United States will be entitled to attorney fees and related expenses unless the Government action was substantially justified or special circumstances would make an award unjust. . . .
>
> . . . .
>
> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.

H.R. Rep. No. 96-1418, at 5-6, 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4984, 4988.

The Equal Access to Justice Act does not authorize an award to an applicant for interest expenses, crop losses, lost down payments, and the value of lost opportunities that an applicant may have incurred as a result of an agency's adverse decision that gave rise to an adversary adjudication. Applicants' alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill are not fees and other expenses incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, and cannot be awarded under the Equal Access to Justice Act. Therefore, even if Applicants had filed a timely and complete EAJA Application, I would have denied Applicants' request for an award for their alleged additional interest payments, lost spring wheat, lost income from calves, and the loss of their down payment for, and discount on, a drill.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W.

2. Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified.

3. Applicants failed to file a timely and complete Equal Access to Justice Act application.

4. Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and lost down payment for, and lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W.

5. Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

6. Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W.

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

Order

Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W, is denied.

In re: PAUL W. THOMAS and LEONA THOMAS.
EAJA-FSA Docket No. 99-0004.
Order Denying Petition for Reconsideration filed August 4, 1999.

Failure to file timely petition for reconsideration.

The Judicial Officer denied Applicants' Petition for Reconsideration because it was not timely filed (7 C.F.R. § 1.146(a)(3)).

Margit Halvorson Williams, for Respondent.
Applicants, Pro se.
Initial decision issued by Byron Bennes, Hearing Officer.
Order issued by William G. Jenson, Judicial Officer.

Paul W. Thomas and Leona Thomas [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture, National Appeals Division, Western Regional Office, on October 19, 1998.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W, in which Applicants appealed the denial, by the Farm Service Agency, United States Department of Agriculture [hereinafter Respondent], of Applicants' application for a $76,000 emergency loan and Applicants' $175,515 subordination request; (2) Applicants incurred fees and expenses of $83,469 in connection with *In re Paul W. Thomas*, Case No. 98000848W; and (3) Applicants are eligible for an award of $83,469, in accordance with the criteria for eligibility in section 1.184 of the EAJA Rules of Practice (7 C.F.R. § 1.184).

On December 22, 1998, Respondent filed Answer to Application for Fees and Expenses [hereinafter Answer], in which Respondent: (1) admits that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) states that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was substantially justified; (3) states that Applicants request relief that is not available under the Equal Access to Justice Act; (4) states that Applicants' EAJA Application does not comply with the requirements in the Equal Access to Justice Act or the EAJA Rules of Practice; and (5) states that Applicants' request for professional fees is not supported by documentation.

On January 11, 1999, Applicants filed a response to Respondent's Answer, and on January 15, 1999, Larry T. Jordan, Assistant Director, National Appeals Division, United States Department of Agriculture, issued a Notice of Closing of EAJA Record which states that neither Applicants nor Respondent requested any further proceedings, as authorized by section 1.199 of the EAJA Rules of Practice (7 C.F.R. § 1.199).

On April 1, 1999, Byron Bennes, Hearing Officer, National Appeals Division, United States Department of Agriculture, issued an Equal Access to Justice Act Application Determination [hereinafter Initial Decision and Order] in which he: (1) found that Applicants filed a complete and timely EAJA Application (Initial

Decision and Order at 2-4); (2) found that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 8); (3) found that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified (Initial Decision and Order at 4-6); and (4) awarded Applicants $2,392.50 for fees Applicants incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W (Initial Decision and Order at 6-8).

On May 4, 1999, Respondent appealed to the Judicial Officer; on May 11, 1999, Applicants filed a letter responding to Respondent's appeal; and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On June 15, 1999, I issued a Decision and Order: (1) finding that Applicants were the prevailing parties in *In re Paul W. Thomas*, Case No. 98000848W; (2) finding that Respondent's position in *In re Paul W. Thomas*, Case No. 98000848W, was not substantially justified; (3) finding that Applicants failed to file a timely and complete Equal Access to Justice Act application; (4) finding that Applicants' alleged additional interest payments, lost spring wheat, lost income from 150 calves, and forfeited down payment for, and a lost discount on, a drill are not fees and expenses that they incurred in connection with *In re Paul W. Thomas*, 98000848W; (5) finding that Applicants failed to establish that all of the fees charged by the North Dakota Agricultural Mediation Service were incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W; (6) concluding that Applicants are not entitled, under the Equal Access to Justice Act (5 U.S.C. § 504) and the EAJA Rules of Practice (7 C.F.R. §§ 1.180-.203), to fees and other expenses that they allege they incurred in connection with *In re Paul W. Thomas*, 98000848W; and (7) denying Applicants' request, under the Equal Access to Justice Act, for fees and other expenses, which Applicants allege they incurred in connection with *In re Paul W. Thomas*, Case No. 98000848W. *In re Paul W. Thomas*, 58 Agric. Dec. ___, slip op. at 26-27 (June 15, 1999).

On June 19, 1999, the Hearing Clerk served Applicants with the Decision and Order.[1] On July 8, 1999, 19 days after the Hearing Clerk served Applicants with the Decision and Order, Applicants filed a letter addressed to the Hearing Clerk requesting reconsideration of the Decision and Order [hereinafter Petition for Reconsideration]. On August 3, 1999, Respondent filed Response to Applicants' Request for Reconsideration, and on August 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the

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[1]See Domestic Return Receipt for Article Number PO93175073 and Domestic Return Receipt for Article Number PO93175074.

June 15, 1999, Decision and Order.

Section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides:

> **§ 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).

Applicants' Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date the Hearing Clerk served the Decision and Order on Applicants, was filed too late, and, accordingly, Applicants' Petition for Reconsideration must be denied.[2]

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[2]*See In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (May 14, 1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*,

(continued...)

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

Order

Applicants' Petition for Reconsideration is denied.

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[2](...continued)
55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: STEPHEN DOUGLAS BOLTON and JANET T. BOLTON.
HPA Docket No. 99-0010.
Decision and Order as to Stephen Douglas Bolton filed June 18, 1999.

Default — Failure to file timely answer — Entering — Ownership — Civil penalty — Disqualification.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt assessing Respondent a $2,000 civil penalty and disqualifying Respondent for 1 year because he entered, for the purpose of showing or exhibiting in a horse show, a horse which was sore. The Judicial Officer held that prohibition on entering in 15 U.S.C. § 1824(2)(B) applies to all persons, including any person who does not own the horse which he or she enters. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], 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], by filing a Complaint on March 4, 1999.

The Complaint alleges, *inter alia*, that on or about July 2 or 3, 1998, Stephen Douglas Bolton [hereinafter Respondent] entered, for the purpose of showing or exhibiting, a horse known as "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶¶ 3-4).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of

the Rules of Practice, and a service letter on March 13, 1999.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On April 22, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Stephen Douglas Bolton Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. On May 6, 1999, Respondent filed an objection to Complainant's Motion for Default Decision and Proposed Default Decision.

On May 13, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter the ALJ] issued a Decision and Order as to Stephen Douglas Bolton Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that on or about July 2 or 3, 1998, Respondent entered, for the purpose of showing or exhibiting, a horse known as "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); (2) assessing Respondent a $2,000 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 2).

On June 3, 1999, Respondent appealed to the Judicial Officer; on June 14, 1999, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order; and on June 16, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's findings of fact and conclusion, as restated.

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[1]See Domestic Return Receipt for Article Number P 093 141 420.

Applicable Statutory Provisions

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

. . . .

(a) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse

exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. §§ 1821(3), 1824(2), 1825(b)(1), (c).

ALJ'S INITIAL DECISION AND ORDER (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file a timely answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact and Conclusion of Law

1. Respondent Stephen Douglas Bolton is an individual whose mailing address is 1940 Clearwater Trail, Carrollton, Texas 75010, and at all times material to this proceeding, was an owner of a horse known as "Extra News Flash."

2. On or about July 2 or 3, 1998, Respondent Stephen Douglas Bolton entered, for the purpose of showing or exhibiting, "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas.

3. On or about July 2 or 3, 1998, Respondent Stephen Douglas Bolton entered "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, while the horse was sore, for the purpose of showing or exhibiting the horse in the horse show, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent states in his letter to Joyce A. Dawson, dated June 1, 1999, and filed June 3, 1999 [hereinafter Appeal Petition], that he disagrees with only one aspect of the ALJ's Initial Decision and Order, as follows:

This letter is my appeal to the Department's Judicial Officer in the above referenced proceeding.

I am objecting to the evidence in accordance with Section 1.145 of the Uniform Rules of Practice. I have one (1) objection to the evidence. As required by Section 1.145, this objection was made before the Administrative Law Judge in my Response to the Proposed Decision, dated April 29, 1999.

My objection to the evidence is presented below.

1) I have never been an owner of the horse known as Extra News Flash. I have enclosed a copy of the horse's Certificate of Registration with the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA) to document this fact.

Appeal Pet. (emphasis in original).

The Complaint alleges that:

1. Respondents Stephen Douglas Bolton and Janet T. Bolton . . . at all times mentioned herein, were the owners of the horse known as "Extra News Flash."

Compl. ¶ 1.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on March 13, 1999.[2] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the

[2]See note 1.

proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent on March 13, 1999, informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that a timely answer must be filed, as follows:

CERTIFIED RECEIPT REQUESTED

March 5, 1999

Mr. Stephen Douglas Bolton
Ms. Janet T. Bolton
1940 Clearwater Trail
Carrollton, Texas 75010

Dear Sir/Madam:

Subject: In re: Stephen Douglas Bolton and Janet T. Bolton, Respondents
HPA Docket No. 99-0010

Enclosed is a copy of a Complaint, which has been filed with this office under the Horse Protection Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated March 5, 1999, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Stephen Douglas Bolton and Janet T. Bolton (emphasis in original).

Respondent's Answer was required to be filed no later than April 2, 1999. Respondent's first filing in this proceeding is dated April 29, 1999, and was filed on May 6, 1999, 54 days after the Complaint was served on Respondent and 34 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations of the Complaint, including the allegation that at all times mentioned in the Complaint, he was one of the owners of the horse known as "Extra News Flash." Respondent's denial that he was an owner of a horse known as "Extra News Flash" is filed too late to be considered.

Moreover, even if I found that Respondent was never the owner of the horse known as "Extra News Flash," that finding would not constitute a basis for setting aside the ALJ's conclusion that on or about July 2 or 3, 1998, Respondent entered "Extra News Flash," as entry number 130 in class number 1, at the Marshall Lions Club 36th Annual Charity Horse Show, in Marshall, Texas, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) prohibits the entering, for the purposes of showing or exhibiting in any horse show or horse exhibition, of any horse which is sore. The prohibition in section 5(2)(B) of the Horse Protection Act on entering applies to all persons, including persons who do not own the horse that is entered. Thus, even if I found that Respondent was never the owner of the horse known as "Extra News Flash," that finding would not operate as a defense to the allegation that Respondent violated 15 U.S.C. § 1824(2)(B).

Although on rare occasions default decisions have been set aside for good cause

shown or where the complainant did not object,[3] Respondent has shown no basis for setting aside the Initial Decision and Order.[4] The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the complaint

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[3]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[4]*See generally In re Dean Byard*, 56 Agric. Dec. 1543 (1997) (holding the default decision was properly issued where the respondent failed to file an answer and the respondent is deemed, by his failure to file an answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 94 days after the complaint was served on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. §§ 1824(1) and 1824(2)(B)); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (holding the default decision was properly issued where the response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1825(c)), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re A.P. Holt* (Decision as to A.P. Holt), 50 Agric. Dec. 1612 (1991) (holding the default decision was properly issued where the respondent was given an extension of time to file an answer, but the answer was not filed until 69 days after the extended date for filing the answer and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B)); *In re Jerry Seal*, 39 Agric. Dec. 370 (1980) (holding the default decision was properly issued where a timely answer was not filed and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824 and section 11.2 of the Horse Protection Regulations (9 C.F.R. § 11.2)).

(7 C.F.R. § 1.136(a)). Respondent's first filing in this proceeding was filed 54 days after the Hearing Clerk served Respondent with the Complaint and 34 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Initial Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[5]

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

Order

1. Respondent Stephen Douglas Bolton is assessed a civil penalty of $2,000. The civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014-South Building
Washington, D.C. 20250-1417

Respondent Stephen Douglas Bolton's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 65 days after service of this

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[5]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Order on Respondent Stephen Douglas Bolton. Respondent Stephen Douglas Bolton shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0010.

2. Respondent Stephen Douglas Bolton is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating[6] in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Stephen Douglas Bolton shall become effective on the 65th day after service of this Order on Respondent Stephen Douglas Bolton.

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[6]"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas, or in any area where spectators are not allowed; and (4) financing the participation of others in equine events.

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISIONS

In re: RANDY L. STEPHENS.
DNS Docket No. RD-99-0001.
Decision and Order filed March 29, 1999.

Debarment affirmed – Failure of engineer to fulfill contractual obligations.

Judge Bernstein affirmed Decision to debar Respondent for three years because Respondent, who had contracted to perform engineering services for the Town of Boligee, financed by RUS, a USDA agency formerly known as "FmHA," failed to notify RUS of cost overruns in a timely manner, failed to obtain necessary permits which delayed the project and caused cost overruns, and advised a contractor to submit false claims for payment, all in violation of his contract.

Wally B. Beyer, Debarring Official.
David Oblich, for RD.
William J. Donald III, Tuscaloosa, AL, for Respondent.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. § 3017.100-.515, the regulations which implement a government wide system for nonprocurement debarment and suspension ("Regulations"). The Regulations at 7 C.F.R. § 3017.100(a), state "Executive Order ("E.O.") 12549 provides that to the extent permitted by law, Executive departments and agencies shall participate in a government wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have government wide effect."

On November 18, 1998, Respondent, Randy L. Stephens, filed a timely appeal ("Appeal") of the October 23, 1998, decision of the debarring official, Wally B. Beyer, acting on behalf of Rural Utilities Service ("RUS"), United States Department of Agriculture ("USDA"), which debarred Respondent from participation in government programs for a period of three years ("Debarment Decision"). The bases of the debarment were that Respondent, as an engineer contractor for RUS, failed to notify RUS of cost overruns in a timely manner; failed to obtain required permits; and advised the construction contractor to file false claims.

On December 4, 1998, I entered a ruling respecting procedural requirements

governing this proceeding. Pursuant to that ruling, on December 21, 1998, RUS filed the record of the agency proceeding ("Record"), and on January 5, 1999, RUS filed its Opposition to Respondent's Appeal of Debarment. In a telephone conference on January 13, 1999, both parties agreed, pursuant to Procedural Requirement 10(c), to waive the requirement that the appeal be decided within 90 days of its filing date and agreed that the appeal may be decided on or before April 1, 1999. On January 29, 1999, Respondent filed its Response to Opposition to Respondent's Appeal of Debarment.

Findings of Fact

By Agreement for Engineering Services dated November 15, 1994 ("Agreement") (Record Tab L, Exhibit B) Respondent contracted to perform engineering services for the Town of Boligee, Alabama, in connection with the construction of a sanitary sewer system financed by RUS.[1]

In paragraph 2 of a letter dated April 25, 1997, (Record Tab L, Exhibit D) RUS instructed Respondent to submit a contract change order for increased quantities of items in which there had been overruns and that such change order must also cover the anticipated quantities necessary to finish the project. Paragraph 3 of the letter stated that questions had been raised "whether certain roads can be open cut or if they will have to be bored under." It was not until August 1, 1997, that Respondent submitted a Contract Change Order ("Contract Change Order No. 02") indicating that 30 road bores would be required at a cost in excess of $119,000.00 (Record Tab M).

In a June 19, 1998, letter to the Debarring Official, Respondent admitted that he was advised in February 1997 by the Greene County Engineer that a required permit had not been obtained and that open cutting on any county road, therefore, would not be allowed (Record Tab I).

In a meeting on February 10, 1998, Respondent admitted that he advised the construction contractor to submit a written payment estimate to RUS claiming a greater quantity of one item (sand) than was actually used to cover the cost of another item (pipe). When Respondent was asked at that meeting if he "had knowingly certified to an incorrect payment estimate and had sent it in requesting payment," Respondent nodded his head and said "yes" (Record Tab L, Exhibit P, p. 2).

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[1]RUS is an agency of the United States Department of Agriculture. The water and waste program, administered by Rural Development, a part of RUS, was formerly administered by Farmers Home Administration ("FmHA"). FmHA is in many of the relevant documents.

Paragraph 14 of the Agreement required Respondent to provide for resident construction inspection (Record Tab L, Exhibit B). During an inspection of the project on April 25, 1997, a RUS employee observed that sewer lines were being installed with no resident inspection on the job site. The RUS official was told that the resident inspector refused to continue inspecting the project because he had not been paid (Record Tab L, Exhibit D).

During an inspection of the project on July 29, 1997, the Mayor of the Town of Boligee advised that her signature had been forged on two invoices dated July 3, 1997, and July 24, 1997, for payments to Respondent. The Mayor also stated that her signature was forged on the application for a permit from Greene County (Record Tab L, Exhibit A, p. 2 and Exhibit H).

Conclusion

The decision of the debarring official, debarring Respondent, Randy L. Stephens, for three years is affirmed. The decision was supported by a preponderance of the evidence in the record.

Discussion

In debarment proceedings, the burden of proof is on the agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). "Debarment must be established by a preponderance of the evidence." 7 C.F.R. § 3017.314(c)(1). "Preponderance of the evidence" is defined as "[p]roof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not." 7 C.F.R. § 3017.105(a). The decision of the debarring official may be vacated by the Administrative Law Judge if the judge determines that the decision was: "(1) Not in accordance with the law; (2) Not based on the applicable standard of evidence; or (3) Arbitrary and capricious and an abuse of discretion." 7 C.F.R. § 3017.515(a).

Respondent, Randy L. Stephens and Associates, Inc., contracted to perform engineering services for the Town of Boligee as described in their Agreement dated November 15, 1994. These services involved the design and monitoring of construction in connection with the installation of a sanitary sewer system for the town financed by the RUS, an USDA agency formerly known as Farmers Home Administration, or "FmHA."

RUS based its debarment of Respondent upon three grounds:

1. That Respondent failed to notify RUS officials of cost overruns in a timely

manner. The cost overruns occurred for three months before Respondent notified RUS and the overruns placed the project at 20 percent over budget.

2. That Respondent failed to obtain required permits from Greene County. Respondent ordered the contractor to discontinue work until the permits were obtained. This caused $119,080. in cost overruns.

3. That Respondent advised the construction contractor to submit false claims for payment for quantities of material that had not been used on the project.

Respondent's arguments in response to these alleged grounds are contained in its Appeal and in its Response to Opposition to Respondent's Appeal of Debarment, filed January 29, 1999 ("Response"). These arguments can be summarized as follows:

1. With respect to the contention that Respondent did not notify RUS officials of change orders over a three-month period which resulted in cost overruns that placed the project at 20 percent over budget, Respondent did not deny that he failed to notify RUS officials of these cost overruns during this three-month, period and that the overruns placed the project at 20 percent over budget. However, Respondent contended that he did not "willfully or significantly fail to notify RUS officials in a timely manner given the unusually heavy rains encountered during the project, the fact that the 20% increase did not occur over a three-month period as alleged but was extended out for the life of the project and other circumstances" (Response, p. 2).

2. With respect to the contention that Respondent's failure to obtain the necessary permits caused the project to be shut down and caused cost overruns of $119,080., Respondent did not deny that he failed to obtain the necessary permits but argued that RUS also was to blame for this. He stated, "It was overlooked by all concerned that the County permit had not been received. . . . It was overlooked by RECD officials and by me." He contended that it was the lending agency's responsibility to ascertain that permits were in hand (Appeal, p. 3). Further, Respondent denied that this effectively shut the contractor down. However, in the same section of its argument, Respondent acknowledged that, although its contract was dated November 15, 1994, and it allegedly furnished the Greene County Engineer's office with plans on the project in April 1995 and permits were obtained for all agencies except Greene County by October 1995, construction did not begin until September 1996 (Appeal, p. 3).

3. With respect to the contention that Respondent advised the construction contractor to submit false claims for material that had not been used on the project, Respondent stated that "it is common practice in the engineering and construction industry that when there is an underrun on one particular item and an overrun on

another particular item to substitute the item with the surplus quantities for the item with the shortage. The dollar amount of the work performed does not change by on (sic) cent" (Appeal, p. 4). He reiterated this argument in his Response as follows: "Additionally, Respondent never advised the contractor to substitute items. Respondent was asked by the contractor if he could do so since there was an 'underrun' in one item and an 'overrun' in another item." Respondent, thus, admitted authorizing this false invoicing; however, he argued that this is a common practice in the engineering and construction industry and that the total price was not affected (Response, p. 3; Appeal, p. 4)..

In RUS' Opposition to Respondent's Appeal of Debarment ("Opposition"), it raised two additional arguments that were not included in the Debarment Decision: (1) That Respondent failed to provide for inspection because Respondent failed to notify RUS that the resident inspector refused to inspect because he had not been paid and (2) that the Mayor of Boligee advised that her signature had been forged on two invoices that Respondent had submitted for payment as well as on an application for a permit from Greene County. Since these were not set forth as grounds for debarment in the Debarment Decision, I agree with Respondent that it would be improper to consider these charges at this time. Furthermore, there is no evidence in the record that Respondent forged the Mayor's signature.

However, with respect to the three grounds set forth in the Debarment Decision, I find that Respondent committed the acts alleged and that they violate the parties' Agreement. Paragraph 15 of the Agreement states, "The ENGINEER will cooperate and work closely with FmHA representatives." In failing to notify RUS officials of changes ordered over a three-month period that resulted in cost overruns which placed the project at 20 percent over budget, Respondent failed to comply with this express contractual duty. Paragraph 17 of the Agreement states, "The ENGINEER will prepare necessary Contract change orders for approval of the OWNER, FmHA, and others on a timely basis." Respondent also clearly failed to comply with this express requirement of the Agreement.

Respondent also violated his obligations under the Agreement with respect to the failure to obtain permits from Greene County. It is not clear that this was Respondent's obligation. RUS has not cited any authority for that contention. However, Respondent has admitted that he was aware of delays in obtaining such permits for a substantial period of time during which Respondent violated Paragraph 15 of the Agreement by failing to communicate this information to RUS.

Finally, with respect to the allegation that Respondent advised the construction contractor to submit false claims, Respondent has not denied that he advised the contractor to submit false claims but argues in his defense that "overruns" were offset by "underruns" and that doing this was a common practice in the engineering

and construction industry. Respondent has submitted no evidence that this was a common practice and, in any event, if he wished to authorize such offsetting, he had an obligation to inform RUS of this practice. Thus, in advising the construction contractor to submit false claims without so informing RUS, Respondent violated his contractual obligation to RUS.

Respondent also argued:

> The stated reasons for debarment do not rise to the level of "willful failure to perform in accordance with the terms of a public agreement" required under 7 C.F.R. § 3017.305(b)(1), or "any other cause so serious or compelling a nature that it affects the present responsibility of a person" required under 7 C.F.R. § 3017.305(d). At most, the conduct charged to Respondent represents simple inadvertence, mistake, negligence or nonperformance of contractual duties for which extenuating or mitigating circumstances exist.

(Response, pp. 1-2)

I disagree. Respondent's actions clearly were willful. Willfulness in USDA and Administrative Procedure Act proceedings has long been defined as doing an act which is prohibited and doing it intentionally irrespective of evil motive or reliance on erroneous advice or acting with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-188 (1973); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); and *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

Thus, Respondent's acts, which it concedes may constitute "inadvertence," "negligence," or "nonperformance of contractual duties" do constitute willful failures to perform and, in the case of advising the construction contractor to submit false claims, rise to intentional acts with intent to falsify claims.

In addition, Respondent's actions, which show careless disregard of his responsibilities, at best, also constitute actions so serious and compelling as to effect Respondent's present responsibility to perform as an engineering contractor for the United States Government.

Order

1. The three-year debarment of Respondent, Randy L. Stephens, is affirmed.
2. This Order shall take effect immediately. This Decision and Order is final and not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

[This Decision and Order became final March 29, 1999.--Editor]

In re: BALBO CONSTRUCTION, INC., and GERARD CASTOR, PRESIDENT.
DNS RHS Docket No. 99-0001.
Decision and Order filed April 29, 1999.

Nonprocurement debarment--False contract quote--Failure to follow the terms of the construction contract--Debarment affirmed.

Administrative Law Judge Dorothea A. Baker, affirmed the decision of the debarring official that the Corporation (Balbo Construction, Inc.) of which Mr. Castor was the President had willfully committed irregularities which seriously reflected on the propriety of further dealings between it and the Federal Government, for failure to follow Agency's regulations, including but not limited to, failure to fulfill the terms of a construction contract on rural housing financed by the Rural Housing Service.

Jan E. Shadburn, Debarring Official.
Donald M. McAmis, for RD.
James M. Derr, St, Thomas, Virgin Islands, for Appellants-Respondents.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. Part 3017, being the regulations which implement a government-wide system for nonprocurement debarment and suspension.

The regulations at 7 C.F.R. § 3017.100(a), implement Executive Order No. 12549, which requires, to the extent permitted by law, Executive Department and Agencies to participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one Agency shall have government-wide effect.

By letter dated June 25, 1998, Mr. Gerard Castor, President of Balbo

Construction, Inc. was advised, among other things, that the Rural Housing Service (RHS) was proposing that he as an individual be debarred for a period of three years. Such action was indicated to be based on evidence that the Corporation (Balbo Construction, Inc.) of which Mr. Castor was the President, had committed irregularities which seriously reflected on the propriety of further dealings between it and the Federal Government. More specifically, debarment was proposed as a result of its failure to follow Agency's regulations, including but not limited to, failure to fulfill the terms of a construction contract on rural housing financed by the Rural Housing Service. A copy of the referenced contract was enclosed. The effected property belonged to a Miss Jerain Fleming. As President, the Corporation's actions were imputed to Mr. Castor. 7 C.F.R. § 3017.325.

Debarment was based on the following grounds: violations of the terms of a public agreement or transaction so serious as to affect the integrity of an Agency program, such as (1) willful failure to perform in accordance with the terms of one or more public agreements or transactions; (2) willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction; and (3) any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

More specifically, it was indicated that noncompliance was evidenced by the Corporation's failure to follow Agency's regulations under the construction contract for rural housing financed by Rural Housing Service. The Corporation entered into a construction contract on April 3, 1996, to build a home for Miss Jerain Fleming, to be completed in 180 days at a cost of $75,000.00. The Corporation and Mr. Castor were notified in writing on August 6, 1996, to proceed in accordance with the terms of that letter, and the construction contract. Pursuant to the general conditions paragraph III., Completion of Work, the Corporation refused and failed to complete the work within the time specified in the contract and as of the date of the letter, June 25, 1998, had yet to complete the work. The Appellants-Respondents were notified that they had the opportunity to contest the proposed debarment within thirty days of receipt of the Notice of Proposed Debarment. No response was received from the Appellants-Respondents until after August 13, 1998, more than thirteen days after the period for response had expired.

The Appellants-Respondents were given several additional opportunities to meet with officials of Complainant, but never took advantage of these opportunities. For instance, they were offered an opportunity to present additional information and to meet with officials of the Rural Housing Service on September 4, 1998. The Appellants-Respondents were given until November 30, 1998 to contact officials to set up such a meeting in response to Appellants'-Respondents' request for an informal meeting. No responses from Appellants-

Respondents were ever received. On January 13, 1999, the Rural Housing Service debarred Appellant-Respondent-Castor, as an individual, and so notified him. The reasons of the debarment were the same as set forth in the Notice of Proposed Debarment. Appellant-Respondent-Castor was debarred for a period of three years, effective June 25, 1998, through June 25, 2001. It is the appeal from that debarment notice which is at issue in this proceeding.

Appellants'-Respondents' appeal was filed with the Hearing Clerk on February 12, 1999. Briefly summarized, the grounds set forth by the Appellants-Respondents in their Appeal Petition are that the suspending and debarring officials decision is not supported by the facts and, therefore, failed to comply with substantive and procedural due process requirements. Also, it is contended that the contract at issue herein contained adequate sanction for nonperformance and debarment should not be considered an appropriate sanction for any alleged failure to perform thereunder.

A review of the administrative file indicates that the debarment decision was in accordance with law; was based on the applicable standards of evidence and, was not arbitrary, capricious or an abuse of discretion.

Findings of Fact

1. Appellant-Respondent-Gerard Castor is President of Balbo Construction, Inc. Jurisdiction over this matter is conferred by 7 C.F.R. § 3017.515.

2. The contract entered into by Appellant-Respondent with Fleming was dated April 3, 1996.

3. The contract in question specifically provided in Clause A that all work was to comply with the FmHA and Virgin Islands' adopted building codes and cited specifically FmHA Instruction 1924, Exhibit D.

4. The Virgin Islands and FmHA's Building Codes were incorporated by reference and attached to the contract signed by Appellant-Respondent.

5. The contract specified in Clause A that construction would be completed at the agreed upon price.

6. The contract specified in Clause B that construction would be completed within 180 days of notification to begin construction.

7. Appellant-Respondent was given notice to begin construction on August 6, 1996.

8. Construction of the dwelling was still not complete on July 16, 1997, when Appellant-Respondent was so notified.

9. The construction-contract period for construction was extended beyond the 180-day period for 90-additional days on July 30, 1997.

10. The construction-contract period for construction was extended a second time on September 29, 1997 for an additional twenty-one days to October 30, 1997, the scheduled completion date of the dwelling.

11. A letter from Fleming to Appellant-Respondent, dated October 2, 1997, indicated that during a September 21, 1997 meeting Appellant-Respondent indicated to Fleming that an additional $15,680.00 (or an additional 21% above the contract price) would be necessary before Appellant-Respondent would agree to complete the dwelling.

12. On November 24, 1997, the dwelling was still only ninety percent complete.

13. On December 30, 1997, Appellant-Respondent filed a lien notice against the dwelling property in the amount of $33,398.48.

14. On June 25, 1998, debarring official Jan E. Shadburn, (Complainant) sent Appellant-Respondent a Notice of Proposed Debarment.

15. No response was received from Appellant-Respondent until after August 13, 1998, more than thirteen days after the period for response had expired.

16. Complainant offered Appellant-Respondent an opportunity to present additional information and to meet with officials of Complainant on September 4, 1998.

17. Appellant-Respondent was given until November 30, 1998 to contact officials of Complainant, to set up a meeting in response to Appellant's-Respondent's request for an informal meeting.

18. No response was ever received.

19. On January 13, 1999, Complainant debarred Appellant-Respondent-Gerard Castor, and so notified him.

20. On February 12, 1999, the Appellants-Respondents filed an appeal.

21. The Appellant's-Respondent's contention that a change in the status of Virgin Islands' Building Code led directly to the issuance of the debarment order from which an appeal was taken is without merit.

Discussion and Conclusions

In the discussion which follows Balbo Construction, Inc., and Gerard Castor will be referred to as Respondent[s], although this is an appeal procedure and the afore-named are Appellants.

The Respondent sets forth several grounds on appeal for overturning the debarment, among which was that the debarment lacked substantive due process. Respondent alleges, among other things, that failure to disclose all the grounds for a debarment presents a paradigm case of denial of both procedural and substantive

due process. Respondent further argues that debarment is not suppose to follow automatically from the proof of a cause for debarment. These contentions lack merit. Both the Notice of Proposed Debarment dated June 25, 1998, and the Notice of Debarment dated January 13, 1999, clearly set forth the basis of the debarment, namely, "violation of the terms of a public agreement or transaction so serious as to affect the integrity of an Agency program, such as: [1] wilful failure to perform in accordance with the terms of one or more public agreements or transactions, 7 C.F.R. § 3017.305(b)(1); [2] willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, 7 C.F.R. § 3017.305(b)(3); and [3] any other cause of so serious or compelling a nature that it affect the present responsibility of a person, 7 C.F.R. § 3017.305(d)." Clearly, Respondent was notified in writing of the proposed debarment and the three proposed causes of debarment are clearly set out in the notice, as required by 7 C.F.R. § 3017.312(c). Specific actions and inactions by Respondent are clearly identified with sufficient specificity as to leave no doubt as to the conduct or transactions upon which the debarment is based. In addition, pursuant to the requirement of 7 C.F.R. § 3017.313, Respondent was given an opportunity to submit opposition to the proposed debarment, as well as several additional opportunities to meet with officials of Complainant. Respondent never took advantage of these opportunities.

Appellant was afforded procedural due process as specified under the debarment regulations found at 7 C.F.R. Part 3017.

The additional contention of Respondent, that the procedure was defective because no written Findings of Fact were made, is without merit. Sufficient information was included in the final debarment to constitute Findings of Fact. There is no requirement that the Findings of Fact be separate from the debarment notice. Nor is there any requirement that they be specifically labeled "Findings of Fact."

In debarment proceedings, the burden of proof is on the Agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). Debarment must be established by a preponderance of the evidence. 7 C.F.R. § 3017.314(c)(1). Preponderance of the evidence is defined as proof by information that compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. 7 C.F.R. § 3017.105(a). In the subject case, Complainant's decision to debar Respondent is established by a preponderance of the evidence as required by the regulations.

Respondent alleges that the reason for the price increase in the construction of Fleming's dwelling was due to changes in wind-loading requirements, which took place during and after formation of the contract and construction startup, in the

Virgin Islands' Building Code. However, Respondent has furnished no reliable evidence that such a situation had occurred even though Respondent was given several opportunities to do so, to the Complainant, prior to the issuance of the debarment notice.

The construction contract incorporates by reference the Virgin Islands' Building Code. Two sections of the Virgin Islands' Building Code are pertinent to Respondent's allegations: "Paragraph (h) of section 292; and paragraph (h) of section 311, both of which incorporate certain sections of the Council of American Building Officials One and Two Family Dwelling Code, and subsequent amendments thereto."

A review thereof reveals no changes to the 110 mph wind-load requirement either before the date of the construction contract, nor at any time during construction, nor thereafter. Furthermore, the 1994 Uniform Building Code, in effect prior to the last amendment to the Virgin Islands' Building Code also shows a wind-load requirement of 110 mph.

A change in building code requirements for construction would have required a new set of plans, drawings and specifications for the dwelling in question. In order to assure that the changes conformed to applicable standards, some type of competent, license professional must have reviewed and certified to the plans and modifications conformity with the applicable development standard.

Section 1924.5(f) of FmHA Instruction 1924-A recognizes the necessity of such an approach and requires it. The administrative record demonstrates that no change in the plans, drawings or specifications had ever been requested nor submitted by the Respondent.

Respondent relies upon a document, Construction Information for a Stronger Home, which was for guidance only and did not purport to be an official version of the Virgin Islands' Building Code. It does not show officially any changes to building requirements. It simply states that it is what amounts to a guide which has no official effect. The document is dated "Feb. 1996" which is prior to the formation of the construction contract signed by Respondent. As pointed out by Complainant, the requirement to build to 110 mph wind-load requirements has been in effect since the 1994 Uniform Building Code. Respondent has not shown any change to the Virgin Islands' Building Code in anything it has submitted.

Since the Uniform Building Code had the 110 mph wind-load requirements as early as 1994, Respondent had to be or, as a professional builder, should have been aware of the 110 mph wind-load requirements well prior to entering into the construction contract; and even if the document supplied by Respondent were a part of the official Virgin Island's Code, Respondent had ample opportunity to be aware of its contents prior to signing the construction contract. Respondent agreed

to build the dwelling for the sum specified in the contract. It waited for six months after it signed the contract before it even made mention about not being able to build the house for the sum that it agreed to. Respondent should bear the responsibility for its own actions or inaction.

Even applying the principles that debarment is discretionary and that mitigating factors should be considered, the Appellant had not shown that there is any basis in such principles to alter the determination of debarment.

The administrative record indicates that the construction contract was not completed within the specified terms and extensions granted. On November 24, 1997, the end date of the final extension, the dwelling was still only ninety percent complete. No certificate of occupancy was issued until June 11, 1998, six months after the final extension. There has been no demonstration of a code change which would have required an increase in the contract price. There was no amendment nor change order to the contract in this regard.

Rather than build a dwelling for the agreed upon contract price, Respondent admits in its August 13, 1998 contest of proposed debarment and in its appeal of the debarment, that it procured an arrangement on the side, without notification to the Complainant, with the father of the prospective dwelling owner to provide sweat equity. There is no reliable indication that the Complainant had knowledge of this part of the arrangement. The administrative record shows that checks were issued to the Respondent, not Fleming's father, for work produced. While Complainant did some inspections, there is nothing inherent in an inspection which would give rise to knowledge on the part of Complainant of the arrangements between Respondent and Fleming's father. Even with such an arrangement, the administrative record shows that Fleming had to absorb costs in excess of $11,800.00 over and above the contract cost and forego the completion of the driveway.

Complainant has a valid interest in assuring the elimination of a serious housing shortage, including substandard and inadequate housing, and assuring the realization of a decent home and suitable living environment for every American family. See 42 U.S.C. § 1441. This goal is achieved through the rural housing programs of the Rural Housing Service, formally the FmHA as provided in 42 U.S.C. § 1471 *et seq.*, including its single family rural housing loan programs. In order to run a successful loan program, loans must be able to be repaid. Respondent's ratios are setup based upon the loan amount, which is based on the construction contract price. Significant variations in the construction contract, such as those borne out by the administrative record herein, strike at the heart of a successful nation-wide loan program. In the subject case, the increased cost was not justified based upon any evidence submitted by Respondent. It was the

experience of officials of Complainant that a house of this type built by Respondent in the Virgin Islands during that period of time could have been built for $75,000.00. The additional cost which have to be borne by Fleming affects significantly her repayment ability. Respondent's failure to follow the terms of the construction contract and failure to secure Complainant's concurrence on any of these contract variations, as required by the regulations, show a cavalier attitude towards both Fleming and the Agency, as well as the terms of the construction contract which incorporated 7 C.F.R. Part 1924 by reference.

As provided in 7 C.F.R. § 3017.115(b) debarment is used in the public interest and for the Government's protection. Respondent clearly violated the terms of the construction contract. The violation was willful. Willfulness in the United States Department of Agriculture and Administrative Procedure Act's proceedings has long been defined as doing an Act which is prohibited and doing it intentionally irrespective of evil motive or reliance on erroneous advice or acting with careless disregard of statutory requirements. *Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182 (1973); *Finer Foods Sales Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

The failure of the Respondent to properly perform his contractual obligations indicates a lack of present responsibility and his failure to live up to the terms of the contract, at the very least, shows incompetence. The debarring official found that the Respondent was irresponsible and in order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons.

Respondent mistakenly uses the term sanction in his argument as a penalty for noncompliance with a requirement of the law and argues that the contracts themselves contain adequate sanctions for nonperformance. The Respondent is mistaken in this regard. The debarment imposed is to protect the Government loan program from having to do business with building contractors such as Respondent who fail to follow regulations and fail to honor their contractual obligations. What Respondent has done is to refuse to complete a public contract for no good cause. Respondent has obtained additional monies for the dwelling it contracted to build at a certain price by waiting until the house was almost completed, by negotiating a different construction contract on the side, and then profiting beyond the amount agreed upon by refusing to finish the project without additional reimbursement.

Based upon the administrative record and after considering all of the contentions put forth by the Respondent in its appeal, the debarment imposed upon the Respondent is supported by the evidence, is reasonable and is warranted. As set forth in the Notice of Debarment, dated January 13, 1999, the debarment is

"* * * effective June 25, 1998 through June 25, 2001."

Order

The three-year debarment of Respondent Gerard Castor, is affirmed.

This Order shall take effect immediately.

This Decision and Order are final and are not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

[This Decision and Order are final and not appealable within this Department.-Editor]

[This Decision and Order became final April 29, 1999.-Editor]

In re: AVTAR S. GILL.
DNS-RMA Docket No. 99-0001.
Decision and Order filed June 4, 1999.

Nonprocurement debarment and suspension--False statements--Filing false crop insurance claims--Mail fraud--Suspension affirmed.

Administrative Law Judge Dorothea A. Baker affirmed the decision of the suspending official that Respondent be suspended for a period of twelve months from participating in the Federal Crop Insurance Program and all other governmental programs. He was advised that the suspension may be shorten or extended in accordance with 7 C.F.R. Part 3017. The decision was based on facts including those that Respondent had been indicted for making false statements, filing false crop insurance claims and engaging in mail fraud. Specifically, the indictment indicated that Respondent together with two other individuals, committed conspiracy and wire fraud by submitting false claims under the Federal Crop Insurance Program for the 1994 Raisin Crop Year and was charged with seven counts of making false statements to the Federal Crop Insurance Corporation.

Kenneth D. Ackerman, Suspension Official.
Donald M. McAmis, for RD.
Anthony P. Capozzi, Fresno, California, for Respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This Decision and Order are issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. Part 3017,

being the regulations which implement a government-wide system for nonprocurement debarment and suspension.

The regulations at 7 C.F.R. § 3017.100(a), implement Executive Order No. 12549, which requires, to the extent permitted by law, Executive Department and Agencies to participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one Agency shall have government-wide effect.

By letter dated October 26, 1998, Mr. Gill ("Respondent") was informed that pursuant to 7 C.F.R. Part 3017, the Federal Crop Insurance Corporation (FCIC) was initiating proceedings to suspend him for a period of twelve months beginning with the date of the letter [October 26, 1998] from participating in the Federal Crop Insurance Program and all other government programs. He was further advised "This suspension may be shorten or extended in accordance with 7 C.F.R. Part 3017. Suspension is being imposed to protect the interest of the Government."

The Agency indicated that it had "adequate evidence" for making this suspension because the Respondent had been indicted for making false statements, filing false crop insurance claims and engaging in mail fraud. Specifically, it was pointed out, that together with two other individuals it was alleged in the indictment that he committed conspiracy and wire fraud by submitting false claims under the Federal Crop Insurance Program for the 1994 Raisin Crop Year. Further it was noted that the Respondent was charged with seven counts of making false statements to the Federal Crop Insurance Corporation.

These actions were indicated to be cause for suspension under 7 C.F.R. § 3017.405 because they furnished adequate evidence that a case for debarment might exist under 7 C.F.R. § 3017.305 and furnished a reason to suspect commission of an offense under 7 C.F.R. § 3017.305(a). The suspension was immediate and was indicated to be necessary to protect a public interest.

The same letter, dated October 26, 1998, advised the Respondent, among other things:

> Within 30 days after receipt of this notice of suspension, you have a right to submit in person, in writing, or through a representative, information and argument in opposition to this proposed action including any additional specific information that raises a genuine dispute over the facts material to your suspension.

Respondent was further advised that within forty-five days after receipt of any

information and arguments submitted by him, the suspending official would make a decision concerning the suspension and that the suspension would remain in effect pending the completion of the FCIC's consideration of any evidence submitted by Respondent.

By letter dated December 2, 1998, Respondent, through counsel, indicated, among other things:

> "Additional time is requested in which to submit information and argument in opposition to said suspension.
>
> Would you please contact this office so that we may discuss the process involved herein."

Said letter was directed to Kenneth D. Ackerman, suspending official.

By letter of January 19, 1999, accompanied by a declaration of Respondent, the Respondent objected to the notice of suspension and submitted detailed reasons controverting the charges of the indictment as well as indication he had entered a not guilty plea to any and all charges alleged in the indictment in Case No. CRF-98-5339. Respondent contended that the mere allegations set out in the indictment are not proof of any fact, and that to base a suspension merely on an indictment returned in a Federal criminal case is arbitrary and capricious in that it did not allow Respondent to present any evidence prior to the suspension. Accordingly, it was concluded by Respondent that the action of the Agency in suspending Respondent was arbitrary and capricious and a violation of his constitutional rights. In addition, it was requested that the Department of Agriculture Risk Management Agency, be required to present evidence as a basis for the indictment or present evidence as a basis for the suspension of Respondent's participation in the Federal Crop Insurance Program. The declaration accompanying said letter sets forth in considerable detail the basis of Respondent's denials.

It was in response thereto that the suspending official addressed a letter dated March 4, 1999, to Respondent wherein it was indicated:

> "We receive your letter dated January 19, 1999, in opposition to the suspension action initiated against Mr. Avtar S. Gill (Mr. Gill) by the Federal Crop Insurance Corporation (FCIC) dated October 26, 1998. We have determined that did not raise a genuine dispute as to the facts material to Mr. Gill's suspension, nor did you present any information which would warrant reversing our suspension action. Therefore, your request that the suspension action initiated against Mr. Gill be terminated immediately

is denied.

Pursuant to 7 C.F.R. § 3017.405(b), indictments shall constitute adequate evidence for purposes of suspension actions. Adequate evidence of a debarrable offense requires immediate action to protect the public interest.

Respondent was given thirty days from the receipt of the March 4, 1999 letter to appeal that decision, which he did by "Notice of Appeal" filed with the Hearing Clerk on March 31, 1999.

By letter dated April 15, 1999, addressed to the Respondent, it was indicated that the debarring official would have ten days from the date of that letter to file a response in opposition to the appeal.

On April 16, 1999, there was filed "Complainant's Response in Opposition to Respondent's Appeal Petition" wherein the Complainant indicated that it believed the suspending official's determination should be affirmed premised upon the administrative record and the fact that Complainant followed the government-wide debarment and suspension regulations found at 7 C.F.R. Part 3017. It was set forth therein, among other things, that: "The Administrative Record shows conclusively that Complainant has afforded Respondent prompt opportunity to convince Complainant that its decision was in error and afforded Respondent additional requested time to make such arguments without any corresponding response from Respondent which delineate any cogent reason not to have imposed the suspension."

The correctness of the suspension must take into consideration whether or not the decision of the debarring official was not in accordance with law, not based on the applicable standard of evidence, or was arbitrary and capricious and an abuse of discretion. We have found no such infirmities with respect to the subject suspension.

It is provided in 7 C.F.R. § 3017.405 that suspension may be imposed upon adequate evidence that a cause for debarment exists and "indictment shall constitute adequate evidence for the purposes of suspension actions." (Emphasis added). Complainant maintains that suspension was premised upon the indictment and that the decision was neither arbitrary nor capricious nor an abuse of discretion.

Respondent was granted an extension of time within which to respond to Complainant's contentions which he did by document (Respondent's Reply) field May 14, 1999. Therein, Respondent submits that he has been denied due process of law by refusing to provide him with an evidentiary hearing pertaining to his suspension; that Respondent was never told what specific facts he should attempt to dispute; and that the Respondent "put in issue" the facts relating to and

supporting the indictment. More specifically, Respondent states that the Department of Agriculture, when it suspended Respondent on the basis of the subject indictment, engaged in a permissible action. However, the Respondent indicates, among other things: "* * *what is not permissible and a violation of Respondent's due process rights is to continue this suspension without affording the Respondent the opportunity to refute the bare allegations of the indictment. The indictment is simply the description of the charges made by the Government against the Respondent; it is not evidence of anything * * *." By document filed May 10, 1999, Complainant filed a Motion for Extension of Time in which to file a reply. Complainant requested an extension of time to June 4, 1999 within which to file any response necessary to Respondent's reply. This request was granted.

The Complainant filed its Reply to Respondent's Reply on May 25, 1999.

Findings of Fact

1. Respondent, along with others was indicted in the United States District Court for the Eastern District of California in Case No. CRF-98-5339 on or about October 1, 1998 (The document attached as part of the administrative record does not show a clear date stamp. for violations of 18 U.S.C. §§ 2, 371, 1014 and 1343 for conspiracy to make false statements and to commit wire fraud and for aiding and abetting wire fraud.

2. By letter dated October 26, 1998, Complainant suspended Respondent pursuant to the United States Department of Agriculture's nonprocurement suspension regulations at 7 C.F.R. Part 3017.

3. By letter dated January 19, 1999, Respondent opposed the suspension.

4. By letter dated March 4, 1999, Complainant notified Respondent that it had determined that Respondent did not raise a genuine issue as to the facts material to Mr. Gill's suspension nor did "... [Respondent] present any information which would warrant reversing our suspension action. Therefore, your request that the suspension action initiated * * * be terminated immediately is denied."

5. By letter dated March 16, 1999, Respondent appealed the suspension.

6. Among other things, the suspension prohibits Respondent from obtaining Federal Crop Insurance on crops in which he has an interest, and from selling, servicing, adjusting, or acting in any capacity relating to any crop insurance policy, insured or reinsured by the Federal Crop Insurance Corporation.

7. The sole basis for the suspension was the fact that Respondent was indicted.

8. The indictment of an individual constitutes a finding by a Grand Jury that probable cause exists to believe that the indicted individual committed a

felony.

9. The regulations provided that indictment shall constitute adequate evidence for purposes of suspension actions.

10. The suspension is a temporary suspension and pursuant to government-wide debarment and suspension regulations (7 C.F.R.§ 3017.415) must be revisited within one year of the suspension, if not sooner.

Conclusions

In debarment proceedings, the burden of proof is on the Agency proposing debarment. 7 C.F.R. § 3017.314(c)(2). Debarment must be established by a preponderance of the evidence. 7 C.F.R. § 3017.314(c)(1). Preponderance of the evidence is defined as proof by information that compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. In the subject case, Complainant's decision to debar Respondent is established by a preponderance of the evidence as required by the regulations.

There was articulated a rational connection between the fact of indictment and the choice made namely, suspension in the public interest. The standard for the subject suspension is enunciated in 7 C.F.R. § 3017.410 in that the suspension must not be groundless and adequate evidence is required. An indictment constitutes adequate evidence. It would be inappropriate in this proceeding to "second guess" a Grand Jury and to try to determine whether there was probable cause for the indictment. Only the Grand Jury and the Assistant U.S. Attorney know what evidence the Grand Jury had before it. Complainant took prompt action which balanced the threat to the individual verses the threat to the public as set forth by the Supreme Court in *Federal Deposit Insurance Corporation v. Mallen et al.*, 486 U.S. 230, 243 (1988).

The suspension in the subject case is for a specific, temporary period of time only. Within the one-year period, the suspension must either be revisited and renewed or terminated. 7 C.F.R. § 3017.415(b).

Order

Based upon the record as a whole, the suspension of Respondent Avtar S. Gill is affirmed.

This Order shall take effect immediately.

This Decision and Order are final and are not appealable within this Department. 7 C.F.R. § 3017.515(d) 1990.

The Hearing Clerk shall serve copies of this Decision and Order upon the

parties.

[This Decision and Order became final June 4, 1999.-Editor]

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: MERALDA MILLER.
P.Q. Docket No. 98-0013.
Decision and Order filed February 24, 1999.

Bringing fresh untreated Mangoes into United States from Jamaica prohibited - Civil penalty imposed.

Judge Bernstein imposed a civil penalty of $1,000, upon Respondent for importing fresh Mangoes into the United States from Jamaica which had not been treated in accordance with the applicable regulations.

James D. Holt, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This administrative proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) ("the Act"), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") on April 1, 1998. The Complaint alleges that Respondent violated these acts and the regulations promulgated under the acts (7 C.F.R. § 319.56 *et seq.*). Respondent filed a timely Answer to the Complaint on May 19, 1998. On November 6, 1998, I presided over a hearing in this matter. James D. Holt, Office of the General Counsel, United States Department of Agriculture ("USDA") appeared for Complainant. Respondent appeared *pro se*.

Complainant filed post-hearing proposed findings of fact, proposed conclusions of law, a proposed order and a brief on December 18, 1998. Respondent filed no post-hearing submission. The proposed findings of fact, conclusions of law, and both parties' arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the Record. Complainant's exhibits are referred to as "CX" and the hearing transcript is referred to as "Tr."

Findings of Fact

1. Respondent, Meralda Miller, resides at 3485 Fenton Avenue, Bronx, New York 10469.

2. On May 29, 1997, at John F. Kennedy International Airport, New York, Respondent imported mangoes from Jamaica into the United States without a permit.

3. On May 29, 1997, at John F. Kennedy International Airport, New York, Respondent imported mangoes from Jamaica into the United States that were fresh and had not been treated to destroy insects.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. Respondent violated the Plant Quarantine Act (7 U.S.C. §§ 151-167); and the regulations promulgated (7 C.F.R. §§ 319.56-2(e), 319.56-2i; Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables, The Plant Protection and Quarantine Treatment Manual) and the standards issued pursuant to the Act.

Discussion

The Plant Quarantine Act provides that the Secretary of Agriculture ("the Secretary") may forbid the importation of a fruit into the United States in order to prevent the introduction of any injurious insect into the United States. 7 U.S.C. § 160. The Act also provides that the Secretary may promulgate regulations which prohibit such importation regardless of the use for which the fruit is intended. 7 U.S.C. § 160. The Act further provides that no person shall import, or offer for entry into the United States, fruit which has been prohibited by such regulations. 7 U.S.C. § 160. The Secretary may assess a civil penalty not exceeding $1,000 for each violation of the Act. 7 U.S.C. § 163.

Fresh fruit is defined as "the edible, more or less, succulent, portions of food plants in the raw or unprocessed state, such as bananas, oranges, grapefruit, pineapples, ..." 7 C.F.R. § 319.56-1. The Fruits and Vegetables subpart of Part 319 (Foreign Quarantine Notices), Chapter III, Title 7, Code of Federal Regulations, prohibits the importation of fruit into the United States unless the importation is explicitly allowed by an administrative instruction. 7 C.F.R. § 319.56. The Fruits and Vegetable subpart provides that fruit from the West Indies may only be imported under permit if it is treated to kill all injurious insects. 7 C.F.R. § 319.56-2(e). The administrative instructions for the importation of fruit from the West Indies identifies the treatments listed in the Plant Protection and Quarantine Treatment Manual as those treatments which meet the requirements of 7 C.F.R. § 319.56-2(e) for the importation of fruit into the United States from the West Indies. 7 C.F.R. § 319.56-2i. The Plant Protection and Quarantine Treatment

Manual is incorporated by reference into Part 319 (Foreign Quarantine Notices), Chapter III, Title 7, Code of Federal Regulations. 7 C.F.R. § 300.1. Mango is a fruit. 7 C.F.R. § 319.56-1. The treatment identified as T102-a (Mango) in the Plant Protection and Quarantine Treatment Manual requires that mango must be treated by a hot water dip, in the country of origin at a certified facility and under the supervision of APHIS personnel, to protect from the introduction of the Mediterranean fruit fly (Ceratitis capitata). Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables.

Fresh mangoes from Jamaica are not allowed entry into the United States (CX 6; Tr. 53-54). This is to prevent the introduction of the Mediterranean fruit fly into the United States. 7 U.S.C. § 160, 7 C.F.R. § 319.56. The regulations prohibit importation of mangoes from Jamaica regardless of the use for which the fruit is intended. 7 U.S.C. § 160, 7 C.F.R. §§ 319.56-2(e), 7 C.F.R. § 319.56-2i, Treatment schedules, T100--Schedules for Fruit, Nuts, and Vegetables, The Plant Protection and Quarantine Treatment Manual.

On May 29, 1997, Respondent flew from Jamaica to the United States on Jamaica Airlines, landing at John F. Kennedy International Airport, New York (CX 4-5; Tr. 20-21, 70). When Respondent was questioned about her Customs Declaration, she stated that she was bringing cooked mangoes and cooked yams into the United States (CX 4; Tr. 48-49). When Respondent's baggage was inspected by Plant Protection and Quarantine Officers, they discovered cooked yams and fresh, untreated mangoes. The mangoes had been provided to Respondent in Jamaica by a relative and had not been treated as required by the treatment manual (CX 1, 3-4; Tr. 28, 51-54, 58-60, 70, 73, 75). Respondent did not present a permit allowing her to import mangoes.

Therefore, on May 29, 1997, Respondent imported into the United States fresh, untreated mangoes from Jamaica, West Indies, without a permit in violation of the Act and the regulations promulgated under the Act. 7 U.S.C. §§ 151-167, 7 C.F.R. § 319.56).

A civil penalty of $1,000.00 is an appropriate sanction. The Secretary may assess a civil penalty not exceeding $1,000.00 for each violation of the Act. 7 U.S.C. § 163. Fresh mangoes from Jamaica are prohibited from entering the United States because they might harbor the larva of the Mediterranean fruit fly (CX 6; Tr. 26, 41, 64). The Mediterranean fruit fly is one of the world's most destructive insect pests. It attacks more than 250 different kinds of fruits, nuts, and vegetables, many of which grow in home gardens and orchards. If the Mediterranean fruit fly became established in the continental United States, they would devastate commercial agriculture. United States consumers would pay more for fruits and vegetables because of higher production costs and reduced yields.

The Mediterranean fruit fly would cost consumers an additional $821 million per year. *See, Mediterranean Fruit Fly, Impact on You*, United States Department of Agriculture, Animal and Plant Health Inspection Service, Agriculture Information Bulletin No. 636.

It is well established policy that "the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility of achieving the congressional purpose." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as Respondent. Without the adherence of these individuals to federal regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. Sanctions are very important to prevent people from spreading plant pests. The sanctions need to be substantial enough to deter a wrongdoer from committing such a violation in the future as well as to deter others in similar situations.

Therefore, the civil penalty of $1,000.00, which was requested by USDA, is appropriate. It is also consistent with civil penalties assessed in similar circumstances. *See In re Ana Maria Rosales*, 56 Agric. Dec. 1689 (1997)(Default Decision); *In re Rigaud Pierre*, 56 Agric. Dec. 1688 (1997)(Default Decision); *In re Arturo Caneles*, 56 Agric. Dec. 1691 (1997)(Default Decision); *In re Fermin Rivera-Torres and Miguel Pallens*, 56 Agric. Dec. 1693 (1997)(Default Decision).

Order

1. Respondent is assessed a civil penalty of $1,000.00. Respondent shall send a certified check or money order for $1,000.00, payable to "Treasurer of the United States," to USDA, APHIS Field Servicing Office, Accounting Section, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

2. This Decision will become final and effective without further proceedings 35 days after service upon Respondent unless appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to § 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final May 6, 1999.--Editor]

In re: NKIAMBI JEAN LEMA.
P.Q. Docket No. 99-0002.
Decision and Order filed March 15, 1999.

Failure to deny allegations — Due process — Importation from Zaire — Limes — Passion fruit — Civil penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $500 civil penalty because he imported 12 limes and 6 passion fruit into the United States from Zaire, in violation of 7 C.F.R. § 319.56. Respondent's failure to deny the material allegations of the Complaint is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). The Judicial Officer stated that agencies may dispense with a hearing in a proceeding in which there is no material issue of fact on which a meaningful hearing may be held. Accordingly, the Default Decision did not violate Respondent's right to due process. The Judicial Officer also stated that a sanction imposed by an agency will be overturned only if it is unwarranted in law or without justification in fact. The Judicial Officer held the civil penalty assessed against Respondent was authorized by the Federal Plant Pest Act (7 U.S.C. §§ 150gg) and the Plant Quarantine Act (7 U.S.C. § 163) and therefore, warranted in law. Moreover, the Judicial Officer found that, while there is no requirement that sanctions imposed by an agency be uniform, the civil penalty assessed against Respondent was consistent with sanctions imposed for similar violations of 7 C.F.R. § 319.56 and that the facts in the proceeding justify assessment of a $500 civil penalty against Respondent. The Judicial Officer also rejected Respondent's contention that the Commodities Exchange Act (7 U.S.C. §§ 1-25) was applicable to the proceeding.

Rick D. Herndon, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act] and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8) [hereinafter the Regulations]; 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], by filing a Complaint on October 16, 1998.

The Complaint alleges that, on or about January 14, 1998, Nkiambi Jean Lema [hereinafter Respondent] imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56 (Compl. ¶ II).

On November 16, 1998, Respondent filed a Motion to Dismiss or in the Alternative Answer to Complaint [hereinafter Answer]. Respondent did not deny

the material allegations of the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

On November 27, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On December 11, 1998, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On January 4, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Default Decision and Order in which the ALJ: (1) found that Respondent imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56, as alleged in the Complaint; and (2) assessed Respondent a $500 civil penalty (Default Decision and Order at 2).

On February 16, 1999, Respondent appealed to, and requested oral argument before, the Judicial Officer. On March 8, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on March 11, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex; thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Default Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION AND ORDER (AS RESTATED)

Respondent filed an Answer on November 16, 1998, but failed to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that a failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for the purposes of the proceeding, an admission of the allegation. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that the admission of all the material allegations of fact contained in the complaint shall constitute a waiver

of hearing. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision and Order as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Nkiambi Jean Lema is an individual whose mailing address is 3605 Blair Avenue, Randallstown, Maryland 21133.

2. On or about January 14, 1998, at Dulles International Airport, Herndon, Virginia, Respondent imported 12 limes and 6 passion fruit from Zaire into the United States.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56, which prohibit the importation of limes and passion fruit into the United States from Zaire.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in his February 16, 1999, Appeal Petition. First, Respondent contends that he was not afforded an opportunity for a hearing on the record (Appeal Pet. ¶¶ 1-2).

Respondent is entitled to due process of law in this proceeding, and the fundamental elements of due process of law are notice and an opportunity to be heard.[1] Moreover, section 108 of the Federal Plant Pest Act (7 U.S.C. § 150gg)

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[1]*See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (stating that our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property); *Lankford v. Idaho*, 500 U.S. 110, 126 (1991) (stating that notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988) (stating that a fundamental requirement of due process is notice reasonably calculated to apprise the parties of the pendency of an action and afford them the opportunity to present their objections); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (stating that the due process clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case); *Baldwin v. Hale*, 1 Wall. 223, 233 (1864) (stating that

(continued...)

provides that the Secretary of Agriculture may issue an order assessing a civil penalty for violation of the regulations issued under the Federal Plant Pest Act only after notice and an opportunity for an agency hearing on the record and section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that the Secretary of Agriculture may issue an order assessing a civil penalty for violation of the regulations issued under the Plant Quarantine Act only after notice and an opportunity for an agency hearing on the record. However, a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing in a proceeding in which there is no material issue of fact on which a meaningful hearing can be held.[2] Therefore, a decision without hearing, based upon a respondent's admission of the material allegations of fact in a complaint, by the respondent's failure to deny or otherwise respond to a complaint, generally is not set aside.

The record reveals that Respondent was given an opportunity for a hearing on

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[1](...continued)
"[c]ommon justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence"); *Boswell's Lessee v. Otis*, 9 How. 336, 350 (1850) (stating that "no principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence").

[2]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating that the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) (rejecting petitioner's contention that the Federal Energy Regulatory Commission's failure to hold an evidentiary hearing denied petitioner procedural due process and stating that since no material factual dispute exists, the Federal Energy Regulatory Commission was not required to hold a hearing); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986); *United States v. Cheramie Bo-Truc # 5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976) (stating that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the Administrative Procedure Act requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed); *Independent Bankers Ass'n of Georgia v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (stating that the case law in this circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating that it is settled law that when no fact question is involved or the facts are agreed, an agency hearing is not required); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (stating that no agency hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law).

the record and was informed that a failure to deny or otherwise respond to the allegations in the Complaint would be deemed an admission of the allegations and a waiver of hearing.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on October 21, 1998.[3] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to deny or otherwise respond to a complaint, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Office of the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that failure to answer any allegation in the Complaint would constitute an admission of that allegation and a waiver of the right to a hearing, as follows:

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[3]Domestic Return Receipt for Article Number P093143480.

CERTIFIED RECEIPT REQUESTED

October 16, 1998

Mr. Nkiambi Jean Lema
3605 Blair Avenue
Randallstown, Maryland 21133

Dear Mr. Lema:

Subject: In re: Nkiambi Jean Lema, Respondent -
P.Q. Docket No. 99-0002

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may

result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Regina Paris
Legal Technician

Letter dated October 16, 1998, from Regina Paris, Legal Technician, Office of the Hearing Clerk, Office of Administrative Law Judges, USDA, to Mr. Nkiambi Jean Lema (emphasis in original).

Despite being informed of the consequences of failure to deny the allegations of the Complaint in his answer, Respondent failed to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States. Therefore, I find that there are no issues of fact on which a meaningful hearing could be held in this proceeding. Consequently, the Default Decision and Order, issued without hearing, based on Respondent's failure to deny the material allegations of fact in the Complaint, does not violate Respondent's right, under the due process clause of the Fifth Amendment to the United States Constitution, the Federal Plant Pest Act, or the Plant Quarantine Act, to an opportunity for a hearing.

Second, Respondent contends that the $500 civil penalty assessed against him by the ALJ is "extremely excessive and arbitrar[y]" (Appeal Pet. ¶ 2).

I disagree with Respondent's contention that the $500 civil penalty assessed against him is excessive and arbitrary. A sanction by an administrative agency will be overturned only if it is unwarranted in law or without justification in fact.[4] The

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[4]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States*
(continued...)

Secretary of Agriculture has authority to assess a civil penalty not exceeding $1,000 for each violation of the Regulations (7 U.S.C. §§ 150gg, 163); therefore, the assessment of a $500 civil penalty against Respondent for a violation of 7 C.F.R. § 319.56 is warranted in law.

Moreover, while there is no requirement that sanctions imposed by an administrative agency must be uniform,[5] the $500 civil penalty assessed against Respondent is consistent with sanctions imposed for similar violations of the Regulations,[6] and I find that the facts in this proceeding justify the assessment of

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[4](...continued)
Dep't of Agric., 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 29-30 (Aug. 18, 1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[5]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 776 (9th Cir. 1985); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979); *General Securities Corp. v. SEC*, 583 F.2d 1108, 1110 (9th Cir. 1978) (per curiam); *Hiller v. SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970).

[6]See, e.g., *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (assessing the respondent a $250 civil penalty for the importation of approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States, in violation of 7 C.F.R. § 319.56); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (assessing the respondent a $375 civil penalty for the importation of a fresh mango into the United States from Jamaica, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c)); *In re Christian King*, 52 Agric. Dec. 1333 (1993) (assessing the respondent a $750 civil penalty for the importation of approximately 5 to 8 pounds of fresh okra
(continued...)

a $500 civil penalty against Respondent.

Third, Respondent states that he "disclosed to the authority the content of his luggage through form 6055" (Appeal Pet. ¶ 4).

Respondent is deemed by his failure to deny or otherwise respond to the allegations in the Complaint that on or about January 14, 1998, he imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56. Even if I found that Respondent disclosed the contents of his luggage to an authority on a form, Respondent's reporting the contents of his luggage would not operate as a defense to his violation of 7 C.F.R. § 319.56, which he is deemed to have admitted by his failure to deny or otherwise respond to the allegations of the Complaint.

Fourth, Respondent contends that the requirements regarding the assessment of civil penalties under the Commodities Exchange Act, as amended (7 U.S.C. §§ 1-25) [hereinafter the Commodities Exchange Act], are applicable to this proceeding (Appeal Pet. ¶¶ 5-6).

I disagree with Respondent's contention that the requirements regarding the

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[6](...continued)
into the United States from Sierra Leone, in violation of 7 C.F.R. § 319.56); *In re Carol F. Hines*, 52 Agric. Dec. 336 (1993) (assessing the respondent $375 civil penalty for the importation of mangoes and pomegranates into the United States from Guyana, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56); *In re Alicia Piedad Valero*, 52 Agric. Dec. 328 (1993) (assessing the respondent a $375 civil penalty for the importation of fresh mango fruits into the United States from Ecuador, in violation of 7 C.F.R. § 319.56); *In re Vanessa Hopkins*, 51 Agric. Dec. 1212 (1992) (assessing the respondent a $375 civil penalty for the importation of approximately 2 mangoes into the United States from Trinidad, in violation of 7 C.F.R. § 319.56); *In re Rousseline Claude*, 51 Agric. Dec. 1209 (1992) (assessing the respondent a $375 civil penalty for the importation of mangoes into the United States from Haiti, in violation of 7 C.F.R. § 319.56); *In re Maurice Duani*, 47 Agric. Dec. 973 (1988) (assessing the respondent a $375 civil penalty for the importation of approximately 2 pounds of fresh dates into the United States from Israel without a permit, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56(c)); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (assessing the respondent a $250 civil penalty for the importation of approximately 4 peaches and approximately 5 plums into the United States from Israel, in violation of 7 C.F.R. § 319.56(c)); *In re Sotirios Foundas*, 47 Agric. Dec. 611 (1988) (assessing the respondent a $125 civil penalty for the importation of 10 pounds of chestnuts into the United States from Greece, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Lawrence Craig*, 47 Agric. Dec. 606 (1988) (assessing the respondent a $375 civil penalty for the importation of approximately 3 avocados into the United States from Mexico, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196 (1986) (assessing the respondent a $250 civil penalty for the importation of plantains into the United States from the Philippines, in violation of 7 C.F.R. § 319.56(c)); *In re Rene Vallalta*, 45 Agric. Dec. 1421 (1986) (assessing the respondent a $250 civil penalty for the importation of approximately 1 cacao seed pod into the United States from El Salvador, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56).

assessment of civil penalties under the Commodities Exchange Act are applicable to this proceeding. Complainant instituted this proceeding under the Plant Quarantine Act, the Federal Plant Pest Act, and the Regulations. The Commodities Exchange Act is not applicable to this proceeding.

Although, on rare occasions, default decisions have been set aside for good cause shown or where Complainant did not object,[7] generally there is no basis for setting aside a default decision issued in those situations in which a respondent files an answer and fails to deny the material allegations of the complaint.[8]

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[7]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (setting aside the default decision, which was based upon respondent's statements during two telephone conference calls with the administrative law judge and complainant's counsel, because respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived respondent of its right to due process under the Fifth Amendment to the United States Constitution) (Remand Order); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the PACA had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[8]See generally *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733 (1992) (stating that since the respondent failed to deny the allegation of interstate commerce in its answer, the allegation as to interstate commerce in the complaint is deemed admitted); *In re Rex Kneeland*, 50 Agric. Dec. 1571 (1991) (holding the default order proper where the answer, filed late, does not deny the material allegations of the complaint); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) (stating that the respondent's answer was filed late and fails to deny the material allegations of the complaint; either reason warrants a default decision); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (ruling that a default decision should be issued because respondent's answer does not deny the material allegations of the complaint); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (holding the default order proper where the answer admits or does not deny material allegations of the complaint); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations of the complaint); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (holding the default order proper where the answer does not deny

(continued...)

Respondent was given notice of the proceeding and an opportunity for a hearing. The Rules of Practice clearly provide that a failure to deny or otherwise respond to the allegations of the complaint shall be deemed, for the purposes of the proceeding, to be an admission of the allegations of the complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139). Respondent failed, in his Answer, to deny the material allegations of fact in the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States. In accordance with the Rules of Practice, Respondent's failure to deny or otherwise respond to the allegations of the Complaint is deemed an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139).

Accordingly, the Default Decision and Order was properly issued. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[9]

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

Order

Nkiambi Jean Lema is assessed a civil penalty of $500. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

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[8](...continued)
material allegations of the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding the default order proper where an answer, filed late, does not deny material allegations of the complaint); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (holding the default order proper where the answer does not deny material allegations of the complaint); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default order proper where the answer, filed late, does not deny material allegations of the complaint); *In re Michael A. Lucas*, 43 Agric. Dec. 1721 (1984) (stating that since the respondent's answer fails to deny the allegations of the complaint, the administrative law judge's default decision was properly issued).

[9]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations).

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0002.

In re: NKIAMBI JEAN LEMA.
P.Q. Docket No. 99-0002.
Order Denying Petition for Reconsideration and Motion to Transfer Venue filed May 14, 1999.

Failure to file timely petition for reconsideration — Judicial Officer's power to transfer case — Venue — Jurisdiction.

The Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Decision and Order on Respondent, as required by 7 C.F.R. § 1.146(a)(3). The Judicial Officer also denied Respondent's Motion to Transfer Venue to the United States District Court for the District of Maryland, holding that the Judicial Officer has no authority under the Rules of Practice to transfer the proceeding to a United States district court.

Rick D. Herndon, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act] and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 319.56-.56-8); 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], by filing a Complaint on October 16, 1998.

The Complaint alleges that, on or about January 14, 1998, Nkiambi Jean Lema [hereinafter Respondent] imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56 (Compl. ¶ II).

On November 16, 1998, Respondent filed a Motion to Dismiss or in the Alternative Answer to Complaint. Respondent did not deny the material allegations of the Complaint and expressly admitted carrying "acidic fruits" aboard the aircraft on which he arrived in the United States.

On November 27, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On December 11, 1998, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On January 4, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Default Decision and Order: (1) finding that Respondent imported 12 limes and 6 passion fruit from Zaire into the United States, in violation of 7 C.F.R. § 319.56, as alleged in the Complaint; and (2) assessing Respondent a $500 civil penalty (Default Decision and Order at 2).

On February 16, 1999, Respondent appealed to the Judicial Officer. On March 8, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on March 11, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On March 15, 1999, I issued a Decision and Order: (1) finding that on or about January 14, 1998, at Dulles International Airport, Herndon, Virginia, Respondent imported 12 limes and 6 passion fruit from Zaire into the United States; (2) concluding that Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. § 319.56, which prohibit the importation of limes and passion fruit into the United States from Zaire; and (3) assessing Respondent a $500 civil penalty. *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___, slip op. at 3-4, 15 (Mar. 15, 1999).

On March 17, 1999, the Hearing Clerk served Respondent with the Decision and Order.[1] On April 21, 1999, 35 days after the Hearing Clerk served Respondent with the Decision and Order, Respondent filed Appeal Petition [hereinafter Petition

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[1]See Domestic Return Receipt for Article Number PO93174998.

for Reconsideration] and Motion to Transfer Venue. On May 14, 1999, Complainant filed Complainant's Response to Respondent's Motion to Transfer Venue and Appeal Petition, and on May 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the March 15, 1999, Decision and Order and a ruling on Respondent's Motion to Transfer Venue.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 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).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date the Hearing Clerk served the Decision and Order on Respondent, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[2]

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[2]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Apr. 14, 1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for

(continued...)

Respondent's Motion to Transfer Venue of this proceeding to the United States District Court for the District of Maryland is also denied. The Judicial Officer has no authority under the Rules of Practice to transfer a case to a district court of the United States.[3] Further, the United States District Court for the District of Maryland has no jurisdiction to review the final order, *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (Mar. 15, 1999), assessing Respondent a $500 civil penalty under the Plant Quarantine Act and the Federal Plant Pest Act. Rather, section 10 of the Plant Quarantine Act (7 U.S.C. § 163) provides that an order by the Secretary of Agriculture, assessing a civil penalty under the Plant Quarantine Act, is reviewable in a United States court of appeals (other than the United States Court of Appeals for the Federal Circuit) under 28 U.S.C. §§ 2341-2351, and section 108(b) of the Federal Plant Pest Act (7 U.S.C. § 150gg(b)) provides that an order by the Secretary of Agriculture, assessing a civil penalty under the Federal Plant Pest Act, is reviewable in a United States court of appeals (other than the United States Court of Appeals for the Federal Circuit) under 28 U.S.C. §§ 2341-2351. Should Respondent file a petition for review of *In re Nkiambi Jean Lema*, 58 Agric. Dec. ___ (Mar. 15, 1999), in accordance with 28 U.S.C. §§ 2341-2351, venue is provided by statute, as follows:

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[2](...continued)
reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

[3]*Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating that the Chief Administrative Law Judge does not have authority to transfer a case to a district court of the United States under 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).

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2343.

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

Order

Respondent's Petition for Reconsideration and Respondent's Motion to Transfer Venue are denied.

In re: ROBERT HOURIET, d/b/a HARDWICK ORGANIC PRODUCE.
P.Q. Docket No. 98-0016.
Decision and Order filed May 6, 1999.

Failure to file timely answer — Default — Selective prosecution — Due process — Civil Penalty.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt, assessing Respondent a $1,000 civil penalty because he imported peppers and tomatoes into the United States from Mexico and onions into the United States from the Netherlands, without the required permit, in violation of 7 C.F.R. § 319.56-2. Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Judicial Officer held that agency officials have broad discretion in deciding against whom to institute disciplinary proceedings and found nothing in the record to indicate that Complainant's filing of the Complaint was an abuse of administrative discretion.

James D. Holt, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Plant Quarantine Acts];

regulations issued under the Plant Quarantine Acts (7 C.F.R. §§ 319.56-.56-8); 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], by filing a Complaint on July 28, 1998.

The Complaint alleges that on or about March 3, 1998, Robert Houriet, d/b/a Hardwick Organic Produce [hereinafter Respondent], imported red peppers, green peppers, red tomatoes, and cherry tomatoes from Mexico into the United States without a permit and imported onions from the Netherlands into the United States without a permit, in violation of 7 C.F.R. § 319.56-2 (Compl. ¶¶ II-VI).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on September 16, 1998.[1] Respondent failed to answer the Complaint within 20 days, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On October 8, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a proposed Decision and Order.

On October 16, 1998, Respondent filed an Answer denying the material allegations in the Complaint and a Motion requesting a 30-day period in which to prepare a defense. On November 5, 1998, Complainant filed Complainant's Views on Document filed by Respondent on October 16, 1998, an Amended Motion for Adoption of Proposed Decision and Order [hereinafter Amended Motion for Default Decision], and an amended proposed Decision and Order [hereinafter Amended Proposed Default Decision]. On December 7, 1998, Respondent filed objections to Complainant's Amended Motion for Default Decision and Amended Proposed Default Decision.

On December 7, 1998, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge James W. Hunt [hereinafter ALJ] issued a Decision and Order [hereinafter Default Decision] in which the ALJ: (1) found that Respondent violated 7 C.F.R. § 319.56-2, as alleged in the Complaint; and (2) assessed Respondent a $1,000 civil penalty (Default Decision at 2-3).

On January 19, 1999, Respondent appealed to the Judicial Officer. On May 5,

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[1]The Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter to Respondent by certified mail (Domestic Return Receipt for Article Number P093143416). The United States Postal Service returned the Complaint, Rules of Practice, and service letter to the Hearing Clerk in an envelope marked "unclaimed." On September 16, 1998, in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint, Rules of Practice, and service letter to Respondent by ordinary mail (Memorandum to File, dated September 16, 1998, by Regina A. Paris).

1999, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer, and on May 6, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Default Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusion.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS RESTATED)

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, on November 5, 1998, Complainant filed Amended Motion for Default Decision. On December 7, 1998, Respondent filed objections to Complainant's Amended Motion for Default Decision. Respondent's objections are not meritorious.

The allegations in the Complaint having been admitted and there being no valid reason for not entering a default decision, the allegations in the Complaint are adopted and set forth in this Decision and Order as the Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of Robert Houriet, d/b/a Hardwick Organic Produce, is RD 1, Box 934, Hardwick, Vermont 05843.

2. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported red peppers from Mexico into the United States without the required permit.

3. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported green peppers from Mexico into the United States without the required permit.

4. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported red tomatoes from Mexico into the United States without the required permit.

5. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported cherry tomatoes from Mexico into the United States without the required permit.

6. On March 3, 1998, at Highgate Springs, Vermont, Respondent imported onions from the Netherlands into the United States without the required permit.

Conclusion

By reason of the facts contained in the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Plant Quarantine Acts and 7 C.F.R. § 319.56-2.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in his January 19, 1999, filing [hereinafter Appeal Petition]. First, Respondent contends that he filed a timely Answer and denies the allegations of fact in the Complaint (Appeal Pet. at first unnumbered page).

I disagree with Respondent's contention that he filed a timely Answer, and I find that he is deemed, for the purposes of this proceeding, to have admitted the facts in the Complaint based on his failure to file a timely Answer.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on September 16, 1998.[2] Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

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[2]See note 1.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint clearly informs Respondent of the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-1400, in accordance with the applicable rules of practice (7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of all the allegations in this complaint and a waiver of hearing.

Compl. at 3-4.

Likewise, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that an answer should be filed

pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

July 29, 1998

Mr. Robert Houriet
dba Hardwick Organic Produce
RD 1, Box 934
Hardwick, Vermont 05843

Dear Mr. Houriet:

Subject: In re: Robert Houriet, d/b/a Hardwick Organic Produce, Respondent - P.Q. Docket No. 98-0016

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law

Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated July 29, 1998, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Mr. Robert Houriet (emphasis in original).

Respondent filed his Answer to the Complaint on October 16, 1998, 30 days after he was served with the Complaint and 10 days after his Answer was due. Respondent's answer, which was due no later than October 6, 1998, is filed too late. Respondent is deemed, for purposes of this proceeding, by his failure to file a timely Answer, to have admitted the allegations in the Complaint.

Second, Respondent asserts that "the USDA inspector who filed the complaint abused her administrative discretion in violation of sections 6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44 of . . . Title 7 of the Administrative Procedures [sic] Act" (Appeal Pet. at second unnumbered page).

As an initial matter, Respondent's citation to "sections 6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44 of . . . Title 7 of the Administrative Procedures [sic] Act" appears to be error. The Administrative Procedure Act, which is applicable to this proceeding, is in Title 5 of the United States Code and does not contain sections "6.39, 6.40, 6.41, 6.42, 6.43, [and] 6.44." Moreover, the Complaint in this proceeding was not filed by an inspector, as Respondent contends, but rather, the

Complaint was filed by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture.

I infer that Respondent asserts that filing the Complaint was an abuse of "administrative discretion." However, Respondent does not state any basis for his belief that filing the Complaint was an abuse of "administrative discretion."

Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings. Even if Respondent could show that he was singled out for a disciplinary action, such selection would be lawful so long as the administrative determination to selectively enforce the Plant Quarantine Acts was not arbitrary.[3] Respondent has no right to have the Plant Quarantine Acts go unenforced against him, even if he is the first individual against whom the Plant Quarantine Acts are enforced and even if Respondent can demonstrate that he is not as culpable as some others that have not had disciplinary proceedings instituted against them. The Plant Quarantine Acts do not need to be enforced everywhere to be enforced somewhere.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.[4]

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.[5] Respondent bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was

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[3]*See FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (per curiam); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 278-79 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1908 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

[4]*Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[5]*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

motivated by a discriminatory purpose.[6] In order to prove a selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[7] Respondent has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must show: (1) he exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.[8] Respondent has not shown, or even alleged, any of these circumstances, and I find nothing in the record to indicate that Complainant's filing of the Complaint was an abuse of "administrative discretion."

Third, Respondent asserts that:

> [T]he discretionary exemption to the inspector's actions or her failure to act does not apply when the the [sic] inspector or the agency have not grounded their actions in rational justification or not inconsistent with public policy as expressed in Congressional intent of the North American Free Trade Agreement. [(*Berkovitz v. United States*, 486 U.S. 531; 108 S. Ct. 1954; 100 L.Ed.2d 531 (1988))].

Appeal Pet. at second unnumbered page.

While I am uncertain of the meaning of Respondent's assertion, there is nothing in the record that indicates that the United States Department of Agriculture violated the North American Free Trade Agreement. Moreover, I find that *Berkovitz v. United States*, 486 U.S. 531 (1988), is inapposite.

Fourth, Respondent states that the "[a]gency has not provided the [R]espondent with any justification at all of the inspector's actions as discretionary" (Appeal Pet.

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[6]*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

[7]*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

[8]*Id.*

at second unnumbered page). Again, I am uncertain of the meaning of Respondent's statement. However, the record does not reveal any United States Department of Agriculture obligation to justify an action of an inspector to Respondent.

Although, on rare occasions, default decisions have been set aside for good cause shown or where Complainant did not object,[9] Respondent has shown no basis for setting aside the Default Decision.[10] Respondent was given notice of the

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[9]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[10]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of a regulation (7 C.F.R. § 319.56) promulgated under the Act of August 20, 1912, as amended, as alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and a regulation (7 C.F.R. § 319.56(c)) promulgated under the Act of August 12, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding that the default decision was properly issued where the respondent filed an answer over a month late and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 318.13-10, .13-12(a)) promulgated under the Act of August

(continued...)

proceeding and an opportunity for a hearing. The Rules of Practice clearly provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's Answer was filed 30 days after Respondent was served with the Complaint and 10 days after Respondent's Answer was due. Respondent's failure to file a timely answer constitutes, for the purposes of this proceeding, an admission of the allegations in the Complaint and a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the United States Constitution.[11]

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

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[10](...continued)
20, 1912, as amended, and Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed 66 days after service of the complaint on the respondent, does not deny material allegations and that the respondent is deemed, by its failure to file a timely answer and its failure to deny the allegations in the complaint, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, the Act of February 2, 1903, as amended, and regulations (7 C.F.R. § 330.400(b)(1); 9 C.F.R. § 94.5(b)(1)) promulgated under the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and the Act of February 2, 1903, as amended, as alleged in the complaint); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding that the default order was properly issued where a timely answer was not filed and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 319.74, 330.110) promulgated under the Act of August 20, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint).

[11]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Order

Robert Houriet, d/b/a Hardwick Organic Produce, is assessed a civil penalty of $1,000. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 98-0016.

In re: LEADERMAR (USA) CORPORATION.
P.Q. Docket No. 99-0004.
Decision and Order filed May 19, 1999.

Failure to file timely answer — Due process — Failure to give advance notification — Failure to give notification of time of arrival — Civil penalty.

The Judicial Officer affirmed the Default Decision by Acting Chief Administrative Law Judge Edwin S. Bernstein, assessing Respondent a $3,750 civil penalty because Respondent violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, and violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the changed estimated time of arrival of vessels to the Plant Protection and Quarantine office at the port of Jacksonville, Florida. The Judicial Officer stated that 7 C.F.R. § 1.136(a) requires that a respondent file an answer with the Hearing Clerk within 20 days after service of the complaint and 7 C.F.R. § 1.147(g) provides that the effective date of filing is the date a document reaches the Hearing Clerk. Therefore, even if Respondent mailed its Answer within 20 days after Respondent was served with the Complaint, Respondent's Answer would not be timely because Respondent's Answer was not filed with the Hearing Clerk within 20 days after service of the Complaint on Respondent. The Judicial Officer held that Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. Application of the default provisions of the Rules of Practice does not deny Respondent due process under the Fifth Amendment to the United States Constitution.

James A. Booth, for Complainant.
Jerold H. Tabbott, Jacksonville, FL, for Respondent.
Initial decision issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167), and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Acts]; regulations issued under the Acts (7 C.F.R. pt. 330) [hereinafter the Regulations]; 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], by filing a Complaint on October 23, 1998.

The Complaint alleges that: (1) on or about February 3, 1998, Leadermar (USA) Corporation [hereinafter Respondent] violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Akademikis Zavarickis proceeding from Quayaquil, Ecuador (Compl. ¶ II); (2) on or about March 16, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Gloria Elena proceeding from Pertigalete, Venezuela (Compl. ¶ III); (3) on or about June 3, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Rodin proceeding from London, England (Compl. ¶ IV); (4) on or about July 13, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Candor proceeding from Cristobal, Panama (Compl. ¶ V); and (5) on or about August 11, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Marsha Chuykov proceeding from Navarasik, Russia (Compl. ¶ VI).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of

the Rules of Practice, and a service letter on December 17, 1998.[1] Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)), and on January 14, 1999, the Hearing Clerk sent Respondent a letter informing Respondent that its answer had not been received within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 29, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On February 23, 1999, Respondent filed an Answer, 68 days after Respondent was served with the Complaint and 48 days after Respondent's Answer was due. On March 11, 1999, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Proposed Default Decision and Order.

On March 11, 1999, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Acting Chief Administrative Law Judge Edwin S. Bernstein [hereinafter the Acting Chief ALJ] issued a Default Decision and Order: (1) finding that on or about February 3, 1998, Respondent failed to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, in violation of 7 C.F.R. § 330.111(a); (2) finding that on or about March 16, 1998, June 3, 1998, July 13, 1998, and August 11, 1998, Respondent failed to give immediate notification of the changed estimated time of arrival of vessels to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, in violation of 7 C.F.R. § 330.111(d); and (3) assessing Respondent a $3,750 civil penalty (Default Decision and Order at 5-6).

On April 19, 1999, Respondent appealed to the Judicial Officer. On May 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal to the Judicial Officer, and on May 18, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Acting Chief ALJ's Default Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Acting Chief ALJ's conclusion.

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[1]See Domestic Return Receipt for Article Number P093143567.

ACTING CHIEF ALJ'S DEFAULT DECISION AND ORDER (AS RESTATED)

Respondent failed to file its Answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Leadermar (USA) Corporation, is a business whose mailing address is 6054 Arlington Expressway, Suite 1, Jacksonville, Florida 32211.

2. On or about February 3, 1998, Respondent violated 7 C.F.R. § 330.111(a) by failing to give the appropriate advance notification of intent to arrive to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Akademikis Zavarickis proceeding from Quayaquil, Ecuador.

3. On or about March 16, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Gloria Elena proceeding from Pertigalete, Venezuela.

4. On or about June 3, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Rodin proceeding from London, England.

5. On or about July 13, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Candor proceeding from Cristobal, Panama.

6. On or about August 11, 1998, Respondent violated 7 C.F.R. § 330.111(d) by failing to give immediate notification of the vessel's changed estimated time of arrival to the Plant Protection and Quarantine office at the port of Jacksonville, Florida, concerning the arrival of the M/V Marsha Chuykov proceeding from

Navarasik, Russia.

Conclusion

By reason of the Findings of Fact in this Decision and Order, *supra*, Respondent has violated the Acts and the Regulations issued under the Acts (7 C.F.R. § 330.111(a), (d)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends in its letter to Joyce A. Dawson, dated April 14, 1999, and filed April 19, 1999 [hereinafter Appeal Petition], that it timely mailed Respondent's Answer, but that Respondent's Answer may have been misplaced or lost after delivery, and requests that its Answer, filed February 23, 1999, be accepted as timely, as follows:

> First, we wish to point out that an assumption has been made that our letter of the 29th of December was undelivered by the U.S. Postal Service. We consider it equally likely - and more plausible - that it was misplaced or lost after delivery. This has been our opinion from the start, but it seemed friendlier to ascribe error to the post office.
>
> In our experience dealing with other government agencies, we can document instances where we received penalties for failing to file documents for which we had signed receipts in hand. We therefore have a different perspective when viewing a letter from a government agency stating that they haven't received some document we know we've filed. These mostly go away, as this one should have. From this perspective, the USDA letter of January 14th was not viewed with particular alarm, and was set aside with the intention of timely dealing with it later.
>
> Typical working hours in our office exceed 65 hours per week per person (easily), and we operate with a staff of four. I personally handle most questions of this nature, and my hours are usually even longer. During the last part of January I took the first serious (more than three days) vacation that I have taken in 14 years. I didn't get to replying to the January 14th letter before I left, and it was overlooked on my return until seeing the copy re-sent on the 29th of January.

> The bottom line is that the delay in response to the January 14th letter was error. But it is a clerical error much the same as losing the original letter of December 29th may have been. We considered and still consider the Hearing Clerk's letter of January 14th to be incorrect. Had the December 29th letter not gone astray or been found, their letter of January 14th would have been moot.
>
> The default order stipulates a willingness to accept Leadermar's letter of December 29th, 1998. It then argues that it will still find Leadermar in default for not responding timely to the hearing officer's letter of January 14th, 1999. This is contradictory, and also clearly contrary to the bests [sic] interests of justice, which can only be served by examining the actual penalties in question.
>
> We point out that in all other cases where we have dealt with government agencies over penalties or fines, there has always been consideration given for 'clerical error'. In this matter, the only downside to responsibly allowing such consideration, is that the penalty issues will be permitted to be judged upon their own merits. Default is based on the concept that if the respondant [sic] fails to answer within a given time, there is an assumption of guilt. This has already been disputed in our letter of December 29th, 199[8]. The USDA has already made too many assumptions, and this, like others, is clearly inaccurate.

Appeal Pet. at 1-2.

I find that Respondent failed to file a timely answer to the Complaint and that the Acting Chief ALJ's Default Decision and Order was not error.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on December 17, 1998.[2] Sections 1.136(c) and 1.139 of the Rules of Practice clearly state the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under §

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[2]See note 1.

1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. §§ 1.136(c), .139.

Moreover, the Complaint served on Respondent on December 17, 1998, informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130 *et seq.*, 380.1, and 70.1 *et seq.*). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this complaint and a waiver of hearing.

Compl. at 3-4.

Similarly, the Hearing Clerk informed Respondent in the service letter, which accompanied the Complaint and Rules of Practice, that a timely answer must be filed, as follows:

CERTIFIED RECEIPT REQUESTED

October 23, 1998

Leadermar (USA) Corporation
Arlington Expressway, Suite 1
Jacksonville, Florida 32211

Dear Gentlemen:

Subject: In re: Leadermar (USA) Corporation, Respondent -
P.Q. Docket No. 99-0004

Enclosed is a copy of a Complaint which has been filed with this office under the Federal Plant Pest Act, as amended and the Plant Quarantine Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated October 23, 1998, from Joyce A Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Leadermar (USA) Corporation (emphasis in original).

Respondent's Answer was required to be filed no later than January 6, 1999. Respondent filed its Answer on February 23, 1999, 68 days after the Complaint was served on Respondent and 48 days after Respondent's Answer was due. Respondent's failure to file a timely answer constitutes an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(a), (c)) and a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Acting Chief ALJ's Default Decision and Order was properly issued.

Respondent contends that it mailed its Answer, dated December 29, 1998, prior to the time that its Answer was due. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed with the Hearing Clerk, and section 1.147(g) of the Rules of Practice provides that a document required or authorized to be filed under the Rules of Practice shall be deemed to be filed at the time it 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).

Respondent's mailing its Answer does not constitute filing the Answer with the Hearing Clerk,[3] and even if I found that Respondent mailed its Answer prior to the date its Answer was due, that finding would not cause me to conclude that Respondent's Answer was timely. The record establishes that Respondent did not file its Answer until February 23, 1999, 48 days after Respondent's Answer was due.

Although on rare occasions default decisions have been set aside for good cause

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[3]See *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7 (Mar. 8, 1999) (Order Denying Pet. for Recons.) (stating that the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (Order Denying Late Appeal) (stating that neither the applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk). *Cf. In re Harold P. Kafka*, 58 Agric. Dec. ___, slip op. at 8-9 (Apr. 5, 1999) (Order Denying Late Appeal) (stating that the respondent's continued unsuccessful efforts to file his appeal petition do not constitute filing an appeal petition with the Hearing Clerk); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 3 n.1 (Mar. 22, 1999) (stating that appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

shown or where the complainant did not object,[4] Respondent has shown no basis for setting aside the Default Decision and Order and accepting Respondent's late-filed Answer.[5] The Rules of Practice clearly provide that an answer must be filed

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[4]*See In re H. Schnell & Co.*, 57 Agric. Dec. ___ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

[5]*See generally In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of a regulation (7 C.F.R. § 319.56) promulgated under the Act of August 20, 1912, as amended, as alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding that the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and a regulation (7 C.F.R. § 319.56(c)) promulgated under the Act of August 12, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (holding that the default decision was properly issued where the respondent filed an answer over a month late and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 318.13-10, .13-12(a)) promulgated under the Act of August 20, 1912, as amended, and Federal Plant Pest Act, as amended, as alleged in the complaint); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (holding that the default decision was properly issued where an answer, filed 66 days after service of the complaint on the respondent, does not deny material allegations and that the respondent is deemed, by its failure to file a timely answer and its failure to

(continued...)

within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent's Answer was filed 68 days after the Hearing Clerk served Respondent with the Complaint. Respondent's failure to file a timely answer constitutes, for the purposes of this proceeding, an admission of the material allegations in the Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Accordingly, the Default Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.[6]

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

Order

Leadermar (USA) Corporation is assessed a civil penalty of $3,750. The civil penalty shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and sent to:

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[5](...continued)
deny the allegations in the complaint, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, the Act of February 2, 1903, as amended, and regulations (7 C.F.R. § 330.400(b)(1); 9 C.F.R. § 94.5(b)(1)) promulgated under the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and the Act of February 2, 1903, as amended, as alleged in the complaint); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (holding that the default order was properly issued where a timely answer was not filed and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Act of August 20, 1912, as amended, the Federal Plant Pest Act, as amended, and regulations (7 C.F.R. §§ 319.74, 330.110) promulgated under the Act of August 20, 1912, as amended, and the Federal Plant Pest Act, as amended, as alleged in the complaint).

[6]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

The certified check or money order shall be forwarded to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 65 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0004.

AGRICULTURE DECISIONS

Volume 58

January - June 1999
Part Two (P&S)
Pages 451 - 473

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statues and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision numbers, e.g., D-578; S. 1150, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent Decisions entered subsequent to December 31, 1986, are no longer published. However, a list of the decisions is included. The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Direct all inquiries regarding this publication to: Editors, Agriculture Decisions, Hearing Clerk Unit, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1081 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-4443.

MISCELLANEOUS ORDERS

In re: SIERRA KIWI, INC., A CALIFORNIA CORPORATION.
98 AMA Docket No. F&V 920-1.
Ruling on Petitioner's Motion to Withdraw Petition; Dismissal of Respondent's Appeal; and Ruling on Respondent's Motion for Expedited Decision on Respondent's Appeal filed June 23, 1999.

Motion to withdraw petition — With prejudice — Without prejudice.

The Judicial Officer granted Petitioner's motion to withdraw its petition without prejudice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a petition, generally, a petitioner's motion to withdraw a petition in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the petitioner moves to withdraw the petition with prejudice; (2) error is apparent on the face of the petition such that the petitioner should be precluded from refiling essentially the same flawed petition; (3) allowing the petitioner to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the petitioner has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same petition. The Judicial Officer concluded that, because the petition was dismissed, Respondent's appeal and motion for expedited decision on Respondent's appeal were moot, and the Judicial Officer dismissed Respondent's appeal and denied Respondent's motion for expedited decision on Respondent's appeal.

Colleen A. Carroll, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits issued by James W. Hunt, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

SIERRA KIWI, INC., a California corporation [hereinafter Petitioner], instituted this proceeding on April 8, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the marketing order regulating Kiwifruit Grown in California (7 C.F.R. pt. 920) [hereinafter the Kiwi Order]; 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], by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner requests modification of, or exemption from, the Kiwi Order; declaratory relief; an order requiring the United States Department of Agriculture [hereinafter USDA] to implement procedures that enable USDA to modify the Kiwi Order expeditiously; and fees authorized by the Equal Access to Justice Act (Pet.).

On June 8, 1998, the Administrator, Agricultural Marketing Service, USDA

[hereinafter Respondent], filed Motion to Dismiss Petition; on July 6, 1998, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss; and on August 7, 1998, Administrative Law Judge James W. Hunt [hereinafter the ALJ] filed Order Denying Motion to Dismiss.

On August 24, 1998, Respondent filed Answer to Petition: (1) denying the material allegations in the Petition; (2) asserting three affirmative defenses; and (3) requesting denial of the relief sought by Petitioner and dismissal of the Petition with prejudice. The ALJ scheduled a hearing to be held in Sacramento, California, on January 27, 1999 (Summary of Telephone Conference; Notice of Hearing).

On January 21, 1999, Respondent filed Respondent's Motion for Prehearing Conference, Motion for Leave to File Amended Motion to Dismiss, Motion to Exclude Petitioner's Exhibits, and Motion to Continue Hearing Date Pending Ruling on Motions. The ALJ rescheduled the hearing to commence on June 9, 1999 (Order Postponing Hearing), and on February 28, 1999, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss.

On April 13, 1999, the ALJ filed Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits. On April 30, 1999, Respondent appealed the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits to the Judicial Officer, and on May 3, 1999, Respondent filed Motion for Expedited Decision on Respondent's Appeal and Respondent's Motion to Continue Oral Hearing. On May 14, 1999, Petitioner filed Petitioner's Response to Respondent's Motion to Continue Oral Hearing, and on May 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Continue Oral Hearing. On May 18, 1999, I granted Respondent's Motion to Continue Oral Hearing and cancelled the hearing scheduled by the ALJ to commence on June 9, 1999 (Ruling Granting Motion to Continue Oral Hearing and Cancellation of Hearing).

On May 27, 1999, Petitioner filed Petitioner's Opposition to Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and ruling on Respondent's Motion for Expedited Decision on Respondent's Appeal.

On June 11, 1999, Petitioner filed a motion to withdraw its Petition without prejudice (Petitioner's Request to Withdraw the Petition), and on June 17, 1999, Respondent filed Respondent's Response to Request by Petitioner Sierra Kiwi, Inc. to Withdraw Petition [hereinafter Respondent's Response] in which Respondent states that "[R]espondent does not oppose the granting of [P]etitioner's request to

withdraw its [P]etition, but urges that the [P]etition be dismissed 'with prejudice' rather than 'without prejudice.'"

Respondent cites no basis for urging that I dismiss Petitioner's Petition with prejudice. The right of a petitioner instituting a proceeding under the Rules of Practice to voluntarily withdraw a petition and reinstitute the proceeding should be preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to petitioner issued after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally res judicata of the merits, even if the merits have not been considered.[1] In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based solely on a petitioner's motion to dismiss the petition without prejudice.

Second, USDA should be reluctant to bar a petition filed in accordance with section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)), based solely upon a petitioner's request to withdraw the petition without prejudice. A petitioner has a right under section 8(c)(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) to file a petition seeking modification of, or exemption from, an order that is not in

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[1]*See, e.g.*, *Aungst v. Continental Machines, Inc.*, 90 F.R.D. 348, 350 (M.D. Pa. 1981) (stating that dismissal with prejudice acts as a bar to further action upon the same claims); *Hicks v. Allstate Ins. Co.*, 799 S.W.2d 809, 810 (Ark. 1990) (stating that dismissal of an action with prejudice is as conclusive of the rights of the parties as if there were an adverse judgment as to the plaintiff after trial); *People v. Creek*, 447 N.E.2d 330, 333 (Ill. 1983) (stating that dismissal of an information with prejudice has the same effect as a final adjudication on the merits and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action); *Schuster v. Northern Co.*, 257 P.2d 249, 252 (Mont. 1953) (stating that the term *with prejudice*, as used in a judgment of dismissal, is the converse of the term *without prejudice*, and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff; the terms *with prejudice* and *without prejudice* have been recognized as having reference to, and being determinative of, the right to bring a future action); *Harris v. Moye's Estate*, 202 S.W.2d 360, 362 (Ark. 1947) (stating that the words *with prejudice*, when used in an order of dismissal, indicate that the controversy is thereby concluded); *Bryant v. Ryburn*, 174 S.W.2d 938, 939 (Ark. 1943) (stating that the "suit having been dismissed with prejudice by the plaintiffs therein, such action was as conclusive of the rights of the parties as would an adverse judgment after trial"); *Fenton v. Thompson*, 176 S.W.2d 456, 460 (Mo. 1943) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff); *Union Indemnity Co. v. Benton County Lumber Co.*, 18 S.W.2d 327, 330 (Ark. 1929) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the plaintiff); *In re Fresh Prep, Inc.* (Ruling on Certified Question), 58 Agric. Dec. ___, slip op. at 8 (Mar. 11, 1999) (stating that a dismissal with prejudice has the same effect as a decision adverse to a complainant issued after full consideration of the merits of the case).

accordance with law, and barring a petitioner from presenting its case, based solely upon the petitioner's motion to withdraw the petition without prejudice, could subject the petitioner to an order that is not in accordance with law.

Third, if, as a general matter, judges were to dispose of motions to withdraw petitions without prejudice by dismissing the petitions with prejudice, petitioners may become reluctant to file motions to withdraw petitions, even when such motions are appropriate. A case that is prosecuted by a petitioner only because the petitioner fears that a motion to withdraw the petition will result in the petition being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a petition is dismissed with prejudice should forestall any reluctance on the part of a petitioner to file a motion to withdraw a petition, if the petitioner is not certain that it should proceed against the respondent.

Nonetheless, there are circumstances in which a petition should be dismissed with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a petition, generally, a petitioner's motion to withdraw a petition in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the petitioner moves to withdraw the petition with prejudice; (2) error is apparent on the face of the petition such that the petitioner should be precluded from refiling essentially the same flawed petition;[2] (3) allowing the petitioner to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the petitioner has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same petition.

Petitioner has not moved to withdraw the Petition with prejudice; Petitioner's Request to Withdraw the Petition, filed June 11, 1999, is the first such motion filed by Petitioner; Respondent does not allege in Respondent's Response that error is apparent on the face of the Petition; and Respondent does not allege in Respondent's Response that allowing Petitioner to reinstitute the proceeding would legally prejudice Respondent.

Therefore, the Petition should be dismissed without prejudice. Further, an

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[2]*Cf. In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114 (1997) (dismissing with prejudice a petition filed in a proceeding instituted under 7 U.S.C. § 608c(15)(A); concluding that the petition, which alleged that petitioner was not a handler, left petitioner no standing to institute an action under 7 U.S.C. § 608c(15)(A); and holding that the administrative law judge erred by dismissing the petition without prejudice because dismissal without prejudice would allow the petitioner to file the same flawed petition, but stating that there is precedent for allowing the petitioner to file a similar petition in which it alleges that it is a handler).

Order dismissing the Petition renders moot both Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits, filed April 30, 1999, and Respondent's Motion for Expedited Decision on Respondent's Appeal, filed May 3, 1999. Therefore, Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits should be dismissed, and Respondent's Motion for Expedited Decision on Respondent's Appeal should be denied.

For the foregoing reasons, the following Order is issued.

Order

Petitioner's Request to Withdraw the Petition, filed June 11, 1999, is granted, and the Petition, filed April 8, 1998, is dismissed without prejudice. Respondent's Appeal of Order Granting in Part and Denying in Part Respondent's Motion to Dismiss and Motion to Exclude Exhibits, filed April 30, 1999, is dismissed, and Respondent's Motion for Expedited Decision on Respondent's Appeal, filed May 3, 1999, is denied.

In re: JAMES A. YAKLIGIAN, AN INDIVIDUAL, DOING BUSINESS AS SUNDACE FRUIT COMPANY, ALSO KNOWN AS SUNDANCE FRUIT, INC., A CALIFORNIA CORPORATION.
AMAA Docket No. 98-0001.
Complaint Withdrawn filed June 28, 1999.

Colleen A. Carroll, for Respondent.
Donald H. Hazel, Sanger, California, for Complainant.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

Pursuant to"Notice of Complainant's Withdrawal of Complaint," filed June 25, 1999, the Complaint filed herein on July 13, 1998, is withdrawn.

Copies hereof shall be served upon the parties.

In re: DAVID MEYER, d/b/a SPECTRUM GENETICS RIVERSIDE COLONY, d/b/a RIVERSIDE HOG FARM, DAVE WALDER, DAN KOSTER and ROBERT WOESSNER.
A.Q. Docket No. 99-0003.
Order Dismissing Complaint as to Robert Woessner filed February 10, 1999.

James D. Holt, for Complainant.
Walter C. Kilgus, Morrison, IL, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's "Motion to Dismiss as to Robert Woessner" is granted. Accordingly, the Complaint against Respondent Robert Woessner, filed on November 2, 1998, is dismissed.

In re: PATTY MARKELL, d/b/a WILLOW BAY FARM.
A.Q. Docket No. 99-0005.
Order Dismissing Complaint filed February 11, 1999.

James D. Holt, for Complainant.
Respondent, Pro se.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

Complainant's motion to dismiss the Complaint against Respondent Patty Markell is granted. It is ordered that the Complaint filed on February 2, 1999, be dismissed.

In re: DAVID MEYER, d/b/a SPECTRUM GENETICS, RIVERSIDE COLONY, d/b/a RIVERSIDE HOG FARM, DAVE WALDNER, DAN KOSTER and ROBERT WOESSNER.
A.Q. Docket No. 99-0003.
Order Dismissing Complaint as to Dave Waldner filed June 29, 1999.

James D. Holt, for Complainant.
Jeffrey Sveen, Aberdeen, SD, for Respondent.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's June 29, 1999, "Motion to Dismiss as to Dave Waldner" is granted. The complaint against Respondent Dave Waldner, filed on November 2,

1998, is dismissed.

In re: DAVID M. ZIMMERMAN.
AWA Docket No. 98-0005.
Order Denying Petition for Reconsideration filed January 6, 1999.

Petition for reconsideration.

The Judicial Officer denied Respondent's Petition for Reconsideration for the reasons previously set forth in the Judicial Officer's decision.

Brian T. Hill and Frank Martin, Jr., for Complainant.
Eugene R. Campbell, York, PA, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; 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], by filing a Complaint on December 9, 1997.

The Complaint alleges that on or about May 13, 1997, through October 14, 1997, David M. Zimmerman [hereinafter Respondent] operated as a dealer, as defined in the Animal Welfare Act and the Regulations, without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1). On December 29, 1997, Respondent filed an Answer denying the material allegations of the Complaint and requesting a hearing.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on August 25, 1998, in Lancaster, Pennsylvania. Brian T. Hill and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Eugene R. Campbell of York, Pennsylvania, represented Respondent. During the hearing, Complainant submitted Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Pre-hearing Brief in Support Thereof and a Proposed Decision and

Order. On September 2, 1998, Complainant filed Complainant's Supplemental Brief, and on September 10, 1998, Respondent filed Respondent's Supplemental Brief.

On September 16, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that from May 13, 1997, through October 14, 1997, Respondent operated as a dealer, as defined by the Animal Welfare Act and the Regulations, when he was not licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1); (2) assessed Respondent a civil penalty of $20,000; (3) revoked Respondent's Animal Welfare Act license; and (4) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations. (Initial Decision and Order at 2, 9.)

On October 14, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in USDA's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On October 23, 1998, Complainant filed Complainant's Memorandum in Opposition to Respondent's Appeal and Complainant's Cross-Appeal. On November 13, 1998, Respondent filed Respondent's Response to Complainant's Cross-Appeal, and on November 16, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On November 18, 1998, I issued a Decision and Order in which I: (1) concluded that Respondent was a dealer, as defined in the Animal Welfare Act and the Regulations, and from May 13, 1997, through October 14, 1997, willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) by selling 33 dogs in commerce, for resale for use as pets, without being licensed; (2) ordered Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, ordered Respondent to cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations, without being licensed; (3) assessed Respondent a civil penalty of $20,000; and (4) permanently disqualified Respondent from obtaining a license under the Animal Welfare Act. *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 10, 45-46 (Nov. 18, 1998).

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

On December 1, 1998, Respondent filed a Petition for Reconsideration, and on December 23, 1998, Complainant filed Complainant's Opposition to Respondent's Petition for Reconsideration. On December 28, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Decision and Order issued November 18, 1998.

Respondent raises three issues in his Petition for Reconsideration. Respondent's one-page Petition for Reconsideration states in its entirety, as follows:

PETITION FOR RECONSIDERATION

Respondent requests Reconsideration of the Judicial Officer's Decision and Order dated November 18, 1998 for the following reasons:

1. The Judicial Officer erred in granting Complainant's Appeal and permanently disqualifying Respondent from obtaining a license.

2. The Judicial Officer erred in upholding the civil fine of $20,000.00 for the following reasons:

a. Respondent does not operate a "substantial" business.

b. Respondent was not acting in bad faith.

c. Complainant did not carry its burden of proof in establishing Respondent's alleged violations of the Animal Welfare Act.

3. The Judicial Officer erred in not upholding Respondent's other objections to the ALJ's decision.

Respondent does not cite the record or any authority for his contention that I erred. I have carefully reviewed my November 18, 1998, Decision and Order, and I find no error with respect to the issues raised by Respondent.

For the foregoing reasons and the reasons set forth in the Decision and Order filed November 18, 1998, *In re David M. Zimmerman, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the

determination to grant or deny a timely filed petition for reconsideration.[2] Respondent's Petition for Reconsideration was timely filed and automatically stayed the November 18, 1998, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay and the Order in the Decision and Order filed November 18, 1998, is reinstated, with allowance for time passed.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations issued under the Animal Welfare Act and, in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations issued under the Animal Welfare Act, without being licensed, as required. The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a civil penalty of $20,000, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and forwarded to:

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[2]*In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. ___, slip op. at 26 (June 1, 1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. ___, slip op. at 24 (May 13, 1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. ___, slip op. at 23 (Apr. 3, 1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. ___, slip op. at 4-5 (Feb. 2, 1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. ___, slip op. at 10 (Jan. 26, 1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. ___, slip op. at 20 (Jan. 5, 1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Frank Martin, Jr.
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Ave., SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Frank Martin, Jr., within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 98-0005.

3. Respondent is permanently disqualified from obtaining a license under the Animal Welfare Act. The disqualification provisions of this Order shall become effective upon service of this Order on Respondent.

In re: KEVIN ACKERMAN and VICKI ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Order Denying Late Appeal as to Kevin Ackerman filed February 3, 1999.

Late appeal.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Decision and Order became final.

Robert A. Ertman, for Complainant.
Kevin Ackerman, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint

on July 23, 1997.

The Complaint alleges that Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, willfully violated the Animal Welfare Act and the Regulations and Standards. On August 21, 1997, Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, filed an Answer to the Complaint denying the material allegations of the Complaint.

Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Vicki Ackerman agreed to the entry of a Consent Decision. The Consent Decision was entered by Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] on April 3, 1998. *In re Kevin Ackerman* (Consent Decision as to Vicki Ackerman), 57 Agric. Dec. 502 (1998).

The ALJ presided over a hearing on April 7, 1998, in Pierre, South Dakota. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Kevin Ackerman, d/b/a Ackerman's Puppy Palace [hereinafter Respondent], represented himself. On June 8, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; on July 10, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; and on July 17, 1998, Complainant filed Complainant's Reply Brief.

On October 2, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $5,000 civil penalty; and disqualifying Respondent from becoming licensed under the Animal Welfare Act for 3 years.

On December 22, 1998, Respondent appealed to the Judicial Officer. On February 2, 1999, Complainant filed Complainant's Response to Appeal, and on February 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

The record indicates that the Initial Decision and Order was served on Complainant on October 6, 1998,[1] and on Respondent on November 16, 1998.[2]

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[1]See letter dated October 5, 1998, from Joyce A. Dawson to Kevin Ackerman, signed by Robert A. Ertman, Counsel for Complainant, indicating receipt of the letter and attached Initial Decision and Order on "10 6 96 [sic]."

[2]See note by TMFisher, dated November 16, 1998, stating that the Initial Decision and Order was "remailed by regular mail" to:

(continued...)

The Initial Decision and Order informs Respondent that failure to file a timely appeal will result in the Initial Decision and Order becoming final, as follows:

> This Decision and Order will become final thirty-five (35) days after service upon the parties unless there is an appeal to the Judicial Officer within thirty (30) days, all as more fully set forth in 7 C.F.R. §§ 1.131 *et seq.*, 1.145).

Initial Decision and Order at 43.

A letter from the Office of the Hearing Clerk accompanying the Initial Decision and Order also informs Respondent that failure to file a timely appeal will result in the Initial Decision and Order becoming final, as follows:

> **CERTIFIED RECEIPT REQUESTED**
>
> October 5, 1998
>
> Mr. Kevin Ackerman d/b/a
> Ackerman [sic] Puppy Palace
> Route 1, Box 66
> Mounds [sic], SD 57646
>
> Dear Mr. Ackerman:
>
> Subject: In re: Kevin Ackerman d/b/a Ackerman [sic] Puppy Palace
> Respondent - AWA Docket No. 97-0039
>
> Enclosed is a copy of the Decision and Order issued in this proceeding by Administrative Law Judge Dorothea A. Baker on October 2, 1998.
>
> Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.

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[2](...continued)
Mr. Kevin Ackerman d/b/a
Ackerman [sic] Puppy Palace
Route 1, Box 66
Mounds [sic], SD 57646

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purpose of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Section 1.145(a) of the Rules of Practice provides the time for filing an appeal, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time. On December 22, 1998, Respondent filed Respondent's Appeal. For the reasons set forth below, Respondent's Appeal must be rejected as untimely.

Respondent's Appeal, filed December 22, 1998, was not filed within 35 days after service of the Initial Decision and Order on Respondent. Respondent contends in his December 1, 1998, filing that he received the Initial Decision and Order on November 20, 1998, and that he had until December 20, 1998, to file his appeal, as follows:

I have received the Judges [sic] Decision and Order on November 20,

1998[,] by United States Mail and wish for you to acknowledge this in writing. I also understand that I have 30 days to appeal this decision[.] I also wish for you to acknowledge in writing that I have until December 20, 1998[,] to file this appeal. I will have the appeal filed by December 20, 1998[.]

Administrative Notice Pursuant to Administrative Procedures [sic] Act.

I disagree with Respondent's contention that he was served with the Initial Decision and Order on November 20, 1998. The record establishes that the Hearing Clerk sent a copy of the Decision and Order to Respondent by certified mail on October 5, 1998.[3] The envelope containing the Initial Decision and Order was returned to the Hearing Clerk, marked "unclaimed" by the United States Postal Service, and on November 16, 1998, the Hearing Clerk remailed the Initial Decision and Order to Respondent by ordinary mail.[4]

Section 1.147(c)(1) of the Rules of Practice provides that under these circumstances the date of service is the date that the Initial Decision and Order was remailed by ordinary mail, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known

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[3]See letter dated October 5, 1998, from Joyce A. Dawson to Kevin Ackerman, and Domestic Return Receipt for Article Number P 368 426 997.

[4]See note 2.

principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

Therefore, Respondent was served with the Initial Decision and Order on November 16, 1998, the date the Initial Decision and Order was remailed by ordinary mail by the Hearing Clerk to Respondent. In accordance with 7 C.F.R. § 1.142(c)(4), the Initial Decision and Order became final on December 21, 1998, 35 days after service of the Initial Decision and Order on Respondent. Respondent filed Respondent's Appeal on December 22, 1998. Therefore, the Judicial Officer no longer has jurisdiction to consider Respondent's Appeal.

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.[5] USDA's construction of the Rules of Practice

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[5]*See In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, 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 respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, 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 that respondents' appeal, filed after the initial decision became final and effective, must be

(continued...)

is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.—**
>
> (1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

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[5](...continued)
dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, 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 respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that 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 that 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 respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that 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 respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider 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 that since 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 respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of USDA not to consider appeals filed more than 35 days after service of the initial decision).

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.[6]

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 initial decision and order 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 for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). 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 initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes

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[6]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since 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 Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed 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); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (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); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

the Judicial Officer from hearing an appeal that is filed after an initial decision and order 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):

> 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.[7]

Accordingly, Respondent's Appeal must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. § 1.142(c)(4).)

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

Order

Respondent's Appeal, filed December 22, 1998, is denied. The Decision and Order filed by Administrative Law Judge Dorothea A. Baker on October 2, 1998, is the final Decision and Order as to Kevin Ackerman in this proceeding.

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[7]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (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), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

In re: KEVIN ACKERMAN and VICKI ACKERMAN, d/b/a ACKERMAN'S PUPPY PALACE.
AWA Docket No. 97-0039.
Order Denying Petition for Reconsideration as to Kevin Ackerman filed April 14, 1999.

Failure to file timely petition for reconsideration.

The Judicial Officer denied Respondent's petition for reconsideration because Respondent did not file the petition for reconsideration within 10 days after the date the Hearing Clerk served the Order Denying Late Appeal as to Kevin Ackerman, as required by 7 C.F.R. § 1.146(a)(3).

Robert A. Ertman, for Complainant.
Kevin Ackerman, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint on July 23, 1997.

The Complaint alleges that Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, willfully violated the Animal Welfare Act and the Regulations and Standards. On August 21, 1997, Kevin and Vicki Ackerman, d/b/a Ackerman's Puppy Palace, filed an Answer to the Complaint denying the material allegations of the Complaint.

Pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Vicki Ackerman agreed to the entry of a Consent Decision. The Consent Decision was entered by Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] on April 3, 1998. *In re Kevin Ackerman* (Consent Decision as to Vicki Ackerman), 57 Agric. Dec. 502 (1998).

The ALJ presided over a hearing on April 7, 1998, in Pierre, South Dakota. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kevin Ackerman, d/b/a Ackerman's Puppy Palace [hereinafter Respondent], represented himself. On June 8, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law,

and Order, and Brief in Support Thereof; on July 10, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order, and Brief in Support Thereof; and on July 17, 1998, Complainant filed Complainant's Reply Brief.

On October 2, 1998, the ALJ issued a Decision and Order directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $5,000 civil penalty; and disqualifying Respondent from becoming licensed under the Animal Welfare Act for 3 years.

On December 22, 1998, Respondent appealed to the Judicial Officer. On February 2, 1999, Complainant filed Complainant's Response to Appeal, and on February 3, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

On February 3, 1999, I issued an Order Denying Late Appeal as to Kevin Ackerman in which I found that Respondent filed his appeal more than 35 days after service of the ALJ's Decision and Order on Respondent, that the ALJ's Decision and Order had become final in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), and that I did not have jurisdiction to consider Respondent's appeal. *In re Kevin Ackerman* (Order Denying Late Appeal as to Kevin Ackerman), 58 Agric. Dec. ___, slip op. at 6, 11 (Feb. 3, 1999). On March 8, 1999, the Hearing Clerk served Respondent with the Order Denying Late Appeal as to Kevin Ackerman.[1]

On March 25, 1999, 17 days after the Hearing Clerk served Respondent with the Order Denying Late Appeal as to Kevin Ackerman, Respondent filed Motion for Reconsideration [hereinafter Petition for Reconsideration]. On April 13, 1999, Complainant filed Complainant's Response to Petition for Reconsideration, and on April 14, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the February 3, 1999, Order Denying Late Appeal as to Kevin Ackerman.

Section 1.146(a)(3) of the Rules of Practice provides:

> **§ 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. . . .*

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[1]See memorandum from TMFisher, dated March 8, 1999.

. . . .

(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).

Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) to be filed within 10 days after the date of service on Respondent of the Order Denying Late Appeal as to Kevin Ackerman, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.[2]

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

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[2]*See In re Marilyn Shepherd*, 57 Agric. Dec. ___ (Sept. 15, 1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the respondent was served with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the respondents were served with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the respondent was served with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the respondent was served with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the respondent was served with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after service of the decision and order on the respondent); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after service of the decision and order on the respondent); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing petition for reconsideration because it was not filed within 10 days after service of the decision and order on the respondent); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after service of the decision and order on the respondent).

Order

Respondent's Petition for Reconsideration is denied. The Decision and Order filed by Administrative Law Judge Dorothea A. Baker on October 2, 1998, is the final Decision and Order as to Kevin Ackerman in this proceeding.

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Ruling Granting Respondent's Request for Information filed March 1, 1999.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; 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], by filing a Complaint on July 7, 1998.

The Complaint alleges that Harold P. Kafka [hereinafter Respondent] violated section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)) by exhibiting animals without an Animal Welfare Act license. The Complaint, the Rules of Practice, and a service letter from the Hearing Clerk were served on Respondent on September 18, 1998.[1]

Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). On October 29, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. Respondent was served with Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon

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[1]See Domestic Return Receipt for Article Number P 368 428 319.

Admission of Facts by Reason of Default on November 5, 1998.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 1, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent exhibited animals without having an Animal Welfare Act license, in willful violation of section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)); (2) assessed Respondent a civil penalty of $5,000; and (3) ordered Respondent to pay a $22,500 civil penalty, which civil penalty had been assessed against Respondent in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision), but was suspended upon the condition that Respondent not violate the Animal Welfare Act, the Regulations, or the Standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) for a period of 20 years from the effective date of the order in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision).

The record indicates that, on January 14, 1999, Respondent was served with the Default Decision,[3] and on February 2, 1999, Respondent filed a letter addressed to the Hearing Clerk, which reads in its entirety, as follows:

> Dear Mrs. Joyce Dawson Hearing Clerk
>
> This letter is to inform your office that I am requesting an appeal in my case AWA Docket No. 98-0028 in the past I informed your office that of my decision to plea not guilty in this matter and never heard back from your office in this case till this letter was received by me the last week of Jan. inclosed is copy of envelope with post mark Jan 20, 1999. Please send to me any information needed to file this appeal as I can not afford a attorney to do so.

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[2]See Domestic Return Receipt for Article Number P 368 427 013.

[3]See Memorandum to the File, dated January 15, 1999, signed by Tonya M. Fisher, Legal Technician.

Thank you
Harold Kafka
901 Valley Rd
Watchung N.J. 07060
phone 908 322-4038
fax 718 967-7834

On February 10, 1998, the Hearing Clerk served Respondent's February 2, 1999, filing on Complainant. The Hearing Clerk's letter of service accompanying Respondent's February 2, 1999, filing refers to the February 2, 1999, filing as "Respondent's Appeal" and informs Complainant that it has 20 days in which to file a response to Respondent's Appeal.[4]

On February 24, 1999, Complainant filed Opposition to Motion by Respondent Harold Kafka to Vacate Default and a Memorandum of Points and Authorities in support of Complainant's Opposition to Motion by Respondent Harold Kafka to Vacate Default. On February 25, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

I find that the Hearing Clerk and Complainant have mischaracterized Respondent's February 2, 1999, filing. First, the Hearing Clerk refers to Respondent's February 2, 1999, filing as "Respondent's Appeal" of the ALJ's December 1, 1998, Default Decision. However, section 1.145(a) of the Rules of Practice describes the purpose and contents of an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately

[4]See the copy of the letter from Joyce A. Dawson, Hearing Clerk, to Harold Kafka, dated February 3, 1999, which Complainant's counsel, Brian T. Hill, signed, establishing Complainant's receipt, on February 10, 1999, of the Hearing Clerk's letter and Respondent's February 2, 1999, filing.

> numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

7 C.F.R. § 1.145(a).

Respondent's February 2, 1999, filing does not conform to the requirements in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) for an appeal; therefore, Respondent's February 2, 1999, filing is not an appeal petition.

Second, Complainant responds to Respondent's February 2, 1999, filing as if it is a motion to set aside, or vacate, the Default Decision. However, Respondent's February 2, 1999, filing does not include a request that I vacate or set aside the Default Decision.

I find that Respondent's February 2, 1999, filing is a request for information that Respondent asserts he needs in order to file an appeal petition.

The record establishes that Respondent was served with a copy of the Rules of Practice on September 18, 1998. I direct Respondent's attention to section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)), which describes the purpose and contents of an appeal petition. Any appeal petition and brief in support of the appeal petition, which Respondent intends to file, must conform to the requirements in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) and must be filed with the Hearing Clerk at the following address:

United States Department of Agriculture
Office of the Hearing Clerk
1400 Independence Avenue, SW
Room 1081 South Building
Washington, D.C. 20250-9200

While this Ruling Granting Respondent's Request for Information provides Respondent with information he requested in his February 2, 1999, filing, Respondent is advised that, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), a default decision becomes final and effective 35 days after service on a respondent. The record indicates that Respondent was served with the Default Decision on January 14, 1999. Therefore, the record indicates that the Default Decision became final and effective on February 18, 1999. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial

decision and order becomes final.[5] Therefore, my jurisdiction to consider any

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[5]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, 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 respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, 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 that respondents' appeal, 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 respondent's appeal, 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 respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that 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 that 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 respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that 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 respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider 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 that since respondent's petition for reconsideration was not filed within 35 days after

(continued...)

appeal petition filed by Respondent is dependent on a showing that the record does not accurately reflect the date Respondent was served with the Default Decision and that any appeal petition filed by Respondent is filed within 35 days of the date on which Respondent was served with the Default Decision.

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Order Denying Late Appeal filed April 5, 1999.

Default — Late answer — Filing with hearing clerk — Late appeal.

The Judicial Officer denied Respondent's late-filed appeal petition. The Judicial Officer found that Respondent filed an Answer 33 days after he was served with the Complaint; therefore, Respondent is deemed to have admitted the allegations in the Complaint and waived his opportunity for a hearing. 7 C.F.R. §§ 1.136(a), (c), .139, .141(a). The Judicial Officer stated that appeal petitions must be filed with the Hearing Clerk and that the effective date of filing an appeal petition is the date the appeal petition reaches the Hearing Clerk. 7 C.F.R. §§ 1.145(a), .147(g). Therefore, Respondent's alleged continued unsuccessful efforts to file his Appeal Petition do not constitute filing the Appeal Petition with the Hearing Clerk. Respondent's Appeal Petition was not filed within 35 days after service of the Default Decision on Respondent; therefore, the Judicial Officer did not have jurisdiction to consider Respondent's appeal.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the

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[5](...continued)
service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that 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).

Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 7, 1998.

The Complaint alleges that Harold P. Kafka [hereinafter Respondent] violated section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)) by exhibiting animals without an Animal Welfare Act license. The Hearing Clerk served the Complaint, the Rules of Practice, and a service letter on Respondent on September 18, 1998.[1]

Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). On October 29, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order Upon Admission of Facts by Reason of Default. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default on November 5, 1998.[2] Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default within 20 days after service, as provided by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 1, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision] in which the ALJ: (1) found that Respondent exhibited animals without having an Animal Welfare Act license, in willful violation of section 2.1(a) of the Regulations (9 C.F.R. § 2.1(a)); (2) assessed Respondent a civil penalty of $5,000; and (3) ordered Respondent to pay a $22,500 civil penalty, which civil penalty had been assessed against Respondent in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision), but was suspended upon the condition that Respondent not violate the Animal Welfare Act, the Regulations, or the Standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) for a period of 20 years from the effective date of the order in *In re Harold Kafka*, 56 Agric. Dec. 1701 (1997) (Consent Decision).

On March 5, 1999, Respondent appealed to the Judicial Officer. On April 1, 1999, Complainant filed Complainant's Opposition to Motion by Respondent Harold Kafka to Vacate Default, and on April 2, 1999, the Hearing Clerk

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[1]See Domestic Return Receipt for Article Number P 368 428 319.

[2]See Domestic Return Receipt for Article Number P 368 427 013.

transmitted the record of this proceeding to the Judicial Officer for a decision.

The record establishes that the Hearing Clerk served the Default Decision on Complainant on December 7, 1998,[3] and the Hearing Clerk served the Default Decision on Respondent on January 14, 1999.[4]

A letter from the Hearing Clerk accompanying the Default Decision informs Respondent that failure to file a timely appeal will result in the Default Decision becoming final, as follows:

> CERTIFIED RECEIPT REQUESTED
>
> December 1, 1998
>
> Mr. Harold P. Kafka
> 901 Valley Road
> Watchung, New Jersey 07060
>
> Dear Mr. Kafka:
>
> Subject: In re: Harold P. Kafka - Respondent
> AWA Docket No. 98-0028
>
> Enclosed is a copy of the Decision and Order Upon Admission of Fact by Reason of Default issued in this proceeding by Administrative Law Judge Edwin S. Bernstein, issued on December 1, 1998.
>
> Each party has thirty (30) days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer.
>
> If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its service. However, no decision or order is final for purpose of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

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[3]See letter dated December 1, 1998, from Regina A. Paris, Acting Hearing Clerk, to Harold P. Kafka, signed by Brian T. Hill, Counsel for Complainant, indicating receipt of the letter and attached Default Decision on "12/7/98".

[4]See Memorandum to the File, dated January 15, 1999, signed by Tonya M. Fisher, Legal Technician.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,
/s/
Regina A. Paris
Acting Hearing Clerk

Section 1.145(a) of the Rules of Practice provides the time for filing an appeal, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time. On March 5, 1999, Respondent filed an appeal [hereinafter Appeal Petition].

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends that he timely filed his Appeal Petition. Respondent bases this contention on his allegation that on February 15, 1999, he received a letter from the Hearing Clerk, dated February 3, 1999, stating that he had 20 days from receipt of the letter to file "paper work." (Appeal Pet. at first unnumbered page.) The record does contain a letter from the Hearing Clerk to Respondent dated February 3, 1999, but the letter does not state that Respondent has 20 days from receipt in which to file "paper work" or an appeal. Instead, the February 3, 1999, letter informs Respondent that *Complainant* has 20 days in which to file a response to Respondent's February 2, 1999, filing.

Second, Respondent contends that he filed an Answer in which he "plead not guilty back when the complate [sic] was first filed" and that he was denied an opportunity for a hearing. Further, Respondent states in his Appeal Petition that

he did not violate the Regulations and attaches a letter from Rich Donovan, Youth Minister, St. Theresa's Church, to Brian Hill, which Respondent states is evidence that he did not violate the Regulations, as alleged in the Complaint. (Appeal Pet. at first unnumbered page and attach.)

The record establishes that Respondent filed an Answer on October 21, 1998, 33 days after he was served with the Complaint. Based upon Respondent's failure to file an answer within 20 days after he was served with the Complaint, Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint and waived his opportunity for a hearing.

The Hearing Clerk served a copy of the Complaint, a copy of the Rules of Practice, and a service letter on Respondent on September 18, 1998.[5] Sections 1.136(a), (c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that

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[5]See note 1.

meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondent on September 18, 1998, clearly informs Respondent of the consequences of failing to file a timely answer, as follows:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2.

Likewise, the Hearing Clerk informed Respondent in the letter of service which accompanied the Complaint and Rules of Practice that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation, as follows:

CERTIFIED RECEIPT REQUESTED

September 1, 1998

Mr. Harold P. Kafka
901 Valley Road
Watchung, New Jersey 07060

Dear Mr. Kafka:

Subject: In re: Harold P. Kafka, Respondent
AWA Docket No. 98-0028

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may

result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Letter dated September 1, 1998, from Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, Office of Administrative Law Judges, to Mr. Harold P. Kafka (emphasis in original).

Third, Respondent contends that he has been "trying to file this appeal" since he received the Default Decision. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that appeal petitions must be filed with the Hearing Clerk and section 1.147(g) of the Rules of Practice provides that a document required or authorized to be filed under the Rules of Practice shall be deemed to be filed at the time it 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).

Therefore, Respondent's unsuccessful efforts to file his Appeal Petition do not constitute filing the Appeal Petition with the Hearing Clerk,[6] and despite Respondent's alleged continued efforts to file his Appeal Petition from the date he received the Default Decision, the record establishes that Respondent did not file his Appeal Petition until March 5, 1999.

For the reasons set forth below, Respondent's Appeal Petition must be rejected as untimely.

Respondent's Appeal Petition, filed March 5, 1999, was not filed within 35 days after service of the Default Decision on Respondent, which occurred on January 14, 1999. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, *viz.*, on February 18, 1999, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's appeal. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final.[7]

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[6]See *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the hearing clerk do not constitute filing an answer with the Hearing Clerk). *Cf. In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 3 n.1 (Mar. 22, 1999) (stating that appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 6-7 (Mar. 8, 1999) (Order Denying Pet. for Recons.) (stating that the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 14 n.2 (Jan. 6, 1999) (stating that the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk); *In re Severin Peterson*, 57 Agric. Dec. ___, slip op. at 8 n.3 (Nov. 9, 1998) (stating that neither applicants' act of mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's act of delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if respondent's answer had been received by complainant's counsel within the time for filing the answer, the answer would not be timely because complainant's counsel's receipt of respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

[7]*See In re Kevin Ackerman*, 58 Agric. Dec. ___ (Feb. 3, 1999) (dismissing respondent Kevin Ackerman's appeal, filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. ___ (Nov. 9, 1998) (dismissing applicants' appeal, filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing respondent's appeal, filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the initial

(continued...)

The United States Department of Agriculture's construction of the Rules of

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[7](...continued)
decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing respondents' appeal, filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, 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 respondent's appeal, filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing respondent's late-filed appeal); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating that respondent's appeal, 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 that respondents' appeal, 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 respondent's appeal, 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 respondent's appeal, filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that 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 that 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 respondents' appeal filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that 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 respondent's appeal that was filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider 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 that since 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 respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that 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).

Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part, that:

> **Rule 4. Appeal as of Right—When Taken**
>
> **(a) Appeal in a Civil Case.—**
>
> (1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry.

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.[8]

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[8]*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since 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 Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed 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); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (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); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory

(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 a default 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 for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). 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 a default decision has become final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after a default 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):

> 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.[9]

Accordingly, Respondent's Appeal Petition must be denied since it is too late

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[8](...continued)
and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

[9]*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (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), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. § 1.139.)

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

Order

Respondent's Appeal Petition, filed March 5, 1999, is denied. The Decision and Order Upon Admission of Facts by Reason of Default filed by Administrative Law Judge Edwin S. Bernstein on December 1, 1998, is the final Decision and Order in this proceeding.

In re: STEPHEN RICHARD DORNIN and LORI UNDERHILL, d/b/a TIGER TALE PRODUCTIONS.
AWA Docket No. 98-0032.
Order Withdrawing Complaint as to Respondent Lori Underhill filed March 12, 1999.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Edwin S. Bernstein, Administrative Law Judge.

Complainant's March 11, 1999, "Motion to Withdraw Complaint as to Respondent Lori Underhill" is granted. The Complaint, filed on August 10, 1998, is withdrawn as to Respondent Lori Underhill.

In re: JUDIE HANSEN, d/b/a WILD WIND PETTING ZOO.
AWA Docket No. 96-0048.
Order Denying Petition for Reconsideration filed March 15, 1999.

Civil penalty — Failing to remove and dispose of animal waste — Failing to allow APHIS inspector access to facilities — Failing to provide adequate housing — Failing to provide clean and safe primary enclosures — Failing to properly store food — Vague regulations — Hearsay evidence — Manure — Excessive fines.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer rejected Respondent's contentions that the evidence was not sufficient to conclude that Respondent violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.126, 3.1(a)-(b), (e)-(f), 3.53(c), 3.125(d), and 3.131(a), (c). The Judicial Officer held that: (1) 9 C.F.R. § 3.131(c) is not unconstitutionally vague because it requires that buildings and grounds be kept clean, but does not specify how much dirt or dust would constitute a violation; (2) the Animal and Plant Health Inspection Service inspector's alleged failures to follow Department rules and supervisor demands are not relevant to the proceeding; (3) the failure of the Judicial Officer to find the proceeding humorous is not error and is not relevant to the proceeding; (4) neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence and responsible hearsay has long been admitted in the Department's administrative proceedings; (5) testimonials of Respondent's customers are not relevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards; and (6) the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Greg Bommelman, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint on May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], represented Complainant. Respondent represented herself, with assistance from her partner, Gregory Bommelman. On

October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Complainant's Brief]. On January 30, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; assessing Respondent a $3,000 civil penalty; and suspending Respondent's Animal Welfare Act license for 30 days.

On March 24, 1998, Respondent filed Motion to Arrest the Decision [hereinafter Respondent's Appeal]; on April 14, 1998, Respondent filed Motion for Dismissal; on May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order [hereinafter Complainant's Response and Cross-Appeal]; on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal; on October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal; and on October 15, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

On December 14, 1998, I issued a Decision and Order: (1) dismissing Respondent's Motion for Dismissal based upon section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), which provides that "[a]ny motion will be entertained other than a motion to dismiss on the pleading"[;] (2) concluding that Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c); (3) assessing Respondent a civil penalty of $4,300; (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (5) suspending Respondent's Animal Welfare Act license for 30 days. *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 3-4, 43, 98-101 (Dec. 14, 1998).

On January 11, 1999, Respondent filed Respondent's Reconsideration of Decision [hereinafter Petition for Reconsideration]. On February 8, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration of Decision and Order, and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the December 14, 1998, Decision and Order.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND STANDARDS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

. . . .

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

§ 2149. Violations by licensees

. . . .

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. §§ 2146(a), 2149(b).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

. . . .

PART 2—REGULATIONS

. . . .

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

. . . .

SUBPART I—MISCELLANEOUS

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure; construction.* Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury,

contain the animals securely, and restrict other animals from entering.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, junk, weeds, and other discarded materials. Animal areas inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. Housing facilities other than those maintained by research facilities and Federal research facilities must be physically separated from any other business. If a housing facility is located on the same premises as another business, it must be physically separated from the other business so that animals the size of dogs, skunks, and raccoons are prevented from entering it.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar

systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

. . . .

SUBPART C—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT AND TRANSPORTATION OF RABBITS

FACILITIES AND OPERATING STANDARDS

. . . .

§ 3.53 Primary enclosures.

All primary enclosures for rabbits shall conform to the following requirements:

. . . .

(c) *Space requirements for primary enclosures acquired on or after August 15, 1990.*

(1) Primary enclosures shall be constructed and maintained so as to provide sufficient space for the animal to make normal postural adjustments with adequate freedom of movement.

(2) Each rabbit housed in a primary enclosure shall be provided a minimum amount of floor space, exclusive of the space taken up by food and water receptacles[.] . . .

. . . .

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

. . . .

(d) *Waste disposal.* Provision shall be made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris. Disposal facilities shall be so provided and operated as to minimize vermin infestation, odors, and disease hazards. . . .

. . . .

ANIMAL HEALTH AND HUSBANDRY STANDARDS

. . . .

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. . . .

. . . .

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

9 C.F.R. §§ 2.100(a), .126(a); 3.1(a)-(b), (e)-(f), .53(c)(1)-(2), .125(d), .131(a), (c).

Respondent raises 15 issues in her Petition for Reconsideration. First, Respondent contends that my conclusion that she willfully violated section 3.1(a) of the Standards (9 C.F.R. § 3.1(a)) on October 25, 1995, is error because "injury has never occured [sic] and no dogs were ever found injured or entangled" (Pet. for Recons. at first unnumbered page (emphasis in original)).

Injury or entanglement is not a necessary prerequisite to a finding that a respondent violated 9 C.F.R. § 3.1(a). As discussed in *In re Judie Hansen, supra*, slip op. at 21-22, 57-58, the evidence and Respondent's admissions support a finding that on October 25, 1995, Respondent willfully violated 9 C.F.R. § 3.1(a). Therefore, I disagree with Respondent's contention that I erred in finding that on October 25, 1995, Respondent failed to design and construct housing facilities for

dogs so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury, in willful violation of 9 C.F.R. § 3.1(a).

Second, Respondent contends that my conclusion that she willfully violated section 3.1(b) of the Standards (9 C.F.R. § 3.1(b)) on June 19, 1995, and October 25, 1995, is error because the "USDA inspector has never seen any dog, puppy, or even evidence of vermin in the neatly organized shop material" (Pet. for Recons. at first unnumbered page).

Section 3.1(b) of the Standards requires that animal areas inside of housing facilities must be kept neat and free of clutter. Proof that an animal was in an animal area at the time that the animal area was cluttered is not required in order to find that a respondent violated 9 C.F.R. § 3.1(b). Moreover, as discussed in *In re Judie Hansen, supra,* slip op. at 22-23, 58, the evidence and Respondent's admissions support a finding that on June 19, 1995, and October 25, 1995, Respondent willfully violated 9 C.F.R. § 3.1(b). Therefore, I disagree with Respondent's contention that I erred in finding that on June 19, 1995, and October 25, 1995, Respondent failed to ensure that animal areas were free of clutter, including equipment, furniture, and stored material, in willful violation of 9 C.F.R. § 3.1(b).

Third, Respondent asserts that "Regulations do not require an empty (this is the secret word) need to be covered" (Pet. for Recons. at first unnumbered page (emphasis in original)).

I infer, based on Respondent's references to *In re Judie Hansen, supra,* slip op. at 24, and Complainant's Exhibit 3, that Respondent contends that I erred in finding that on October 25, 1995, she failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in willful violation of section 3.1(e) of the Standards (9 C.F.R. § 3.1(e)).[1] My conclusion that Respondent willfully violated 9 C.F.R. § 3.1(e) on October 25, 1995, is based on the evidence that bottles of bleach and other toxic substances were stored near animal feed. *In re Judie Hansen, supra,* slip op. at 24. Contrary to Respondent's apparent contention in her Petition for Reconsideration that containers were empty, Respondent admitted in Respondent's Appeal that bleach and food were not properly stored, but stated that the bleach was diluted and the open food sack contained only a small amount of feed (Respondent's Appeal B at 6). As stated in *In re Judie Hansen, supra,* slip op. at 58-59, the dilution of the bleach and the small quantity of feed involved do not exculpate Respondent's

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[1]I infer, based on Respondent's failure to reference Complainant's Exhibit 1, that Respondent does not request that I reconsider my conclusion that she violated 9 C.F.R. § 3.1(e) on June 19, 1995.

violation of 9 C.F.R. § 3.1(e). Therefore, I disagree with Respondent's contention that I erred in finding that on October 25, 1995, Respondent failed to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation, in willful violation of 9 C.F.R. § 3.1(e).

Fourth, Respondent asserts that an "open pail of feces is proof that a cleaning process. Leaving this open pail is no different than soiled newspapers that occured [sic] as part of regular cleaning. This is a double standard." (Pet. for Recons. at first and second unnumbered pages.)

I infer, based on Respondent's reference to *In re Judie Hansen, supra*, slip op. at 25, that Respondent contends that I erred in finding that on October 25, 1995, she failed to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease, in willful violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)).

Respondent contends that an open pail of feces is proof that Respondent was in the process of cleaning. While an open pail of feces could be evidence that Respondent was cleaning her facility, it is not dispositive of the fact that Respondent was in the process of cleaning feces from her facility. However, Respondent testified that a worker was using the pail to clean the cages and had left it on the ground to accompany the USDA inspector during the inspector's October 25, 1995, inspection (Tr. 211-12). I found that Respondent's leaving the pail of feces open for the period necessary for an inspection of her facility constituted a violation of 9 C.F.R. § 3.1(f), *In re Judie Hansen, supra*, slip op. at 25, 43, 59, and I do not, on reconsideration, find that my conclusion that Respondent willfully violated 9 C.F.R. § 3.1(f) on October 25, 1995, was error. However, Respondent should note that, based on Respondent's testimony regarding the circumstances surrounding Respondent's violation of 9 C.F.R. § 3.1(f), I found Respondent's violation of 9 C.F.R. § 3.1(f) to be minor and neither the civil penalty assessed against Respondent nor the suspension of Respondent's Animal Welfare Act license is based on Respondent's violation of 9 C.F.R. § 3.1(f). *In re Judie Hansen, supra*, slip op. at 59.

Fifth, Respondent states, "[a]gain questioning Borchert's creditably [sic]. Does he know the difference between rabbits used for the petting zoo or for meat rabbits[?] Meat rabbits are <u>not</u> governed by [the Animal and Plant Health Inspection Service [hereinafter APHIS]]. Ms. Hansen testified truthfully that these are <u>meat</u> rabbits[.]" (Pet. for Recons. at second unnumbered page (emphasis in original).)

I infer that Respondent contends that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to construct and maintain primary

enclosures for rabbits so as to provide sufficient space for the rabbits to make normal postural adjustments with adequate freedom of movement, in willful violation of section 3.53(c) of the Standards (9 C.F.R. § 3.53(c)). Respondent's contention appears to be based upon Mr. Borchert's alleged lack of credibility, Mr. Borchert's alleged inability to discern the difference between a "meat" rabbit that is not subject to regulation under the Animal Welfare Act and a rabbit that is subject to regulation under the Animal Welfare Act, and Respondent's testimony that the rabbits which Mr. Borchert inspected were "meat" rabbits.

I found Mr. Donovan Borchert, the APHIS inspector who conducted inspections of Respondent's facility on June 19, August 8, and October 25, 1995, and attempted to conduct an inspection of Respondent's facility on June 11, 1997, the inspections and attempted inspection relevant to this proceeding, to be credible. Moreover, Respondent testified that *some* of her rabbits are not subject to the Animal Welfare Act because they are meat rabbits (Tr. 189-93). However, there was nothing to distinguish Respondent's meat rabbits from Respondent's rabbits which are subject to regulation under the Animal Welfare Act. Therefore, I disagree with Respondent's contention that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the rabbits to make normal postural adjustments with adequate freedom of movement, in willful violation of 9 C.F.R. § 3.53(c).

Sixth, Respondent contends that "no inspection reports . . . indicate <u>excessive</u> accumulation of feces" (Pet. for Recons. at second unnumbered page (emphasis in original)).

I infer that Respondent contends that I erred in finding that on August 8, 1995, and October 25, 1995, Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors, in willful violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

I agree with Respondent that the inspection reports which evidence Respondent's violations of 9 C.F.R. § 3.131(a) do not state that there was an "excessive" accumulation of feces in primary enclosures for ferrets.[2] However, a finding that a primary enclosure has an "excessive" accumulation of feces is not a necessary prerequisite to a finding that a respondent violated 9 C.F.R. § 3.131(a). Instead, 9 C.F.R § 3.131(a) provides that excreta shall be removed from primary

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[2]See Complainant's Exhibit 2 at 3, item 7, III, #36 and Complainant's Exhibit 3 at 3, item 7, IV, #36.

enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors.

As explained in *In re Judie Hansen, supra*, slip op. at 35, 64, Respondent provided reasons for, but did not deny, her violations of 9 C.F.R. § 3.131(a).

Therefore, I disagree with Respondent's contention that I erred in finding that on August 8, 1995, and October 25, 1995, Respondent failed to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the ferrets contained therein and to minimize disease hazards and to reduce odors, in willful violation of 9 C.F.R. § 3.131(a).

Seventh, Respondent states that the "[m]anure pile is a[n] incorrect statement. A USDA investigator and the property owner agree that this pile in question is a decomposed totally harmless compose [sic] pile (in normal terms good dirt)[.]" (Pet. for Recons. at second unnumbered page.)

I infer that Respondent contends that I erred in finding that on June 19, 1995, and August 8, 1995, Respondent failed to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards, in willful violation of section 3.125(d) of the Standards (9 C.F.R. § 3.125(d)).

Respondent contends in her Petition for Reconsideration that she did not fail to remove animal waste, but instead, she failed to remove compost. However, the APHIS inspector described the pile that Respondent failed to remove as consisting of manure,[3] and while Respondent stated that the pile presented no health hazard to her animals, Respondent admitted in her Answer that the pile consisted of horse manure and straw that was largely decomposed (Answer at 8). Manure is animal waste.[4]

Moreover, Respondent argues in Respondent's Appeal that collecting animal and food wastes and bedding and composting this material in a pile at the kennel constitutes disposal of animal waste in accordance with 9 C.F.R. § 3.125(d) (Respondent's Appeal B at 10-11). As I stated in *In re Judie Hansen, supra*, slip op. at 63, heaping manure in a pile, with corral straw and bedding, next to the kennel, to allow the natural decomposition process to occur, is not "removal and disposal" as contemplated by 9 C.F.R. § 3.125(d).

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[3]See Complainant's Exhibit 1 at 2, item 7, III, #14 and Complainant's Exhibit 2 at 3, item 7, III, #14.

[4]See Merriam Webster's Collegiate Dictionary 709 (10th ed. 1997):

manure *n* (1549) : material that fertilizes land; *esp* : refuse of stables and barnyards consisting of livestock excreta with or without litter[.]

demands are not relevant to this proceeding, which concerns Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Twelfth, Respondent contends that "[i]f any judge would have looked at the dog breeder reports, they (the judges) would have laughed at this hearing" (Pet. for Recons. at fifth unnumbered page). The ALJ examined the dog breeder reports (RX 19) (Initial Decision and Order at 21-22), and I examined the dog breeder reports. While I do not know whether the dog breeder reports caused the ALJ to find the proceeding humorous, the ALJ gave the dog breeder reports little weight. Moreover, I reviewed the dog breeder reports, and the reports did not cause me to find the proceeding humorous. My failure to find the proceeding humorous is not error and is not relevant to the proceeding.

Thirteenth, Respondent contends that Mr. Borchert's testimony regarding "old soiled newspapers" is hearsay and should not have been admitted into evidence (Pet. for Recons. at fifth unnumbered page). I infer that Respondent is referring to the allegation in paragraph 6(a) of the Complaint that on August 8, 1995, Respondent failed to provide for the regular and frequent collection, removal, and disposal of animal waste and bedding, in willful violation of section 3.1(f) of the Standards (9 C.F.R. § 3.1(f)).

As an initial matter, I did not find that the soiled newspapers constituted a violation of 9 C.F.R. § 3.1(f), as they were present as part of the regular cleaning of the facility, and I dismissed the August 8, 1995, violation of 9 C.F.R. § 3.1(f) alleged in paragraph 6(a) of the Complaint. *In re Judie Hansen, supra*, slip op. at 24-25, 72-73. Second, Mr. Borchert's testimony regarding his observations during inspections of Respondent's facility was not hearsay. Moreover, neither the Administrative Procedure Act nor the Rules of Practice prohibit the admission of hearsay evidence. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides, as follows:

§ 1.141 Procedure for hearing.

. . .

(h) *Evidence*—(1) *In general*. . . .

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.[7] Moreover,

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[7]*See, e.g.*, *Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

responsible hearsay has long been admitted in USDA's administrative proceedings.[8]

Fourteenth, Respondent contends that she "has taken the time to send out puppy buyer questioneers [sic] and they come back positive" (Pet. for Recons. at fifth unnumbered page).

As stated in *In re Judie Hansen, supra*, slip op. at 54, the testimonials of Respondent's customers (RX 20) are not relevant to Respondent's compliance with the Animal Welfare Act and the Regulations and Standards.

Fifteenth, Respondent states that "Article VIII of the constitution states that excessive fines not be imposed. Who determines what the value of this fine should be[?]" (Pet. for Recons. at fifth unnumbered page.)

The Eighth Amendment to the United States Constitution prohibits the imposition of excessive fines, as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. amend. VIII.

However, the Excessive Fines Clause of the Eighth Amendment to the United States Constitution is not applicable to civil administrative enforcement proceedings in which civil penalties are assessed to deter violations, rather than to punish violators.[9] The purpose of civil penalties assessed under the Animal

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[8]*In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 47 (Dec. 14, 1998); *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 39 (Nov. 18, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1355 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

[9]See *Austin v. United States*, 509 U.S. 602, 609 (1993) (stating that "[t]he purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish"); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989) (stating that the word fine, as used in the Excessive Fines Clause, means payment to a sovereign as punishment

(continued...)

Welfare Act is to deter future violations of the Animal Welfare Act and the Regulations and the Standard; civil penalties assessed under the Animal Welfare Act are not for the purpose of punishment.

I have been delegated the authority to determine the amount of the civil penalty to be assessed in administrative disciplinary proceedings instituted under the Animal Welfare Act, and I assessed the $4,300 civil penalty against Respondent.

I found that Complainant proved 20 of the 33 violations alleged in the Complaint and Amended Complaint. I did not assess a civil penalty for three of these 20 violations because I found three of the violations *de minimis*. Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that a dealer or exhibitor may be assessed a civil penalty of $2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Therefore, I could have assessed Respondent a maximum civil penalty of $50,000.

My reasons for assessment of a $4,300 civil penalty against Respondent are fully explained in *In re Judie Hansen, supra*, slip op. at 40-41, 89-98. On reconsideration of the $4,300 civil penalty assessed against Respondent, I do not find the civil penalty assessed against Respondent "excessive."

For the foregoing reasons and the reasons set forth in the Decision and Order filed December 14, 1998, *In re Judie Hansen, supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.[10]

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[9](...continued)
for some offense); *Little v. Commissioner*, 106 F.3d 1445, 1454 (9th Cir. 1997) (stating that the Excessive Fines Clause is not applicable to additions to income tax for negligence and for substantial understatement of tax because the additions serve only to deter noncompliance with tax laws by imposing a financial risk on those who fail to comply with tax laws); *United States v. One Parcel of Real Estate at 321 S.E. 9th Court*, 914 F. Supp. 522, 525-26 (S.D. Fla. 1995) (stating that the Excessive Fines Clause limits the government's power to extract payments as punishment for an offense).

[10]*In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 8, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part
(continued...)

Respondent's Petition for Reconsideration was timely filed and automatically stayed the December 14, 1998, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed December 14, 1998, is reinstated, with allowance for time passed.

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

Order

1. Respondent Judie Hansen is assessed a civil penalty of $4,300. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Colleen A. Carroll
U.S. Department of Agriculture
Office of the General Counsel
1400 Independence Avenue, SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be forwarded to, and received by, Colleen A. Carroll, within 65 days after service of this Order on Respondent. The certified check or money order should indicate that payment is in reference to AWA Docket No. 96-0048.

2. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under

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[10](...continued)
Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

the Animal Welfare Act, and in particular, shall cease and desist from:

a. failing to ensure that primary enclosures for kittens have an elevated resting surface;

b. failing to keep the premises clean in order to protect animals from injury and to facilitate the required husbandry practices;

c. failing to provide for the removal and disposal of animal waste so as to minimize vermin infestation, odors, and disease hazards;

d. failing to construct and maintain primary enclosures for rabbits so as to provide sufficient space for the animals to make normal postural adjustments with adequate freedom of movement;

e. failing to keep the premises where housing facilities for dogs are located clean and control weeds;

f. failing to store supplies of food in a manner that protects the supplies from spoilage, contamination, and vermin infestation;

g. failing to ensure that animal areas are free of clutter, including equipment, furniture, and stored material;

h. failing to design and construct housing facilities for dogs and cats so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them;

i. failing to provide for the regular and frequent collection, removal, and disposal of animal waste in a manner that minimizes the risk of contamination and disease;

j. failing to remove excreta from primary enclosures for ferrets as often as necessary to prevent contamination of the animals contained in the primary enclosures and to minimize disease hazards and to reduce odors;

k. failing to construct indoor and outdoor housing facilities so as to be structurally sound and maintain the facilities in good repair, to protect animals from injury and to contain them; and

l. failing to allow an APHIS inspector access to her facility and records.

The cease and desist provisions shall become effective on the day after service of this Order on Respondent.

3. Respondent's Animal Welfare Act license is suspended for a period of 30 days, and continuing thereafter, until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that she has satisfied the conditions in this paragraph of this Order, a

Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 30-day license suspension period.

The Animal Welfare Act license suspension provisions in this Order shall become effective on the 65th day after service of this Order on Respondent.

In re: JUDIE HANSEN, d/b/a WILD WIND PETTING ZOO.
AWA Docket No. 96-0048.
Order Denying Petition to Reopen Hearing filed May 12, 1999.

Petition to reopen hearing.

The Judicial Officer denied Respondent's petition to reopen hearing, which was filed 4 months and 1 week after the Judicial Officer issued the Decision and Order in *In re Judie Hansen*, 57 Agric. Dec. ___ (Dec. 14, 1998). The Judicial Officer held that the Rules of Practice (7 C.F.R. § 1.146(a)(2)) require that a petition to reopen hearing must be filed prior to the issuance of the Judicial Officer's decision, and Respondent's petition to reopen hearing was untimely.

Colleen A. Carroll, for Complainant.
Judie Hansen, Pro se, and Gregory Bommelman, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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], by filing a Complaint on May 6, 1996.

On July 1, 1996, Judie Hansen, d/b/a Wild Wind Petting Zoo [hereinafter Respondent], filed an Answer to the Complaint. On July 11, 1997, Complainant filed Motion to Amend Complaint requesting the addition of paragraph 8 to the Complaint. Also, on July 11, 1997, Administrative Law Judge James W. Hunt [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint, but waived the requirement that Respondent file a pre-hearing written answer to the

Amended Complaint (Order Granting Motion to Amend Complaint).

The Complaint and the Amended Complaint allege that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards.

The ALJ presided over a hearing on July 23, 1997, in Minot, North Dakota. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent represented herself with assistance from her partner, Gregory Bommelman. On October 10, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On January 30, 1998, the ALJ issued an initial decision and order: (1) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (2) assessing Respondent a $3,000 civil penalty; and (3) suspending Respondent's Animal Welfare Act license for 30 days.

On March 24, 1998, Respondent appealed the initial decision and order; on April 14, 1998, Respondent filed Motion for Dismissal; on May 8, 1998, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order [hereinafter Complainant's Response and Cross-Appeal]; on May 12, 1998, Complainant filed Complainant's Response to Respondent's Motion for Dismissal; on October 7, 1998, Respondent filed Respondent's Response to Complainant's Response and Cross-Appeal; and on October 15, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion for Dismissal and decision.

On December 14, 1998, I issued a Decision and Order: (1) dismissing Respondent's Motion for Dismissal; (2) concluding that Respondent willfully violated 7 U.S.C. § 2146 and 9 C.F.R. §§ 2.100(a), 2.126; 3.1(a), 3.1(b), 3.1(e), 3.1(f), 3.6(b), 3.11(c), 3.53(c), 3.125(a), 3.125(d), 3.131(a), and 3.131(c); (3) assessing Respondent a $4,300 civil penalty; (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (5) suspending Respondent's Animal Welfare Act license for 30 days. *In re Judie Hansen*, 57 Agric. Dec. ___, slip op. at 3-4, 43, 98-101 (Dec. 14, 1998).

On January 11, 1999, Respondent filed Respondent's Reconsideration of Decision [hereinafter Petition for Reconsideration]. On February 8, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Reconsideration of Decision and Order, and on February 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the December 14, 1998, Decision and Order. On March 15, 1999, I denied Respondent's Petition for Reconsideration. *In re Judie Hansen*, 58 Agric. Dec. ___ (Mar. 15, 1999) (Order Denying Pet. for Recons.).

On April 21, 1999, Respondent filed Request for a New Administrive [sic] Hearing [hereinafter Petition to Reopen Hearing]. On May 11, 1999, Complainant filed Complainant's Reply to Respondent's Petition for Rehearing, and on May 12, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Petition to Reopen Hearing.

Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer, as follows:

> **§ 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. . . .*
>
> (2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I issued the Decision and Order in this proceeding on December 14, 1998. Respondent filed Respondent's Petition to Reopen Hearing on April 21, 1999. Therefore, Respondent's Petition to Reopen Hearing, filed 4 months and 1 week after the issuance of the Judicial Officer's Decision and Order, is untimely and is denied.[1]

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

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[1]*See In re Queen City Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 7 (July 7, 1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen hearing because the respondent filed the petition to reopen hearing 26 days after the Judicial Officer issued an Order Denying Late Appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision).

Order

Respondent's Petition to Reopen Hearing, filed April 21, 1999, is denied.

In re: VOLPE VITO, INC., d/b/a FOUR BEARS WATER PARK and RECREATION AREA.
AWA Docket No. 94-0008.
Order Lifting Stay filed April 5, 1999.

Sharlene A. Deskins, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On January 13, 1997, I issued a Decision and Order: (1) concluding that Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area [hereinafter Respondent], violated 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 and Standards]; (2) assessing Respondent a $26,000 civil penalty; (3) revoking Respondent's Animal Welfare Act license; and (4) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997). On February 18, 1997, Respondent filed a Petition for Reconsideration, and on April 16, 1997, I issued an Order Denying Petition for Reconsideration. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269 (1997).

On May 13, 1997, Respondent filed Motion to Stay Execution of Decision and Order Filed January 13, 1997 [hereinafter Respondent's Motion for Stay], requesting a stay of the Order in *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997), pending completion of proceedings for judicial review. On May 19, 1997, I granted Respondent's Motion for Stay. *In re Volpe Vito, Inc.*, 56 Agric. Dec. 278 (1997) (Stay Order).

On January 7, 1999, the United States Court of Appeals for the Sixth Circuit issued a decision affirming *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997). *Volpe Vito, Inc. v. United States Dep't of Agric.*, No. 97-3603 (6th Cir. Jan. 7, 1999). On March 9, 1999, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay. The Hearing Clerk served Respondent

with Complainant's Motion to Lift Stay on March 11, 1999, and in accordance with section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)), Respondent had 20 days after service in which to respond to Complainant's Motion to Lift Stay. Respondent did not file a response to Complainant's Motion to Lift Stay within 20 days after Respondent was served with the Motion to Lift Stay, and on April 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Complainant's Motion to Lift Stay is granted. The Stay Order issued May 19, 1997, *In re Volpe Vito, Inc.*, 56 Agric. Dec. 278 (1997) (Stay Order), is lifted and the Order issued in *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166 (1997), is effective, as follows:

Order

Paragraph I

Respondent is assessed a civil penalty of $26,000. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2014 South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Sharlene A. Deskins within 60 days after service of this Order on Respondent. Respondent should indicate on the certified check or money order that payment is in reference to AWA Docket No. 94-0008.

Paragraph II

Respondent's license under the Animal Welfare Act is hereby revoked, effective

on the 30th day after service of this Order on Respondent.

Paragraph III

Respondent, its agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

1. Failing to maintain complete records showing the acquisition, disposition, and identification of animals;
2. Failing to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;
3. Failing to provide veterinary care to animals in need of care;
4. Failing to construct housing facilities for nonhuman primates in a manner and of materials that allow the housing facilities to be readily cleaned and sanitized, or removed or replaced when worn, soiled, or rusted;
5. Failing to store supplies of food for nonhuman primates in a manner that protects the food from spoilage, contamination, and vermin infestation;
6. Failing to develop, document, and follow an appropriate plan for environmental enhancement, adequate to promote the psychological well-being of nonhuman primates;
7. Failing to provide facilities for animals that are structurally sound and maintained in good repair so as to protect animals from injury, to contain animals, and to restrict the entrance of other animals;
8. Failing to store supplies of food adequately to protect them against deterioration, molding, or contamination by vermin;
9. Failing to keep water receptacles clean and sanitary;
10. Failing to provide refrigeration for supplies of perishable food;
11. Failing to keep the premises (buildings and grounds) clean and in good repair and free of accumulations of trash;
12. Refusing to allow Animal and Plant Health Inspection Service officials to inspect its animals, facilities, and records;
13. Failing to equip housing facilities for nonhuman primates with disposal facilities and drainage systems constructed and operated so that animal wastes and water are rapidly eliminated and the animals stay dry;
14. Failing to provide outdoor housing facilities for nonhuman primates which provide sufficient heat to protect nonhuman primates from temperatures

falling below 45 °F.;

15. Failing to provide a suitable method to eliminate excess water from outdoor housing facilities for animals rapidly;

16. Failing to provide animals with wholesome and uncontaminated food;

17. Failing to provide animals kept outdoors with adequate shelter from inclement weather;

18. Failing to provide nonhuman primates with food that is wholesome and free from contamination;

19. Failing to keep primary enclosures for nonhuman primates clean and spot-cleaned daily;

20. Failing to keep primary enclosures for nonhuman primates clean and sanitized; and

21. Handling any animal in a manner that causes trauma, behavioral stress, physical harm, and unnecessary discomfort.

Paragraph III of this Order shall become effective on the day after service of this Order on Respondent.

In re: KATHERINE T. FINCH, d/b/a PINELAND FARM KENNELS.
AWA Docket No. 95-0045.
Dismissal Order filed June 17, 1999.

Jeffery D. Kirmsse, for Complainant.
Lee Garrision, Bridgewater, Massachusetts, for Respondent.
Edwin S. Bernstein, Administrative Law Judge.

Pursuant to Complainant's Motion therefor, the Complaint filed herein on April 11, 1995, is dismissed.

Copies hereof shall be served upon the parties.

In re: JACK STEPP and WILLIAM REINHART.
HPA Docket No. 94-0014.
Stay Order filed July 1, 1998.

Sharlene A. Deskins, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On May 6, 1998, I issued a Decision and Order: (1) concluding that Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(B)) and that Respondent William Reinhart violated section 5(2)(D) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(D)); (2) assessing Jack Stepp and William Reinhart [hereinafter Respondents] each a civil penalty of $2,000; and (3) disqualifying each Respondent from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, for 1 year. *In re Jack Stepp*, 57 Agric. Dec. ___, slip op. at 21-22, 28-30 (May 6, 1998). On May 27, 1998, Respondents filed a Petition for Reconsideration, which I denied based on my finding that Respondents' Petition for Reconsideration was not timely filed. *In re Jack Stepp*, 57 Agric. Dec. ___ (June 18, 1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondents filed a letter, dated June 26, 1998, stating:

> . . . .
>
> . . . [W]e consider the Petition for Reconsideration properly before you, having been timely filed.
>
> Since, under your original Order, which was served on my [sic] on May 11, 1998, and since a 60 day deadline for appeal to the Federal courts on this matter would be July 10, 1998, this is to request that you immediately notify us as to whether you consider the Petition for Reconsideration properly before you. This request is made so as not to jeopardize our appeal to the Federal court which is our right under the law.
>
> A resolution of this matter on whether our Petition for Reconsideration was timely filed is critical in that the Federal courts would not look favorably on our appeal unless we had exhausted all remedies under your administrative

law system.

Letter from William J. Reinhart and Jack Stepp to William G. Jenson, dated June 26, 1998, at 1-2.

On June 30, 1998, I telephoned Respondents at one of the telephone numbers set forth in their June 26, 1998, letter (Letter from William J. Reinhart and Jack Stepp to William G. Jenson, dated June 26, 1998, at 1). Respondent William Reinhart answered the telephone, and I informed him that Respondents' Petition for Reconsideration is no longer "before me" and that the June 18, 1998, Order Denying Petition for Reconsideration constitutes the final administrative disposition of Respondents' Petition for Reconsideration.

Respondent William Reinhart informed me that Respondents intend to seek judicial review of the May 6, 1998, Decision and Order, and the June 18, 1998, Order Denying Petition for Reconsideration, and requested a stay of the Order issued in the May 6, 1998, Decision and Order, pending the outcome of proceedings for judicial review.

On June 30, 1998, counsel for the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me, by telephone, that Complainant does not oppose Respondents' request for a stay order.

On July 1, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondents' request for a stay order.

Respondents' oral request for a stay order is granted. The Order issued in this proceeding on May 6, 1998, *In re Jack Stepp*, 57 Agric. Dec. ___ (May 6, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: BRETT EDWARD BOYD, JANETTE A. TREAT, and CARLOS L. TREAT.
HPA Docket No. 99-0002.
Order Withdrawing Complaint filed February 26, 1999.

Colleen A. Carroll, for Complainant.
David F. Broderick, Bowling Green, KY, for Respondent.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

On February 23, 1999, Complainant filed a "Notice of Complainant's Withdrawal of Complaint" in this matter.

It is ordered that the Complaint, filed herein on December 24, 1998, be withdrawn as to Respondents Brett Edward Boyd, Janette A. Treat and Carlos L. Treat.

In re: JACLYN ELAINE SMITH.
HPA Docket No. 99-0003.
Withdrawal of Complaint filed February 26, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by Dorothea A. Baker, Administrative Law Judge.

Complainant has withdrawn the Complaint filed January 11, 1999 in the above-entitled proceeding. Accordingly, the proceeding is concluded.

Copies hereof shall be served upon the parties.

In re: TIMOTHY E. GRAHAM and DONNA PRUITT.
HPA Docket No. 99-0005.
Order Withdrawing Complaint filed March 4, 1999.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Order issued by Edwin S. Bernstein, Acting Chief Administrative Law Judge.

On March 3, 1999, Complainant filed a "Notice of Complainant's Withdrawal

of Complaint" in this matter.

It is ordered that the Complaint, filed herein on January 14, 1999, be withdrawn as to Respondents Timothy E. Graham and Donna Pruitt.

In re: ALAN L. HANBACK and KAREN L. HANBACK.
HPA Docket No. 99-0009.
Complaint Withdrawn, Proceeding Dismissed filed March 29, 1999.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

By document filed March 18, 1999, the Complainant withdraws Complainant No. HPA 99-0009, filed March 4, 1999. Accordingly the proceeding is dismissed.

Copies hereof shall be served upon the parties.

In re: TEDDY DeLONG.
HPA Docket No. 99-0007.
Order Dismissing Complaint filed April 15, 1999.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

On April 14,1999, Complainant filed a "Notice of Complainant's Withdrawal of Complaint" in this proceeding.

It is ordered that the complaint, filed herein on March 4, 1999, be dismissed.

In re: FRANCISCA GAUDIA.
P.Q. Docket No. 96-0033.
Order Dismissing Complaint filed March 2, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's February 26, 1999, "Motion to Dismiss" is granted. It is ordered that the Complaint, filed herein on August 1, 1996, be dismissed.

DEFAULT DECISIONS

AGRICULTURAL MARKETING AGREEMENT ACT

In re: CALE BLOCKER.
AMAA Docket No. 98-0003.
Decision and Order filed January 5, 1999.

Colleen A. Carroll, for Complaint.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This proceeding was instituted under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* (the "Act"), and the Marketing Order for Vidalia Onions Grown in Georgia, 7 C.F.R. Part 955 (the "Vidalia Onion Order"), by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that respondent Cale Blocker, willfully violated the Vidalia Onion Order.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

Findings of Fact

1. Respondent Cale Blocker is an individual whose mailing address is Route 1, Box 80, Glennville, Georgia 30427. At all times mentioned herein, said respondent was a "handler" as that term is defined in the Act, 7 U.S.C. § 608c(1), and the Vidalia Onion Order, 7 C.F.R. § 955.6.

2. Between approximately February 1997 and the present, respondent Cale Blocker has willfully violated sections 955.60 and 955.101 of the Vidalia Onion Order, 7 C.F.R. §§ 955.60, 955.101, by failing to file with the Vidalia Onion Committee monthly reports of the respondent's receipts and shipments of Vidalia onions.

3. Between approximately February 1997 and the present, respondent Cale Blocker has willfully violated sections 955.42 and 955.142 of the Vidalia Onion Order, 7 C.F.R. §§ 955.42, 955.142, by failing to remit $7,292.70 in assessments owed in the 1996-1997 fiscal period, plus late payment charges and accrued interest thereon.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 955.42, 955.60, 955.101, and 955.142 of the Vidalia Onion Order (7 C.F.R. §§ 955.42, 955.60, 955.101, 955.142).
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondents are assessed a civil penalty of $11,500, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.
2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the Vidalia Onion Committee $7,292.70 in past due assessments for crop year 1996-1997, plus interest of one percent per month pursuant to section 955.142 of the Vidalia Onion Order, and from paying to the Vidalia Onion Committee any and all assessments due under the Vidalia Onion Order for crop year 1997-1998.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 15, 1999.-Editor]

In re: JOHN STEVE CAPERON.
A.Q. Docket No. 98-0001.
Decision and Order filed December 18, 1998.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of Section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act), and the regulations promulgated thereunder governing the importation of birds into the United States from Mexico (9 C.F.R. §§ 92.100 *et seq.*)(regulations), in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under Act and the regulations by a complaint filed on January 14, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. John Steve Caperon is an individual whose last know mailing address is c/o Pima County Jail, P. O. Box 951, Tucson, Arizona 85702.

2. On or about August 19, 1996 , the respondent brought two birds into the United States at Nogales, Arizona, from Mexico, in violation of 9 C.F.R. §§ 92.101, 92.101(c)(3), 92.102(a), 92.103(a)(1), 92.104, and 92.105(b).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 92.100 *et seq.*). Therefore, the following Order is issued.

Order

The respondent, John Steve Caperon, is hereby assessed a civil penalty of two thousand dollars ($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 98-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final February 24, 1999.-Editor]

In re: RUDOLPH J. LUSCHER, JR.
A.Q. Docket No. 98-0008.
Decision and Order filed December 18, 1998.

Howard Levine, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 122)

(Act), and the regulations promulgated thereunder (9 C.F.R. § 85.1 *et seq.*) (regulations).

This proceeding was instituted by a complaint filed against Rudolph J. Luscher, Jr., respondent, on May 8, 1998, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Rudolph Luscher, Jr. is an individual with a mailing address of 6121 N.E. 284th, Battleground, WA, 98604.

2. Between February 15, 1996, and February 22, 1996, the respondent violated 9 C.F.R. § 78.9(a)(3)(iii) by the movement of 299 test-eligible cattle from Battleground, Washington to Adrian, Oregon, at least 32 of which were moved without a certificate containing prescribed information, as required.

3. Between February 15, 1996, and February 22, 1996, the respondent violated 9 C.F.R. § 71.18(a)(1)(iii) by the movement of 299 cattle two years of age or older from Battleground, Washington to Adrian, Oregon, of which at least 32 were moved without the required backtags, eartags, brands, or other acceptable individual identification.

Conclusion

By reason of the facts contained in paragraphs one through three above, Rudolph Luscher, Jr. has violated 9 C.F.R. §§ 78.9(a)(3)(iii) and 71.18(a)(1)(iii).

Therefore, the following order is issued.

Order

Rudolph Luscher, Jr., respondent, is hereby assessed a civil penalty of two thousand dollars ($2000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final March 17, 1999.-Editor]

In re: GARY THOMPSON.
A.Q. Docket No. 98-0009.
Decision and Order filed February 17, 1999.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for violations of the regulations governing the interstate transportation of animals and animal products (9 C.F.R. § 70 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and the regulations promulgated thereunder, by

a complaint filed on June 8, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Gary Thompson is an individual whose mailing address is 456 Donald Perkins Road, Pitkin, Louisiana 70656.

2. On or about October 24, 1996, the respondent, in violation of 9 C.F.R. § 78.9(b)(3)(ii), moved approximately 15 test-eligible cattle interstate from Louisiana to Texas without such cattle being accompanied interstate by a certificate, as required.

3. On or about October 24, 1996, the respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i), moved approximately 15 cattle two years of age or older interstate from Louisiana to Texas without such cattle being accompanied interstate by an owner-shipper statement or other document with prescribed information, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (9 C.F.R. § 70 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 98-0009.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 28, 1999.-Editor]

In re: JOAQUIN LOPEZ.
A.Q. Docket No. 99-0002.
Decision and Order filed March 12, 1999.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate transportation of animals and animal products (9 C.F.R. § 70 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) and sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and the regulations promulgated thereunder, by a complaint filed on October 15, 1998, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in

this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Joaquin Lopez, respondent, is an individual whose mailing address is 336 Colonial Road, Toms River, New Jersey 08753.

2. On or about January 12, 1997, respondent imported approximately 2 kilos of pork from Mexico into the United States at Houston, Texas, in violation of 9 C.F.R. § 94.9(b), because the pork was not treated, and other requirements were not complied with, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Act (9 C.F.R. § 70 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 99-0002

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final April 22, 1999.-Editor]

In re: ALEJANDRO HERRERA CAAMANO.
A.Q. Docket No. 96-0020.
Decision and Order filed April 1, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of birds into the United States (9 C.F.R. § 92.101 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on September 3, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139).

In its proposed order, complainant seeks a $2,000 penalty. However, the Act provides for a maximum civil penalty of $1,000 for each violation. (21 U.S.C. § 122.) The complaint, although referring to the importation of two birds, does not specifically allege more than one violation. Thus, the maximum penalty in this case cannot exceed $1,000. This penalty in turn is reduced to $500 pursuant to *Ricky Bobo, et al.*, 49 Agric. Dec. 849 (1990). Finally, complainant, in proposing any penalty, should have considered that a penalty had already been imposed. *Simon Vejar Sanchez*, 43 Agric. Dec. 748 (1984).

Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Alejandro Herrera Caamano, herein referred to as the respondent, is an individual whose mailing address is 7915 Elmer Avenue, Sun Valley, California 91352.

2. On or about November 10, 1995, respondent imported one live White-fronted Amazon parrot and one live Green Conure from Mexico into the United States at Nogales, Arizona. The importation of the birds violated the Act and the regulations specified below:

A. The birds were not imported into the United States at a designated port in accordance with 9 C.F.R. § 92.101 and 102;

B. The birds were not accompanied by a permit in accordance with 9 C.F.R. § 92.103;

C. The birds were not accompanied by a certificate in accordance with 9 C.F.R. § 92.104; and

D. The birds were not inspected in accordance with 9 C.F.R. § 92.105.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (9 C.F.R. § 92.101 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 96-0020.

This order shall have the same force and effect as if entered after a full hearing

and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final May 19, 1999.-Editor]

ANIMAL WELFARE ACT

In re: DAVID T. RICHTMAN, d/b/a DAVID RICHTMAN'S BEARS, ETC.
AWA Docket No. 98-0003.
Decision and Order filed August 18, 1998.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent to the Respondent by regular mail on December 2, 1997. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the Complaint would constitute an admission of that allegation.

Respondent failed to file an answer addressing the allegations contained in the Complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by Respondent's failure to file an answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. David T. Richtman, hereinafter referred to as Respondent, is an individual doing business as David Richtman's Bears, Etc., whose address is P.0. Box 359 Gonzales, Texas 78629.

B. The Respondent, was a licensed exhibitor until April 8, 1997. The Respondent's license was suspended from April 8, 1997, through May 7, 1997, due to an Order issued in AWA Docket No. 96-0081.

II

A. From April 8, 1997, through May 7, 1997, the Respondent operated as an exhibitor as defined in the Act and regulations without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The Respondent exhibited animals while his license was suspended. Each day that the Respondent exhibited animals is a separate violation.

III

On April 10, 1997, APHIS inspected the Respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b)); and
2. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury (9 C.F.R. § 3.125(a)).

IV

A. On December 3, 1996, APHIS inspected Respondent's premises and found that Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 3, 1996, APHIS inspected the Respondent's facility and found the Respondent willfully violated section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified, since animals kept outdoors were not provided with adequate shelter from inclement weather and the sun (9 C.F.R. § 3.127(a) and (b)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the

Respondent has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair;

(b) Failing to provide animals with adequate shelter from the elements;

(c) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine; and

(d) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The Respondent is assessed a civil penalty of $6,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The check shall be sent to the following address:

1400 Independence Ave., S.W.
Room 2014-South Building Stop 1417
Washington, D.C. 20250-1417

The disqualification from applying for a license as stated below shall continue until the civil penalty is paid.

3. Respondent's license is suspended until the license expires. After the license expires the Respondent is disqualified from applying for a license for ten years.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final October 7, 1998.-Editor]

In re: BRENDA McCURDY, d/b/a TEXAS ANIMAL EXPORT.
AWA Docket No. 98-0022.
Decision and Order filed October 23, 1998.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.)*, by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by personal service on July 23, 1998. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

1. A. Brenda McCurdy, hereinafter referred to as respondent, is an individual doing business as Texas Animal Export whose address is P. O. Box 372, Crystal City, Texas 78839.

B. The respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.

2. A. During 1995 and 1996, the respondent operated as a dealer as defined in the Act and regulations without having obtained a license, in willful violation of

section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold, in commerce, at least 3,499 animals for research, for use as pets, or for exhibition. Each sale constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.
2. The respondent is assessed a civil penalty of $22,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.
3. The respondent is disqualified for a period of one year from becoming licensed under the Act and regulations.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 28, 1999.-Editor]

In re: HAROLD P. KAFKA.
AWA Docket No. 98-0028.
Decision and Order filed December 1, 1998.

Brian Hill, for Complainant.
Respondent. Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served by the Hearing Clerk on the respondent on September 18, 1998. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Harold P. Kafka, hereinafter referred to as the respondent, is an individual with a mailing address of 901 Valley Road, Watchung, New Jersey 07060.

2. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

3. On December 24 and 25, 1997, the respondent exhibited animals without having a license as required, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent is assessed a civil penalty of $5,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.
2. Furthermore, respondent shall pay a civil penalty of $22,500, which was imposed in the decision and order on December 5, 1998 in AWA Docket No. 97-0025 but was suspended upon the condition that the respondent not violate the Animal Welfare Act or the regulations and standards thereunder for a period of 20 years from the effective date of the order.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 21, 1999.-Editor]

In re: MILTON A. MURPHY, d/b/a RAY SINGLETON AND COMPANY.
AWA Docket No. 98-0031.
Decision and Order filed January 20, 1999.

Brian Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed July 28, 1998, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act,

and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent via certified mail to the respondent, return receipt requested, on July 28, 1998. The copies were returned to the office of the Hearing Clerk marked "unclaimed" on August 25, 1998. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to the respondent on October 15, 1998. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. By letter dated January 11, 1999, and filed with the Hearing Clerk on January 12, 1999, the respondent did not deny failing to file an Answer to the Complaint and he set forth reasons why he should be excused from such requirement. However, the circumstances recited by respondent do not furnish a basis for me to deny the Motion for a Default Decision. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Milton A. Murphy, hereinafter referred to as the respondent, is an individual doing business as Ray Singleton and Company, with a mailing address of 10346 B & R Cattle Ranch Road, Arcadia, Florida 34266.

B. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations. Respondent voluntarily terminated his license on September 4, 1997.

II

On August 6, 1996, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. §

2.100(a)) and the standards specified below:

1. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)); and

2. The facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. The structural deficiencies included the absence of a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a)).

III

A. On March 10, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On March 10, 1997, APHIS inspected respondent's premises and records and found that the respondent had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the regulations (9 C.F.R. § 2.75(a)(1)).

C. On March 10, 1997, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. The facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals. The structural deficiencies included the absence of a suitable perimeter fence or equivalent safeguards, necessary for the safe containment of dangerous, carnivorous wild animals (9 C.F.R. § 3.125(a));

2. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a));

3. Sufficient shade was not provided to allow animals to protect themselves from the direct sunlight (9 C.F.R. § 3.127(a)); and

4. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. § 3.131(c)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law above, the respondent has violated the Act and the regulations and standards promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(b) Failing to construct and maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;

(c) Failing to provide animals kept outdoors with adequate shelter from the sun;

(d) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes;

(e) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and

(f) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

2. The respondent is assessed a civil penalty of $3,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified from obtaining a license under the Act and regulations for a period of two years, and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 8, 1999.-Editor]

In re: BRIAN ADRIAN NEELY, d/b/a TEXOTICS.
AWA Docket No. 98-0040.
Decision and Order filed February 12, 1999.

Frank Martin, Jr.. for Complainant.
Resondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by regular mail on October 15, 1997. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. (a) Brian Adrian Neely, doing business as TEXOTICS, hereinafter referred to as the respondent, is an individual whose mailing address is 168 Pine Lane, Montgomery, Texas 77356.

(b) The respondent, at all times material hereto, was operating as a dealer as defined in the Act and regulations.

2. On or about July 21, 1997, the respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold, in commerce, one spider monkey for resale, for use as a pet or for exhibition.

3. On or about July 28, 1997, the respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Respondent sold, in commerce, one cougar for resale, for use as a pet or for exhibition.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The respondent is assessed a civil penalty of $3,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The respondent is disqualified for a period of three years from becoming licensed under the Act and regulations.

Pursuant to the Rules of Practice, this decision becomes final without further

proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 26, 1999.-Editor]

In re: JO ANNE LOHSE.
AWA Docket No. 99-0003.
Decision and Order filed March 10, 1999.

Robert Ertman, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was duly served on the Respondent by the Office of the Hearing Clerk. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. Jo Anne Lohse, hereinafter referred to as the Respondent, is an individual with a mailing address of P.O. Box 212, Tilden, Nebraska 68781.
2. The Respondent, at all times material hereto, was operating as a dealer as

defined in the Act and the regulations.

3. Between February 21, 1997, and June 8, 1997, the Respondent acted as a dealer of animals as defined in the Act and the regulations without having a license as required, in willful violation of section 2.1 of the regulations (9 C.F.R. § 2.1(a)) on at least 14 occasions.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder.

2. A. The Respondent is assessed a civil penalty of $14,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

B. In addition, the Respondent shall pay a civil penalty of $8,000.00, which was assessed but suspended by the Consent Decision and Order issued in AWA Docket 96-0029 on February 14, 1997.

3. The Respondent is permanently disqualified from becoming licensed under the Animal Welfare Act.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 26, 1999.-Editor]

FEDERAL CROP INSURANCE ACT

In re: JOHN L. SHAW.
FCIA Docket No. 99-0001.
Decision and Order filed March 17, 1999.

Donald McAmis, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding instituted by a Complaint filed October 23, 1998, under the Federal Crop Insurance Act, as amended (7 U.S.C. § 1501 *et seq.*) and the regulations promulgated thereunder. The Complaint alleges that the Respondent should be disqualified from purchasing catastrophic risk protection or any other benefit under the Act, for specified periods.

A copy of the Complaint was mailed by certified mail to the Respondent on October 26, 1998 [P.O. stamp], at which time it was addressed to Respondent at P.O. Box 250, Byron, Georgia 31008. This certified mailing was returned to the Hearing Clerk's Office on November 17, 1998, marked "Unclaimed". Thereafter, on December 11, 1998, the Hearing Clerk remailed the Complaint, by regular mail, to the Respondent at 3424 Burnett Road, Byron, Georgia 31008.

The aforementioned procedure fulfills the requirements for valid service pursuant to section 1.147 of the Rules of Practice and Procedure (7 C.F.R. § 1.147). By communication dated January 14, 1999, the Hearing Clerk advised the Respondent that an Answer to the Complaint had not been received within the allotted time. On January 22, 1999, the Complainant filed a Motion for Decision, together with a Proposed Decision, premised upon Respondent's failure to file an Answer within the time allotted.

By objections filed February 19, 1999, the Respondent, through counsel, objected to the Complainant's Motion for Decision. Among other things, the Respondent's objections included certain denials of the allegations of the Complaint, and the assertion that Respondent's failure to file an Answer to the Complaint was due to lack of notice of the proceedings. It was further stated: "Respondent is without sufficient means to adequately participate in further hearing and, therefore, waives oral hearing and requests that this case be decided based upon the pleadings." The case was assigned to this Judge on February 23, 1999. On February 25, 1999, I issued a document entitled "Complainant to File Additional information." On March 5, 1999, the Complainant filed: "Complainant's Response to Respondent's Objection to Motion for Decision."

The "P.O. Box 250" address used was the same address used by United States District Court for the Middle District of Georgia on April 27, 1998 to serve a copy of the judgment against Respondent entered April 14, 1998, for making false statements regarding Federal Crop Insurance on August 12, 1994. Respondent's residence is listed on the judgment as the same address. No response by Respondent was ever received from the remailing, by regular mail, of the Complaint.

The Respondent has requested that this case be decided based upon the pleadings. I have done so. After consideration of all of the pleadings and the record as a whole, I find:

(1) That Respondent was properly served with the Complaint in accordance with the Rules of Practice;

(2) That no response was received from the Respondent within the period specified under the Rules for the filing of an Answer;

(3) Under the Rules of Practice, the failure to timely file an Answer is deemed an admission of the allegations of the Complaint;

(4) John L. Shaw hereinafter referred to as Respondent, has an address of P.O. Box 250, Burnett Road, Byron, Georgia 31008;

(5) Respondent was a participant in the Federal Crop Insurance Program under the Act and the regulations;

(6) Respondent concealed part of his 1994 wheat production and collected an indemnity payment for a reported loss of production on this concealed portion while participating in the federally sponsored Multiple Peril Crop Insurance (MPCI) Program;

(7) Respondent filed false claims with Crop Hail Management, a company reinsured by FCIC to receive an indemnity payment of $68,385.00;

(8) On August 12, 1994, Respondent pled guilty in the United States District Court for the Middle District of Geogia, to one count of false statements regarding crop insurance;

(9) On April 14, 1998, Respondent was ordered to make restitution to FCIC in the amount of $26,203.36, committed to the custody of the United States Bureau of Prison for Imprisonment for a term of six months and upon release of imprisonment a five-year term of supervised probation; and

(10) On August 8, 1998, Respondent reimbursed the Risk Management Agency $26,203.36 for indemnity overpayments.

Conclusions

Respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop insurance Corporation or to the insurer with respect to an insurance plan or policy under the Act [7 U.S.C. § 1506(n)]. Pursuant to section 506 of the Act (7 U.S.C. § 1506) and subpart R of the Regulations (7 C.F.R. § 400.454), the violations detailed above are grounds for disqualification of the Respondent from purchasing catastrophic risk protection and any other benefit under the Act, for a specified period.

Even if the allegations of the Complaint were not deemed admitted (which they are), the attachments submitted by Complainant in its Response filed March 5, 1999, show that Respondent willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act.

The Complainant has filed an Amendment to the Complaint changing the date in Paragraph II(c) from August 12, 1984 to August 12, 1994.

Order

Pursuant to section 506 of the Act (7 U.S.C. § 1506), Respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year and from receiving any other benefit under the Act for a period of five years. The period of disqualification shall be effective thirty-five (35) days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145 of the Rules of Practice.

If the period of disqualification would commence after the beginning of the crop year, and the Respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 28, 1999.-Editor]

FEDERAL MEAT INSPECTION ACT and POULTRY PRODUCTS INSPECTION ACT

In re: PALERMO SAUSAGE CO., and WILLIAM DEFELICE.
FMIA Docket No. 98-0006.
PPIA Docket No. 98-0004.
Decision and Order filed January 6, 1999.

Rick Herndon, for Complainant.
Respondents, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the denial and withholding of inspection services under Title I the FMIA (21 U.S.C. §§ 601 *et seq.*) and the PPIA (21 U.S.C. §§ 451 *et seq.*), in accordance with the rules of practice governing proceedings under the FMIA (9 C.F.R. § 335.1), the PPIA (9 C.F.R. § 381.230) and section 1.136 of the Uniform Rules of Practice (7 C.F.R. § 1.136).

This proceeding was instituted under the FMIA and the PPIA, by a complaint filed on August 13, 1998, by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. The respondents failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Palermo Sausage Company is an unincorporated business with a mailing address of 837 Franklin Avenue, New Castle, Pennsylvania 16101

2. Respondent William DeFelice is an individual with a mailing address of 2009 Wilson Avenue, New Castle, Pennsylvania 16101.

3. On or about November 12, 1996, William DeFelice and Carolyn A. DeFelice, d/b/a Palermo Sausage Company, submitted an application for grant of meat inspection services under Title I of the FMIA and poultry products inspection

services under the PPIA for Palermo Sausage Company located at 3005 Ellwood-New Castle Road, New Castle, Pennsylvania 16101.

4. The respondents' application for inspection services stated that William DeFelice was president and Carolyn A. DeFelice was vice-president of Palermo Sausage Company. Palermo Sausage Company is not incorporated in any state.

5. On or about December 11, 1995, respondent William DeFelice pleaded guilty to six felony counts in the Court of Common Pleas of Lawrence County, State of Pennsylvania. The felony counts included one count of theft by unlawful taking or disposition, one count of criminal conspiracy to commit theft by unlawful taking or disposition, one count of receiving stolen property, one count of criminal conspiracy to commit receiving stolen property and two counts of corrupt organizations.

6. The respondent William DeFelice is and will remain responsibly connected with Palermo Sausage Company.

7. By reason of the aforestated facts, respondents William DeFelice and Palermo Sausage Company are unfit to engage in any business requiring inspection services under Title I of the FMIA and under the PPIA, within the meaning of Section 401 of the FMIA (21 U.S.C. § 671) and the PPIA (21 U.S.C. § 467).

WHEREFORE, it is hereby ordered, that inspection services are denied and withheld indefinitely under Title I of the FMIA and under the PPIA from the respondents William DeFelice and Palermo Sausage Company, and any affiliates, successors or assigns, as authorized by the FMIA and the PPIA.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final on March 9, 1999.-Editor]

PLANT QUARANTINE ACT

In re: VERONICA HYACINTH.
P.Q. Docket No. 97-0023.
Decision and Order filed December 18, 1998.

Jeffrey Kirmsse, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on September 12, 1997, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Veronica Hyacinth is an individual whose mailing address is 1834 Andrews Avenue, The Bronx, New York, 10453.

2. On or about January 13, 1995 at Jamaica, New York, respondent imported juneplums into the United States from Jamaica, in violation of Section 7 C.F.R. § 319.56-2 because importation of juneplums without a permit is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 97-0023.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 17, 1999.-Editor]

In re: SIAGALIMA VAIMAONA.
P.Q. Docket No. 98-0005.
Decision and Order filed December 18, 1998.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a

violation of the regulations governing Hawaiian fruits and vegetables (7 C.F.R. §§ 318.13 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 14, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about October 10, 1996, the respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 9.6 pounds of fresh breadfruit from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Siagalima Vaimaona, respondent herein, is an individual whose mailing address is 94-1291 Huakai St., Waipahu, HI 96797.

2. On or about October 10, 1996, the respondent offered for shipment to a common carrier, namely, the United States Postal Service, approximately 9.6 pounds of fresh breadfruit from Hawaii into the continental United States in violation of Sections 318.13(b) and 318.13-2(a)(1) of the regulations (7 C.F.R. §§ 318.13(b), 318.13-2(a)(1)) because such plant parts are prohibited movement from Hawaii into the continental United States.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. §§ 318.13(b) and 318.13-2(a)(1). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy-five dollars ($ 375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0005.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final January 28, 1999.-Editor]

In re: SHELDON O. HIGGINS.
P.Q. Docket No. 98-0006.
Decision and Order filed December 18, 1998.

Susan Golabek, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. §§ 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 14, 1997, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 12, 1996, the respondent imported approximately four cashew fruits and two mangoes

from the island of Jamaica into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56-2(e), because the cashew fruits and mangoes were not accompanied by a permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Sheldon O. Higgins, respondent herein, is an individual whose mailing address is 53 Acton St., Hartford, CT 06120.

2. On or about August 12, 1996, the respondent imported approximately four cashew fruits and two mangoes from the island of Jamaica into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56-2(e), because the cashew fruits and mangoes were not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0006.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final March 5, 1999.-Editor]

In re: HECTOR HILDAGO, d/b/a H&L TRAVEL INTERNATIONAL.
P.Q. Docket No. 98-0014.
Decision and Order filed December 18, 1998.

Sheila Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of plants and animal products into the United States (7 C.F.R. § 319 *et seq.* and 9 C.F.R. § 94 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on May 12, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately three apples from Ecuador in violation of 7 C.F.R. § 319.56-2(e) because the apples were not accompanied by a permit and were not treated, as required. The complaint also alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States, approximately 10 pounds of fresh beef from Ecuador in violation of 9 C.F.R. § 94.1 because the importation of fresh beef from Ecuador is prohibited. Finally, the complaint alleged that on or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately eight Optunia sp fruit, one papaya, and three giant grenadillas, from Ecuador, in violation of 7 C.F.R. § 319.56-2(e) because the fruit was not accompanied by a permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Hector Hildago is the owner and operator of H&L Travel International which is located at 287-B Monroe Street, Passaic, NJ 07055.

2. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately three apples from Ecuador in violation of 7 C.F.R. § 319.56-2(e) because the apples were not accompanied by a permit and were not treated, as required.

3. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States, approximately 10 pounds of fresh beef from Ecuador in violation of 9 C.F.R. § 94.1 because the importation of fresh beef from Ecuador is prohibited.

4. On or about May 20, 1996, at JFK International Airport, Jamaica, New York, respondent imported into the United States approximately eight Optunia sp fruit, one papaya, and three giant grenadillas, from Ecuador, in violation of 7 C.F.R. § 319.56-2(e) because the fruit was not accompanied by a permit, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56-2(e) and 9 C.F.R. § 94.1. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two thousand dollars ($2,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days

from the effective date of this Order to :

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403.

Respondents shall indicate that payment is in reference to P.Q. Docket No. 98-14.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final January 30, 1999.-Editor]

In re: HEMLATA KATBAMNA.
P.Q. Docket No. 98-0015.
Decision and Order filed December 18, 1998.

Sheila Novak, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of plants into the United States (7 C.F.R. § 319 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*, and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on July 13, 1998, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about February 1, 1998, at Chicago, IL, respondent imported into the United States approximately two fresh yams from India in violation of 7 C.F.R. § 319.56-2(e) because the yams were not accompanied by a permit and were not treated, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a)

shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Hemlata Katbamna is an individual with a mailing address of 4320 Kennedy Drive, # 203, Racine, WI 53404.

2. On or about February 1, 1998, at Chicago, IL, respondent imported into the United States approximately two fresh yams from India in violation of 7 C.F.R. § 319.56-2(e) because the yams were not accompanied by a permit and were not treated, as required.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 9 C.F.R. §§ 71.18 (a)(1)(i), 78.8, and 78.9 (b)(3)(ii). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to :

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403.

Respondents shall indicate that payment is in reference to P.Q. Docket No. 98-15.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer

pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final February 1, 1999.-Editor]

In re: DARLINE SANON.
P.Q. Docket No. 98-0019.
Decision and Order filed April 1, 1999.

James A. Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruit from Haiti into the United States (7 C.F.R. § 319.56 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed on September 28, 1998, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about December 1, 1997, the respondent imported fresh mangoes into the United States from Haiti, at Miami, Florida, in violation of 7 C.F.R. §§ 319.56(c), 319.56(e) and 319.56-3, because the mangoes were not imported under permit, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Darline Sanon, the respondent, is an individual whose mailing address is 3506 14th Street, West, Apartment 242, Bradenton, Florida 34205.

2. On or about December 1, 1997, the respondent imported fresh mangoes into the United States from Haiti, at Miami, Florida, in violation of 7 C.F.R. §§ 319.56(c), 319.56(e) and 319.56-3, because the mangoes were not imported under permit, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 318.13 *et seq.*). Therefore, the following Order is issued.

Order

Respondent Darline Sanon is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 98-0019.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final June 11, 1999.-Editor]

In re: TUNG T. NGUYEN.
P.Q. Docket No. 98-0018.
Decision and Order filed April 20, 1999.

Howard Levine, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) and the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) (Acts), and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed against Tung T. Nguyen, respondent, on September 22, 1998, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent has not filed an answer to date. Pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the complaint constitutes, for the purposes of this proceeding, an admission of said allegations. By respondent's failure to answer, respondent has admitted the allegations of the complaint.

Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Tung T. Nguyen, hereinafter referred to as the respondent, is an individual with a mailing address of 138 Southland Boulevard, #4, Louisville, Kentucky 40214.

2. On or about April 14, 1997, the respondent violated 7 C.F.R. § 319.56(c) by importing two (2) kilograms of fresh longan fruits from Vietnam into the United States.

3. On or about April 14, 1997, the respondent violated 9 C.F.R. § 94.9(b) by importing one (1) kilogram of pork sausage from Vietnam into the United States without the required certificate.

4. On or about April 14, 1997, the respondent violated 9 C.F.R. § 94.12(b) by importing one (1) kilogram of pork sausage from Vietnam into the United States without the required certificate.

Conclusion

By reason of the facts contained in paragraphs one through four above, Tung T. Nguyen, respondent, has violated 7 C.F.R. § 319.56(c), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).

Therefore, the following order is issued.

Order

Tung T. Nguyen is hereby assessed a civil penalty of three thousand dollars ($3000). This penalty shall be payable to "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty days from the effective date of this order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 29, 1999.-Editorl

In re: MARIA MERAZ.
P.Q. Docket No. 98-0007.
Decision and Order filed May 6, 1999.

Rick Herndon, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.),* hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, on November 14, 1997. The respondent failed to file an answer within the time provided under 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that a failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Maria Meraz, herein referred to as the respondent, is an individual whose mailing address is 7243 Kelvin Avenue, #220, Canoga Park, California 91306.

2. On or about May 14, 1996, at Los Angeles, California, respondent imported fifty fresh mangoes from El Salvador into the United States in violation of 7 C.F.R. § 319.56, because the importation of mangoes from El Salvador is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.).*

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 98-0007.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final June 17, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

ANIMAL QUARANTINE and RELATED LAWS

Craig Kohl, d/b/a Red Cedar Preserve. A.Q. Docket No. 98-0005. 2/22/99.

Consent Decision as to Dan Koster. A.Q. Docket No. 99-0003. 3/25/99.

Gordon Appenzeller, d/b/a Hill Top Farms, Hill Top Dairy, Martin Farms, and C&C Farms. A.Q. Docket No. 97-0009. 5/26/99.

Consent Decision as to Riverside Colony, d/b/a Riverside Hog Farm. A.Q. Docket No. 99-0003. 6/23/99.

ANIMAL WELFARE ACT

Mary Moore, d/b/a D&M Kennel. AWA Docket No. 98-0023. 2/5/99.

L. D. Terry, d/b/a A&B Hatchery. AWA Docket No. 99-0006. 2/10/99.

Billy R. Holman. AWA Docket No. 98-0011. 2/17/99.

Jeanette and Swen Bergman, d/b/a Mountain Top Kennel. AWA Docket No. 98-0010. 2/17/99.

Galen and Audrey Rottinghaus. AWA Docket No. 98-0008. 5/5/99.

Sandra K. Pearson. AWA Docket No. 99-0004. 6/3/99.

FEDERAL MEAT INSPECTION ACT

Natural Beef Jerky, Inc., George R. Gieder, and Paul D. Schrader. FMIA Docket No. 99-0004. 2/24/99.

Custom Meats Corporation. FMIA Docket No. 99-0007. 3/25/99.

Thomas Beaver and T&D Meats and Lockers, Inc. FMIA Docket No. 98-0003. 4/9/99.

Brestensky's Meat Market, Inc. and Stephen T. Brestensky. FMIA Docket No. 98-0002. 6/30/99.

HORSE PROTECTION ACT

David Brown, doing business as Brownswood, Inc. HPA Docket No. 98-0010. 3/26/99.

Paul Kilburn and Marla Hatmaker. HPA Docket No. 99-0016. 5/5/99.

Donald E. Parmer, an individual, Deborah L. Parmer, an individual, Robert Nelson Hugh, an individual, and Hugh Stables, an unincorporated association. HPA Docket No. 99-0023. 5/24/99.

June B. Collins. HPA Docket No. 99-0006. 6/15/99.

INSPECTION AND GRADING

Esperanto Exports, Inc. I&G Docket No. 99-0002. 6/11/99.

PLANT QUARANTINE ACT

Whole Foods Market, Inc. P.Q. Docket No. 99-0006. 4/30/99.

La Popular. P.Q. Docket No. 99-0016. 5/7/99.

Video Garcia. P.Q. Docket No. 99-0022. 5/14/99.

Ortiz Mex-Produce, Inc. P.Q. Docket No. 99-0011. 5/20/99.

El Mercadito. P.Q. Docket No. 99-0034. 5/20/99.

Consent Decision as to Reyna's Super Market. P.Q. Docket No. 99-0032. 5/21/99.

Martinez Grocery. P.Q. Docket No. 99-0014. 5/26/99.

Emilio's Supermarcado Y Carn. P.Q. Docket No. 99-0031. 5/28/99.

Consent Decision as to Sonora Produce. P.Q. Docket No. 99-0040. 5/28/99.

Super Exito Video. P.Q. Docket No. 99-0017. 6/1/99.

Consent Decision as to La Principal. P.Q. Docket No. 99-0040. 6/3/99.

Los Americas #2. P.Q. Docket No. 99-0019. 6/16/99.

La Favorita. P.Q. Docket No. 99-0033. 6/24/99.

Sichanh Khamphavog, d/b/a Sichanh Asian Market. P.Q. Docket No. 99-0042. 6/24/99.

Consent Decision as to Bao La, d/b/a Hong Kong Food & Gift Company. P.Q. Docket No. 99-0046. 6/29/99.

POULTRY PRODUCTS INSPECTION ACT

Custom Meats Corporation. PPIA Docket No. 99-0005. 3/25/99.

Thomas Beaver and T&D Meats and Lockers, Inc. PPIA Docket No. 98-0001. 4/9/99.

VETERINARY ACCREDITATION

Randy J. Burgess, d/b/a Ouachita Equine Clinic. V.A. Docket No. 98-0001. 5/14/99.