

# AGRICULTURE DECISIONS

**Volume 62**

January - June 2003  
Part One (General)  
Pages 1 - 195



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 adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. 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 number, e.g., AWA Docket No. 99-0022, 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 consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Beginning in Volume 60, each part of AGRICULTURE DECISIONS has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

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Errata  
Corrections to  
61 Agric. Dec. 275, 278

278

ANIMAL WELFARE ACT

The record establishes that the Hearing Clerk served Respondent with the Decision and Order as to Samuel K. Angel on February 1, 2002.<sup>5</sup> Section 1.145(a) of the Rules of Practice provides the time for appealing an administrative law judge's decision, 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).

Therefore, Respondent's appeal petition was required to be filed with the Hearing Clerk no later than March 4, 2002.<sup>6</sup> On March 11, 2002, Respondent filed an appeal petition with the Hearing Clerk.

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.<sup>7</sup> The ALJ's Decision and

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<sup>5</sup>See note 4.

<sup>6</sup>Thirty days after February 1, 2002, was March 3, 2002. However, March 3, 2002, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended [sic] to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, March 3, 2002, was Monday March 4, 2002. Therefore, Respondent was required to file his appeal petition no later than March 4, 2002.

<sup>7</sup>See *In re Paul Eugenio*, 60 Agric. Dec. 676 (001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal

(continued...)

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**LIST OF DECISIONS REPORTED**

**AGRICULTURAL MARKETING AGREEMENT ACT**

**COURT DECISION**

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND  
MILKY WAY FARMS v. WILLIAM J. LYONS, JR.,  
SECRETARY, CALIFORNIA DEPARTMENT OF  
FOOD AND AGRICULTURE, et al.  
AND  
PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW  
DAIRIES, INC., AND D. KUIPER DAIRY v. WILLIAM J.  
LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT  
OF FOOD AND AGRICULTURE, et al.  
Nos. 01-950, 01-1018. . . . . 1

**DEPARTMENTAL DECISIONS**

In re: FOSTER ENTERPRISES, A CALIFORNIA GENERAL  
PARTNERSHIP, AND EGGS WEST, A CALIFORNIA  
CORPORATION.  
2002 AMA Docket No. F&V 1250-1.  
Decision and Order . . . . . 8

**ANIMAL WELFARE ACT**

**COURT DECISION**

DORIS DAY ANIMAL LEAGUE, et al. v. USDA.  
No. 01-5351. . . . . 19

**BEEF PROMOTION AND RESEARCH ACT**

**DEPARTMENTAL DECISION**

In re: HERMAN CAMARA, d/b/a CAMARA’S NEW  
ENGLAND COMMISSION AUCTION, INC., AND  
ALSO d/b/a CAMARA’S AUCTION SALES.  
BPRA Docket No. 02-0002.  
Decision and Order . . . . . 26

**EQUAL ACCESS TO JUSTICE ACT**

**COURT DECISION**

CHARLES DAVIDSON v. USDA.  
No. 01-60573. . . . . 49

**FEDERAL CROP INSURANCE ACT**

**DEPARTMENTAL DECISION**

In re: CHARLES H. MCCLATCHEY, JR.  
FCIA Docket No. 02-0004.  
Decision and Order by Reason of Summary Judgement. . . . . 58

**FOOD STAMP PROGRAM**

**COURT DECISIONS**

MOHAMED MOHAMED THABIT AND AMIRAH  
ATTAYED THABIT v. USDA.  
No. C-02-2329 SC. . . . . 60

DAIFAH KASSEM, PRESIDENT AND SENECA STREET  
MINI MART v. USDA.  
No. 02-CV-0546E(F). . . . . 67

**HORSE PROTECTION ACT**

**COURT DECISION**

DERWOOD STEWART, RHONDA STEWART,  
d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM,  
STEWART'S FARM & NURSERY, THE DERWOOD  
STEWART FAMILY, AND STEWART'S NURSERY FARM  
STABLES v. USDA.  
No. 01-4204. . . . . 76

WILLIAM J. REINHART v. USDA.  
No. 02-1261. . . . . 80

**DEPARTMENTAL DECISIONS**

In re: WILLIAM J. REINHART AND REINHART STABLES.  
HPA Docket No. 99-0013.  
Ruling Denying Complainant's Motion to Lift Stay Order and  
Respondent's Motion to Amend Case Caption. . . . . 81

In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND  
SILVERSTONE TRAINING, L.L.C.  
HPA Docket No. 02-0002.  
Decision and Order as to Phillip Trimble . . . . . 83

In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND  
SILVERSTONE TRAINING, L.L.C.  
HPA Docket No. 02-0002.  
Stay Order as to Phillip Trimble . . . . . 103

**INSPECTION AND GRADING ACT**

**COURT DECISION**

AMERICAN RAISIN PACKERS, INC. v USDA.  
No. 02-15602. . . . . 105

**PLANT VARIETY PROTECTION ACT**

**DEPARTMENTAL DECISIONS**

In re: J.R. SIMPLOT COMPANY.  
PVPA Docket No. 02-0001.  
Decision and Order . . . . . 107

In re: J.R. SIMPLOT COMPANY.  
PVPA Docket No. 02-0002.  
Decision and Order . . . . . 114

**MISCELLANEOUS ORDERS**

In re: CARUTHERS RAISIN PACKING CO.  
2002 AMA Docket No. F&V 989-3.  
Order Dismissing Petition . . . . . 148

In re: CARUTHERS RAISIN PACKING CO.  
2002 AMA Docket No. F&V 989-4.  
Order Closing Case . . . . . 148

In re: LION RAISINS, INC.  
2002 AMA Docket No. F&V 989-1.  
Remand Order . . . . . 149

In re: BOGHOSIAN RAISIN PACKING CO., INC.  
2002 AMA Docket No. F&V 989-6.  
Remand Order . . . . . 154

In re: LION RAISINS, INC.  
2002 AMA Docket No. F&V 989-5.  
Remand Order and Ruling Denying Request for Extension  
of Time . . . . . 159

In re: BOGHOSIAN RAISIN PACKING CO., INC.  
2002 AMA Docket No. F&V 989-6.  
Order Dismissing Petition . . . . . 165

In re: LION RAISINS, INC. 2002 AMA Docket No. F&V 989-1. Order Canceling Oral Hearing and Dismissing Petition .....	165
In re: LION RAISINS, INC. 2002 AMA Docket No. F&V 989-5. Order Dismissing Petition .....	166
In re: E&A PRODUCE, INC., EDUARDO and ANITA ANTONIO. AMAA Docket No. 02-0004. Dismissal Without Prejudice .....	166
In re: MICHAEL R. THOMAS. DNS-RD Docket No. 03-0001. Order of Dismissal .....	167
In re: SAM'S BAKERY. FMIA Docket No. 03-0001. Order Dismissing Complaint .....	167
In re: NICHOLAS W. EIGSTL. FSA Docket No. 03-0001. Dismissal Without Prejudice .....	167
In re: STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES. FSP Docket No. 02-0003. Order Canceling Hearing and Dismissing Case .....	168
In re: SAM'S BAKERY. FMIA Docket No. 03-0001. Order Dismissing Complaint .....	168

**DEFAULT DECISIONS**

**ANIMAL QUARANTINE AND RELATED ACTS**

In re: WILLIAM HARGROVE. A.Q. Docket No. 01-0012. Decision and Order .....	169
--	-----

In re: CHRISTINE L. SHAH.  
A.Q. Docket No. 01-0011  
Decision and Order. . . . . 172

**ANIMAL WELFARE ACT**

In re: BOB ZUBIC d/b/a PORTAGE PET CENTER.  
AWA Docket No. 02-0018.  
Decision and Order upon Admission of Facts by Reason of Default . . . . 174

In re: DEVA EXOTICS, INC., DEVA EXOTICS’INC., LLC.,  
MICHAEL V. DEMMER, JOANNE VASSALLO.  
AWA Docket. No. 02-0027.  
Decision and Order as to Respondent Exotics, Inc. by Reason of  
Admission of Facts . . . . . 176

In re: DEVA EXOTICS, INC., DEVA EXOTICS’INC., LLC.,  
MICHAEL V. DEMMER, JOANNE VASSALLO.  
AWA Docket No. 02-0027.  
Decision and Order as to Respondent Joanne Vassallo by Reason of  
Admission of Facts . . . . . 180

In re: JAMES R. ANDERSON, d/b/a WIZARD OF CL’OZ.  
AWA Docket No. 02-0017.  
Decision and Order . . . . . 185

**PLANT QUARANTINE ACT**

In re: MARIA MAURICIO LOPEZ.  
P.Q. Docket No. 02-0004.  
Decision and Order By Reason of Default . . . . . 189

**Consent Decisions** . . . . . 193

**AGRICULTURAL MARKETING AGREEMENT ACT**

**COURT DECISION**

**HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS v. WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.**

**AND**

**PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY v. WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.**

**Nos. 01-950, 01-1018.**

**Decided June 9, 2003.**

**(Cite as: 123 S. Ct. 2142).**

**AMMA – Privileges and immunities clause – Corporate citizens – Non-resident petitions. Commerce clause, negative assertion of.**

California's milk marketing program is similar to Federal Milk Market Orders in that both set up pricing structures for various classes of uses for milk sold in California. California's plan has more classes in its price structure than the Federal plan. The California processors pay a unit price for milk into a pool which includes the unit price paid to the producer plus a premium which is paid into an "equalization pool." Under certain market conditions, California processors can acquire milk from out-of-state producers under Federal Milk Marketing Orders at a lower unit price than paid to California milk producers under the California Milk marketing program as long as the processors did not also have to pay into the California "equalization pool." Under certain market conditions, non-resident individual and corporate milk-producers contend that the California milk marketing program violates the Commerce clause and the "privileges and immunities" clauses of the Constitution by imposing additional financial burdens on the milk sold by non-resident producers. The court determined that since the Federal milk marketing statute (7 U.S.C. § 7254) did not grant specific exemption to the California milk marketing program to control pricing, then the power to exempt California's milk purchases and sales from interstate commerce transactions would not be presumed as having Congressional intent. The case was remanded to the lower court for a determination consistent with the pricing structure of the Federal milk marketing order which would not violate the commerce clause and privileges and immunities clauses with respect to non-resident producers.

**Supreme Court of the United States**

Justice STEVENS delivered the opinion of the Court.

In most of the United States, not including California, the minimum price

paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders. Those orders guarantee a uniform price for the producers, but through pooling mechanisms require the processors of different classes of dairy products to pay different prices. Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

The California Legislature has adopted a similar program to regulate the minimum prices paid by California processors to California producers. In the cases before us today, out-of-state producers are challenging the constitutionality of a 1997 amendment to that program. They present us with two questions: (1) whether § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 110 Stat. 917, 7 U.S.C. § 7254, exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause; and (2) whether the individual petitioners' claim under the Privileges and Immunities Clause is foreclosed because those regulations do not discriminate on their face on the basis of state citizenship or state residence.

## I

Government regulation of the marketing of raw milk has been continuous since the Great Depression.<sup>1</sup> In California, three related statutes establish the regulatory structure for milk produced, processed, or sold in California. First, in 1935, the State enacted the Milk Stabilization and Marketing Act, Cal. Food & Agric. Code Ann. §§ 61801-62403 (West 2001), “to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk . . .” § 61802(h). Then, California created requirements for composition of milk products in the Milk and Milk Products Act of 1947. §§ 32501-39912. The standards created under this Act mandate minimum percentages of fat and solids-not-fat in dairy products and often require fortification of milk by adding solids-not-fat. In 1967, California passed another milk pricing act, the Gonsalves Milk Pooling Act, §§ 62700-62731, to address deficiencies in the existing pricing scheme. Together, these three Acts

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<sup>1</sup>The history and purpose of federal regulation of milk marketing is described in some detail in *Zuber v. Allen*, 396 U.S. 168, 172-187, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969).

(including numerous subsequent revisions) create the state milk marketing structure: The 1935 and 1967 Acts establish the milk pricing and pooling plans, while the 1947 Act governs the composition of milk products sold in California.

While it serves the same purposes as the federal marketing orders, California's regulatory program is more complex. Federal orders typically guarantee all producers the same minimum price and create only two or three classes of end uses to determine the processors' contributions to, or withdrawals from, the equalization pools, whereas under the California scheme some of the farmers' production commands a "quota price" and some receives a lower "overbase price," and the processors' end uses of the milk are divided into five different classes.

The complexities of the California scheme are not relevant to these cases; what is relevant is the fact California processors of fluid milk pay a premium price (part of which goes into a pool) that is higher than either of the prices paid to the producers.<sup>2</sup> During the early 1990's, market conditions made it profitable for some California processors to buy raw milk from out-of-state producers at prices that were higher than either the quota prices or the overbase prices guaranteed to California farmers yet lower than the premium prices they had to pay when making in-state purchases. The regulatory scheme was at least partially responsible for the advantage enjoyed by out-of-state producers because it did not require the processors to make any contribution to the equalization pool on such purchases. In other words, whereas an in-state purchase of raw milk resold as fluid milk required the processor both to pay a guaranteed minimum to the farmer and also to make a contribution to the pool, an out-of-state purchase at a higher price would often be cheaper because it required no pool contribution.

In 1997, the California Department of Food and Agriculture amended its plan to require that contributions to the pool be made on some out-of-state

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<sup>2</sup>Because processors of fluid milk typically manufacture some other products as well, their respective pool contributions reflect the relative amounts of those end uses. Each processor's mix of end uses produces an individual monthly "blend price" that is multiplied by its total purchases. Under federal orders the term "blend price" has a different meaning; it usually refers to the price that the producer receives. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 189, n. 1, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

purchases.<sup>3</sup> It is the imposition of that requirement that gave rise to this litigation. Petitioners in No. 01-950 operate dairy farms in Nevada; petitioners in No. 01-1018 operate such farms in Arizona. They contend that the 1997 amendment discriminates against them. In response, the California officials contend that it merely eliminated an unfair competitive advantage for out-of-state producers that was the product of the regulatory scheme itself.

Without reaching the merits of petitioners' constitutional claims, the District Court dismissed both cases and the Court of Appeals for the Ninth Circuit affirmed. 259 F.3d 1148 (2001). Relying on its earlier decision in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (C.A.9 1998), the court held that a federal statute enacted in 1996 had immunized California's milk pricing and pooling laws from Commerce Clause challenge. It also held that the corporate petitioners had no standing to raise a claim under the Privileges and Immunities Clause, and that the individuals' claim under that Clause failed because the 1997 plan amendments did not "on their face, create classifications based on any individual's residency or citizenship." 259 F.3d, at 1156. We granted certiorari to review those two holdings, 537 U.S. 1099, 123 S.Ct. 818, 154 L.Ed.2d 766 (2003), but in doing so we do not reach the merits of either constitutional claim.

## II

In some respects, the State's composition standards set forth in the 1947 Act exceed those set by the federal Food and Drug Administration (FDA). For example, California's minimum standard for reduced fat milk requires that it contain at least 10 percent solids-not-fat (which include protein, calcium, lactose and other nutrients). Cal. Food & Agric. Code Ann. § 38211 (West 2001). Federal standards require that reduced fat milk contain only 8.25 percent solids-not-fat. See 21 CFR §§ 131.110, 101.62 (2002). Some of California's standards were arguably pre-empted by Congress' enactment of the Nutrition Labeling and Education Act of 1990 (NLEA), 104 Stat. 2353, which contains a prohibition against the application of state quality standards to foods moving in interstate commerce. See 21 U.S.C. § 343-1(a). The District Court so held in *Shamrock Farms Co. v. Veneman*, No. Civ-S-95-318 (E.D.Cal.1996). In response to that decision, California sought an exemption from both the FDA and Congress. See *Shamrock Farms*, 146 F.3d, at 1180. Before the FDA acted,

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<sup>3</sup>After the 1997 amendment, processors whose blend price exceeds the quota price must make contributions to the pool on their out-of-state purchases as well as their in-state purchases.

Congress responded favorably with the enactment of the statute that governs our disposition of these cases. That statute, § 144 of the Federal Agriculture Improvement and Reform Act of 1996, provides:

“Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding--

“(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

“(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.”

7 U.S.C. § 7254.

[1] Thereafter, Shamrock Farms brought another suit against the Secretary of the California Department of Food and Agriculture challenging the validity of both the State's compositional standards and its milk pricing and pooling laws. In that case, the Court of Appeals held that § 144 had immunized California's marketing programs as well as the compositional standards from a negative Commerce Clause challenge. *Shamrock Farms*, 146 F.3d, at 1182. In adhering to that ruling in the cases before us today, the Ninth Circuit erred.

[2] The text of the federal statute plainly covers California laws regulating the composition and labeling of fluid milk products, but does not mention laws regulating pricing. Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), but we will not assume that it has done so unless such an intent is clearly expressed. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984). While § 144 unambiguously expresses such an intent with respect to California's compositional and labeling laws, that expression does not encompass the pricing and pooling laws. This conclusion is buttressed by the separate California statutes addressing the composition and labeling of milk products, on the one hand, and the pricing and pooling of milk on the other. See *supra*, at 2145-2146. The mere fact that the composition and labeling laws relate to the sale of fluid milk is by no means sufficient to bring them within the scope of § 144. Because § 144 does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge, the Court of Appeals erred in relying on § 144 to dismiss the challenge.

## III

[3] Article IV, § 2, of the Constitution provides:

“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

Petitioners, who include both individual dairy farmers and corporate dairies, have alleged that California's milk pricing laws violate that provision. The Court of Appeals held that the corporate petitioners have no standing to advance such a claim, and it rejected the individual petitioners' claims because the California laws “do not, on their face, create classifications based on any individual's residency or citizenship.” 259 F.3d, at 1156. Petitioners do not challenge the first holding, but they contend that the second is inconsistent with our decision in *Chalker v. Birmingham & Northwestern R. Co.*, 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919). We agree.

In *Chalker*, we held that a Tennessee tax imposed on a citizen and resident of Alabama for engaging in the business of constructing a railroad in Tennessee violated the Privileges and Immunities Clause. The tax did not on its face draw any distinction based on citizenship or residence. It did, however, impose a higher rate on persons who had their principal offices out of State. Taking judicial notice of the fact that “the chief office of an individual is commonly in the State of which he is a citizen,” we concluded that the practical effect of the provision was discriminatory. *Id.*, at 527, 39 S.Ct. 366. Whether *Chalker* should be interpreted as merely applying the Clause to classifications that are but proxies for differential treatment against out-of- state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of the case. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim. In so holding, however, we express no opinion on the merits of petitioners' Privileges and Immunities Clause claim.

The judgment of the Court of Appeals is vacated, and these cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

\* \* \*

Justice THOMAS, concurring in part and dissenting in part.

I join Parts I and III of the Court's opinion and respectfully dissent from Part II, which holds that § 144 of the Federal Agriculture Improvement and Reform Act of 1996, 7 U.S.C. § 7254, “does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge.” *Ante*, at 2147. Although I agree that the Court of Appeals erred in its statutory analysis, I nevertheless would affirm its judgment on this claim because “[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application,” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute.

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**AGRICULTURAL MARKETING AGREEMENT ACT****DEPARTMENTAL DECISION**

**In re: FOSTER ENTERPRISES, A CALIFORNIA GENERAL PARTNERSHIP, AND EGGS WEST, A CALIFORNIA CORPORATION. 2002 AMA Docket No. F&V 1250-1.**

**Decision and Order.**

**Filed April 8, 2003.**

**AMAA – Eggs – Egg promotion – Petition to modify or exempt – Standing to file petition – Investigatory authority, as to any person.**

The Judicial Officer (JO) affirmed Chief Administrative Law Judge James W. Hunt's Order Dismissing Petition. Neither Respondent nor Petitioners asserted Petitioners were persons subject to the Egg Research and Promotion Order (7 C.F.R. §§ 1250.301-363) (Egg Order). Petitioners, therefore, lacked standing to file a petition for modification of, or to be exempted from, the Egg Order under 7 U.S.C. § 2713(a). The JO rejected Petitioners' argument that the Secretary of Agriculture's requests for Petitioners' documents pertaining to transactions during a period prior to Petitioners' filing the Petition made Petitioners persons subject to the Egg Order with standing to file a petition in accordance with 7 U.S.C. § 2713(a). The JO also rejected Petitioners' argument that *Midway Farms v. United States Dep't of Agric.*, 188 F.3d 1136 (9th Cir. 1999), was apposite.

Colleen A. Carroll, for Respondent.

Brian C. Leighton, for Petitioners.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

Foster Enterprises, a California general partnership, and Eggs West, a California corporation [hereinafter Petitioners], instituted this proceeding by filing a Petition<sup>1</sup> on September 27, 2002. Petitioners instituted the proceeding under the Egg Research and Consumer Information Act, as amended (7 U.S.C. §§ 2701-2718) [hereinafter the Egg Research and Consumer Information Act]; the Egg Research and Promotion Order (7 C.F.R. §§ 1250.301-.363)

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<sup>1</sup>Petitioners entitle their Petition "Petition Pursuant to 7 U.S.C. § 2713 Contending That the Egg Research and Consumer Information Legislation, 7 U.S.C. § 2701 *et seq.*, and the Egg Research and Promotion Order of 7 C.F.R. Part 1250, and the Assessments Imposed for the Same Violate Petitioners' Rights Guaranteed Under the First Amendment of the United States Constitution, and Seeking a Modification of the Order and an Exemption From the Order From Having to Pay Assessments or Supply Records to the American Egg Board or USDA Which Are Used for the Collection of Assessments (7 U.S.C. § 2713; 7 C.F.R. Part 1250; 7 C.F.R. § 1209.402 *et seq.*)" [hereinafter Petition].

[hereinafter the Egg Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 1200.50-.52) [hereinafter the Rules of Practice].<sup>2</sup>

Petitioners contend the Egg Research and Consumer Information Act, the Egg Order, the assessments imposed under the Egg Research and Consumer Information Act and the Egg Order, and the collection of records violate Petitioners' rights to freedom of speech and freedom of association guaranteed under the First Amendment to the Constitution of the United States. Petitioners seek an exemption from, or modification of, the Egg Research and Consumer Information Act and the Egg Order. (Pet. ¶ 14.)

On November 25, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Motion to Dismiss Petition Contending that the Egg Research and Consumer Information Act and Egg Research and Promotion Order are Unconstitutional" [hereinafter Motion to Dismiss] and "Memorandum of Points and Authorities." On December 18, 2002, Petitioners filed "Petitioners' Opposition to Respondent's Motion to Dismiss Petition; Petitioners' Cross-Motion for Summary Judgment" [hereinafter Response to Motion to Dismiss].

On February 4, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] dismissed the Petition on the ground that Petitioners do not have standing to file the Petition (Order Dismissing Petition at 2).

On February 26, 2003, Petitioners appealed to the Judicial Officer. On March 24, 2003, Respondent filed "Respondent's Response to Petitioners' Appeal of the ALJ's 'Order Dismissing Petition'" and "Memorandum of Points and Authorities." On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ's Order Dismissing Petition as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion as restated.

#### **APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

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<sup>2</sup>Section 1200.52(d) of the Rules of Practice (7 C.F.R. § 1200.52(d)) provides 7 C.F.R. §§ 900.52(c)(2)-.71 also govern proceedings on petitions to modify or to be exempted from research, promotion, and education programs. Therefore, where appropriate, references to the "Rules of Practice" in this Decision and Order include 7 C.F.R. §§ 900.52(c)(2)-.71.

U.S. Const.

### **Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

.....

#### **CHAPTER 60—EGG RESEARCH AND CONSUMER INFORMATION**

.....

##### **§ 2702. Definitions**

As used in this chapter—

.....

(b) The term “person” means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

.....

(t) The term “handler” means any person, specified in the order or the rules and regulations issued thereunder, who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets such eggs, including eggs of his own production.

##### **§ 2713. Administrative review of orders; petition; hearing; judicial review**

(a) Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provisions of such order or any obligations 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. After such hearing, the Secretary shall make a ruling upon

the prayer of such petition which shall be final, if in accordance with law.

**§ 2717. Investigations by Secretary; oaths and affirmations; subpoenas; judicial enforcement; contempt proceedings; service of process**

The Secretary may make such investigations as he deems necessary for the effective carrying out of his responsibilities under this chapter or to determine whether an egg producer, processor, or other seller of commercial eggs or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of this chapter, or of any order, or rule or regulation issued under this chapter. For the purpose of such investigation, the Secretary is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, including an egg producer, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

7 U.S.C. §§ 2702(b), (t), 2713(a), 2717.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT  
OF AGRICULTURE**

.....  
**CHAPTER XI—AGRICULTURAL MARKETING SERVICE  
(MARKETING AGREEMENTS AND ORDERS;  
MISCELLANEOUS COMMODITIES),  
DEPARTMENT OF AGRICULTURE**

.....  
**PART 1250—EGG RESEARCH AND PROMOTION**

**Subpart—Egg Research and Promotion Order**

DEFINITIONS

.....  
**§ 1250.304 Egg Board or Board.**

*Egg Board or Board* or other designatory term adopted by such Board, with the approval of the Secretary, means the administrative body established pursuant to § 1250.326.

.....  
**§ 1250.307 Person.**

*Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity.

.....  
**§ 1250.309 Handler.**

*Handler* means any person who receives or otherwise acquires eggs from an egg producer, and processes, prepares for marketing, or markets, such eggs, including eggs of his own production.

7 C.F.R. §§ 1250.304, .307, .309.

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
ORDER DISMISSING PETITION  
(AS RESTATED)**

Petitioners allege:

.....  
4. From approximately 1988 to December 1995, Petitioner Eggs West was a handler of eggs and thus arguably subject to the Egg Research and Consumer Information Act (hereinafter the “Act”) and

arguably subject to the Egg Research and Promotion Order (hereinafter the "Order"). Since December of 1995 Eggs West has not been a handler of eggs. Eggs West submits this petition, on behalf of its self, because apparently USDA believes that Eggs West should be subject to the Order and the Act for activities that occurred prior to December 1995 or thereafter and thus Eggs West submits this petition in order to determine the constitutionality of the Act and the Order.

5. Petitioner Foster Enterprises from December of 1995 until the first part of 2002 was a handler of eggs and arguably subject to the Act and the Order. . . .

6. . . . It is believed that USDA will assert that Foster Enterprises was a handler from 1995 until at least early 2002 and subject to the Act and the Order, and subject to assessments. Foster Enterprises contests the constitutionality of the Act and the Order or the levying of assessments, interest or penalties applicable to Foster Enterprises.

Pet. ¶¶ 4-6.

Respondent filed a Motion to Dismiss on the ground, *inter alia*, that Petitioners lack standing to file the Petition because they do not state they are persons subject to the Egg Order.

Section 14(a) of the Egg Research and Consumer Information Act provides that any person subject to any order may file a petition with the Secretary of Agriculture, as follows:

**§ 2713. Administrative review of orders; petition; hearing; judicial review**

(a) Any person subject to any order may file a written petition with the Secretary, stating that any such order or any provisions of such order or any obligations imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 2713(a).

Petitioners argue Respondent considered them to be subject to the Egg Research and Consumer Information Act and Egg Order by sending them letters and a subpoena duces tecum (Response to Motion to Dismiss at 3-4). One letter from the Agricultural Marketing Service cautions Petitioners not to destroy,

tamper with, or remove any records relating to an audit being conducted by the Agricultural Marketing Service.<sup>3</sup> The second letter from the Agricultural Marketing Service states that it had requested a review of the “egg handling records of Eggs West, Inc. and/or Foster Enterprises between August, 1993 and April, 2001, or during this period of time when Eggs West, Inc. or Foster Enterprises was engaged in handling eggs.”<sup>4</sup> A third letter refers to records from 1995 to 2000.<sup>5</sup> The subpoena duces tecum orders Petitioners to produce for inspection and copying documents pertaining to the period January 1, 1995, to December 31, 1999.<sup>6</sup>

Petitioners cite *Midway Farms v. United States Dep’t of Agriculture*, 188 F.3d 1136 (9th Cir. 1999), in support of their Petition. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit held, even though a person does not admit it is a handler, that person has standing to file a petition requesting the modification of, or to be exempted from, a marketing order, when a person with authority to apply the marketing order seeks to apply the marketing order to the petitioner.

However, *Midway Farms* is inapposite. Respondent in this proceeding does not allege Petitioners are handlers or persons subject to the Egg Order. The letters and subpoena duces tecum filed by Petitioners establish that the Agricultural Marketing Service is reviewing records for a period of time prior to Petitioners’ filing the Petition. Further, Petitioners do not assert that they are persons subject to the Egg Order. Therefore, Petitioners lack standing to file the Petition.

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<sup>3</sup>See undated letter from G. Neil Blevins, Chief Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners’ Response to Motion to Dismiss.

<sup>4</sup>See letter dated July 10, 2002, from Maria Martinez-Esquerro, Compliance Officer, Agricultural Marketing Service, Marketing and Regulatory Programs, United States Department of Agriculture, to Dorothy Chu, Foster Enterprises and Eggs West, Inc. attached to Petitioners’ Response to Motion to Dismiss.

<sup>5</sup>See letter dated September 24, 2002, from Kenneth H. Vail, Assistant General Counsel, Marketing Division, Office of the General Counsel, United States Department of Agriculture, to Jeff Foster, Chief Financial Officer, Foster Enterprises, attached to Petitioners’ Response to Motion to Dismiss.

<sup>6</sup>See subpoena duces tecum dated September 25, 2002, issued by A. J. Yates, Administrator, Agricultural Marketing Service, United States Department of Agriculture, to Petitioners and attachment A to the subpoena duces tecum, attached to Petitioners’ Response to Motion to Dismiss.

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioners raise one issue in “Petitioners’ Appeal of the ALJ’s ‘Order Dismissing Petition’” [hereinafter Appeal Petition]. Petitioners contend the Chief ALJ erred “when he claimed that since Petitioners do not allege or admit that they are handlers subject to the order, they have no standing to bring a petition pursuant to Title 7 U.S.C. § 608c(15)(A)” (Appeal Pet. at 1).

As an initial matter, the Chief ALJ did not conclude Petitioners lack standing to file a petition pursuant to section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)), as Petitioners contend. Instead, Petitioners filed the Petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Pet. at 1), and the Chief ALJ concluded Petitioners do not have standing to file a petition pursuant to section 14 of the Egg Research and Consumer Information Act (7 U.S.C. § 2713) (Initial Decision and Order).

Petitioners rely on *Midway Farms v. United States Dep’t of Agric.*, 188 F.3d 1136 (9th Cir. 1999), as support for their contention that the Chief ALJ’s conclusion that Petitioners lack standing, is error. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit concluded that a processor of off-grade raisins was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A)<sup>7</sup> notwithstanding the processor’s claim that it was not a handler, as follows:

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<sup>7</sup>Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, provides that only a handler may file a petition with the Secretary of Agriculture for modification of, or to be exempted from, a marketing order, as follows:

**§ 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.

<sup>7</sup> U.S.C. § 608c(15)(A).

The operative statute allows “[a]ny handler subject to an order” to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term “handler” is defined by regulation for purposes of section 608c(15)(A) 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(i). Neither party contends, for purposes of this action, that Midway is a “person who, by the terms of a marketing order, is subject thereto.” Thus, the sole question is whether Midway is a “person . . . to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i).

Because it cannot be controverted that the [*Raisin Administrative*] *Committee* did in fact seek to apply the Raisin Marketing Order to Midway, we conclude that Midway is a person to whom a Marketing Order has been sought to be made applicable and is thus a “handler,” if only for purposes of section 608c(15). Accordingly, we hold that Midway has standing to file an administrative petition with the Secretary under section 608c(15)(A).

*Midway Farms v. United States Dep’t of Agric.*, 188 F.3d at 1139-40 (footnotes omitted).

I agree with the Chief ALJ’s conclusion that *Midway Farms* is inapposite. The United States Court of Appeals of the Ninth Circuit’s conclusion that Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) turns on the definition of the word *handler* in section 900.51(i) of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)), which defines *handler* to include *any person to whom a marketing order is sought to be made applicable*. The United States Court of Appeals for the Ninth Circuit found the Raisin Administrative Committee sought to apply the marketing order entitled “Raisins Produced from Grapes Grown in California” (7 C.F.R. pt. 989) [hereinafter the Raisin Order] to Midway Farms.<sup>8</sup> The Ninth Circuit concluded that, as Midway Farms met the definition of the word *handler* in 7 C.F.R. § 900.51(i), it had standing to file a petition in accordance with 7 U.S.C. §

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<sup>8</sup>The Ninth Circuit found the Raisin Administrative Committee had the power to administer and apply the Raisin Order. *Midway Farms v. United States Dep’t of Agric.*, 188 F.3d at 1140.

608c(15)(A).<sup>9</sup> Section 900.51(i) of the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (7 C.F.R. § 900.51(i)) is not applicable to the instant proceeding.

Further, I can find nothing in the Egg Research and Consumer Information Act, the Egg Order, or the Rules of Practice, all of which are applicable to the instant proceeding, which confers standing to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) on a person to whom an order is sought to be made applicable. Instead, section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)) and section 1200.52(a) of the Rules of Practice (7 C.F.R. § 1200.52(a)) confers standing only on persons subject to an order.

Further still, even if the definition of the word *handler* in 7 C.F.R. § 900.51(i) were applicable to this proceeding, I would not reverse the Chief ALJ. In *Midway Farms*, the United States Court of Appeals for the Ninth Circuit found Midway Farms was a handler with standing to file a petition under 7 U.S.C. § 608c(15)(A) because the Raisin Administrative Committee sought to make the Raisin Order applicable to Midway Farms. I find nothing on the record before me to establish that the Agricultural Marketing Service, the Egg Board, or any other person with authority to apply the Egg Order seeks to make Petitioners subject to the Egg Order.

Specifically, I agree with the Chief ALJ that the three letters and the subpoena duces tecum attached to Petitioners' Response to Motion to Dismiss, which Petitioners contend establish that the Agricultural Marketing Service seeks to make Petitioners subject to the Egg Order, pertain to records of transactions that occurred prior to the time Petitioners filed the Petition. The letters and the subpoena duces tecum are related to an exercise of the Secretary of Agriculture's investigatory authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717), which provides the Secretary of Agriculture with authority to require the production of records from any person, not just from persons subject to the Egg Order. The Secretary of Agriculture's investigation of Petitioners' records pursuant to her authority under section 18 of the Egg Research and Consumer Information Act (7 U.S.C. § 2717) does not make Petitioners persons subject to the Egg Order or confer standing on Petitioners to file a petition under section 14(a) of the Egg Research and Consumer Information Act (7 U.S.C. § 2713(a)).

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

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<sup>9</sup>*Midway Farms v. United States Dep't of Agric.*, 188 F.3d at 1140.

**ORDER**

The relief requested by Petitioners is denied. The Petition is dismissed without prejudice.

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**ANIMAL WELFARE ACT**

**COURT DECISION**

**DORIS DAY ANIMAL LEAGUE, et al. v. USDA.**

**No. 01-5351.**

**Filed January 14, 2003.**

**(Cite as: 315 F.3d 297).**

**AWA – Rule making petition – Dealer, wholesale – Retail pet store – Residential sales.**

The Appeals court reversed the lower court's decision which invalidated APHIS's decision to decline to modify its AWA regulations so as to expand the definitions of "persons" requiring licensure as "dealers" to include those making "residential retail sales." Both litigants argued the congressional intent using the legislative record. However, the court found the Secretary's considered reasoning compelling for declining to modify the AWA regulations. Additionally, the 30 year history of the regulations having no congressional or judicial challenges to the agency's interpretation of the Act was persuasive that residential sales are not required to be classified as retail sales.

**United States Court of Appeals,  
District of Columbia Circuit**

Before: RANDOLPH and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Hundreds of thousands of dog breeders throughout the United States raise and sell puppies from their homes. The Animal Welfare Act requires certain animal "dealers" to be licensed and to submit to inspections. The Act, which is administered by the Department of Agriculture, exempts "retail pet stores" from these requirements. The Secretary defines "retail pet store" as "any outlet where only the following animals are sold or offered for sale, at retail for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and coldblooded species." 9 C.F.R. § 1.1. The effect of this regulation is to exempt breeders who sell dogs as pets from their residences. The issue is whether the regulation is valid.

Doris Day Animal League, a membership organization, filed a rulemaking petition with the Agriculture Department, urging a change in the regulatory definition of “retail pet store” so that residential operations would not be exempted. The Secretary published the petition in the Federal Register (62 Fed.Reg. 14,044 (Mar. 25, 1997)) and received more than 36,000 comments. When the Secretary announced that he would retain the definition, and stated the reasons why, 64 Fed.Reg. 38,546 (July 19, 1999), Doris Day Animal League and other organizations and individuals concerned about the mistreatment of dogs brought this action for judicial review.

The Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, seeks to insure the humane treatment of dogs (and other animals) raised and sold at wholesale and retail for research, for exhibitions, for hunting, to serve as guard dogs, and to be pets. *Id.* § 2131(1). Animal dealers must obtain licenses, they must comply with standards governing the handling, care, treatment, and transportation of the animals, and their facilities may be inspected for compliance. *See id.* §§ 2133, 2143, 2146(a). The Act defines “dealer” to exclude “a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer.” *Id.* § 2132(f)(i). The Act does not define “retail pet store.” Pursuant to rulemaking authority in 7 U.S.C. § 2151, the Secretary promulgated the regulation, quoted above, defining “retail pet store.” The regulation’s basic definition of “retail pet store” to mean “any outlet,” without distinguishing homes from traditional business locations, dates back to 1971. *See* 36 Fed.Reg. 24,919 (Dec. 24, 1971) (§ 1.1(t) of the regulations: “ ‘Retail pet store’ means any retail outlet where animals are sold only as pets at retail.”).

The district court viewed the meaning of “retail pet store” as plainly not including one who sells dogs for use as pets from his residence, and therefore held the regulation invalid. *Doris Day Animal League v. Veneman*, No. 00-1057, mem. op. at 15 (D.D.C. July 30, 2001). The court relied on the specific exemptions in the definition of “dealer” in 7 U.S.C. § 2132(f) and the licensing exemption of § 2133.

There is no need to repeat the standards for reviewing an agency’s interpretation of a statute it alone administers. *See Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 75-77 (D.C.Cir.1999). The question is what “retail pet store” in § 2132(f)(i) means, or more precisely, what Congress intended it to mean. Those who sell dogs as pets to consumers from their residences are selling pets at retail. But is a residence a “store”? One usually thinks of a store as a business open to the public and engaged in the sale

of goods. But not all stores are open to the public and not all stores are located in shopping malls or other typical business locations. If a homeowner raised dogs; set up a separate place on his property - say, for instance, a small building; installed a counter and a cash register; displayed leashes, collars, and other dog paraphernalia for sale; and advertised the sale of puppies at his address, it would not be much of a stretch to view this too as a store. The local zoning authority might also view the matter that way.

The government cites a dictionary to show that treating residences as “retail pet stores” is possible. One definition of “store” is “a business establishment where goods are kept for retail sale.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2252 (1986). But what is a “business” and what is an “establishment”? A “business” is a “commercial or mercantile activity customarily engaged in as a means of livelihood,” *id.* at 302, and an “establishment” is a “more or less fixed and usu. (sic.) sizable place of business or residence together with all the things that are an essential part of it.” *Id.* at 778. WEBSTER'S lexicographers thus might say that because a residence can be a “business establishment,” a residence can be viewed as a “retail pet store” if dogs are sold there. Those at BLACK'S LAW DICTIONARY (7th ed.1999), would get to the same conclusion by a more direct route. BLACK'S defines “store” as a “place where goods are deposited to be purchased or sold.” *Id.* at 1432. Residences are of course places and dogs can be considered “goods.” Still, we do not pretend these dictionaries, or any others, provide a complete refutation of plaintiffs' contention that the so-called plain meaning of “retail pet store” excludes residences, or that the opposite is what Congress clearly had in mind. Whatever the printed dictionaries say, we cannot be sure what was in the mental dictionaries of the members of Congress. And so we will move on.

Both sides rely on statements from the legislative history of the Animal Welfare Act. The government and *amicus* American Kennel Club, Inc. say the legislative history reveals that the emphasis of the Act was on regulation of wholesale, not retail, sellers of animals. Plaintiffs point to other statements suggesting that the exemption for retail pet stores should be construed narrowly. In the end we can find no solid evidence showing that Congress came to any conclusion about the issue we face, one way or the other.

Plaintiffs' more serious claim, one that convinced the district court, rests on the structure of 7 U.S.C. § 2132(f), the provision defining “dealer.” The definition of “dealer” has two exceptions. The first we have already mentioned: it provides that “dealer” does not include a “retail pet store” (unless

the animals are sold to a research facility, exhibitor, or dealer). *Id.* § 2132(f)(i). The second excludes from the definition of dealer “any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year.” *Id.* § 2132(f)(ii). One of plaintiffs' arguments is that by not giving sellers of dogs a *de minimis* (\$500) exemption in subsection (ii), Congress meant to make sure that those who sold dogs from their homes remained covered by the Act no matter how much income they generated. But the argument begs the question. If subsection (i) already gave an exemption to residential sellers of dogs as pets (because they were “retail pet stores”), there was no need to give them a *de minimis* exemption in subsection (ii). Plaintiffs also point out that if Congress had wanted to exempt individuals selling dogs from their homes, it could easily have written subsection (i) to cover “any person” rather than “retail pet store,” as it did in subsection (ii). The argument is weak. It may be countered by arguing that if Congress wanted to exclude residential sellers from the definition of retail pet store it easily could have said as much. The argument is, in any event, one that can be made in any case in which there is a fair dispute about the meaning of a statute. Often it is put this way: Congress knows how to say thus and so, and would have written thus and so if that is what it really intended. This proves very little. Congress almost always could write a provision in a way more clearly favoring one side - or the other - in a dispute over the interpretation of a statute. Its failure to speak with clarity signifies only that there is room for disagreement about the statute's meaning.

Plaintiffs also direct us to the licensing exemption contained in § 2133. The relevant portion reads:

any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer....

The argument is that § 2133 reflects two separate and distinct licensing exemptions for dog sellers: “retail pet stores” and “other persons.” The second category, plaintiffs continue, “does not apply to persons who sell dogs or cats to consumers for use as pets from their own premises.” Therefore Congress intended to keep the categories separate, while the regulatory definition of “retail pet store” lumps them together.

We will assume that the “other person” clause applies only to those persons who are selling dogs and cats to dealers and research facilities, rather than to consumers who want the animals for pets. Even so, we cannot see how this helps plaintiffs' contention that the plain meaning of “retail pet store” does not include residences. Plaintiffs read the qualification - breeding and raising dogs and cats, on the person's premises, as a result of which he does not derive a substantial part of his income, and selling to dealers and research facilities - to refer only to “other person,” not to “retail pet store.” Because of the disjunctive “or” in the passage, *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230, 1234, 152 L.Ed.2d 258 (2002), supports their interpretation. But even if plaintiffs are correct about what § 2133 means, which we need not decide, those “other” persons are not within the Secretary's definition of “retail pet store” for the obvious reason that they are not selling at retail. Under the regulation, residential retail sellers, like traditional pet stores, are exempt from licensing regardless of whether they make a substantial part of their income from this activity. If the Secretary's interpretation of “retail pet store” is correct, it would have been senseless for Congress to add retail residential sellers in the “other person” clause of § 2133; that would have created a redundancy, or an overlap between the two classes exempt from licensing. Given the regulation, a residential seller may sell an unlimited number of dogs to the public as pets, but he may sell outside of retail channels only if his sales of dogs are less than a substantial portion of his income. The regulation thus preserves both parts of § 2133, allowing each to operate in its sphere.

[1] While the regulation's definition of “retail pet store” does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity. From what we can make out, Congress has paid little attention to the question posed in this case. Still, it is true that in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of “retail pet store” although it has amended the act three times. One line of Supreme Court cases holds that “when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974)). The quotation fits this case perfectly. Compare *Alexander v. Sandoval*, 532 U.S. 275, 292, 121

S.Ct. 1511, 1522-23, 149 L.Ed.2d 517 (2001), refusing to find that Congress, through silence, had endorsed a judicial interpretation of a statute. *But see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82, 102 S.Ct. 1825, 1840-41, 72 L.Ed.2d 182 (1982).

[2] This leaves the argument that the Secretary's resolution of the meaning of "retail pet store" is not a reasonable one. In our judgment the Secretary's decision and policy statement declining to modify the regulation is supported with reasoning that is persuasive and faithful to the Act's purpose of protecting animal welfare. *See generally* Licensing Requirements for Dogs and Cats, 64 Fed.Reg. 38,546 (July 19, 1999).

The Secretary spelled out several policy considerations thus:

....

Second, we have determined that retail dealers, especially those who sell from their homes, are already subject to a degree of self-regulation and oversight by persons who purchase animals from the retailers' homes, as well as by breed and registry organizations. Breed and registry organizations, such as kennel clubs, require their registrants to meet certain guidelines related to the health and genetic makeup of animals bred and to the education of the registrants. These organizations also monitor the conditions under which animals are bred and raised. Wholesale dealers typically do not have this type of oversight from the public.

....

Fourth, retail outlets are not unregulated. There are already many State and local laws and ordinances in place to monitor and respond to allegations of inhumane treatment of and inadequate housing for animals owned by private retail dealers. If we were to regulate these dealers along with State and local officials, it would clearly not be the most efficient use of our resources.

*Id.* at 38,547.

While plaintiffs are unhappy about the degree of self-regulation and the amount of oversight from local humane societies, kennel clubs, and state agencies, the Secretary, applying his expertise, was entitled to rely on these factors in making his judgment about the need for federal regulation. And he was entitled also to differentiate retail sales from wholesale sales of dogs on the basis that "wholesale dealers typically do not have this type of oversight from the public." *Id.*

The Secretary also declined to amend the definition on the ground that the best interest of animal welfare is supported by allowing the Department to “concentrate [its] resources on those facilities that present the greatest risk of noncompliance with the regulations.” *Id.* The Department has decided to focus on wholesale dealers, where its resources are likely to yield the greatest benefit. This is a reasonable choice, keeping in mind the purpose of the Act to promote animal welfare. *See Envirocare*, 194 F.3d at 77-78. It was also within the authority delegated to him by Congress for the Secretary to decline to amend the definition in light of the potential invasions of privacy that would result if federal inspectors began enforcing “cleaning, sanitation, handling, and other regulatory requirements in private homes.” 64 Fed.Reg. at 38,547.

Taken together, the Secretary's decision to retain the regulatory definition of “retail pet store” reflects the judgment of the agency entrusted with administering the Animal Welfare Act to fulfill the purpose of the Act as effectively as possible. For the reasons given, the regulation is a permissible construction of the statutory term “retail pet store.”

The order of the district court granting partial summary judgment to the plaintiffs and declaring the regulation invalid is therefore

*Reversed.*

**BEEF PROMOTION AND RESEARCH ACT**

**DEPARTMENTAL DECISION**

**In re: HERMAN CAMARA, d/b/a CAMARA'S NEW ENGLAND COMMISSION AUCTION, INC., AND ALSO d/b/a CAMARA'S AUCTION SALES.**

**BPRA Docket No. 02-0002.**

**Decision and Order.**

**Filed April 3, 2003.**

**BPRA – Default — Failure to file timely answer — Beef promotion — Collecting person — Late-payment charges — Assessments — Required information — Civil penalty — Cease and desist order — Appeal issues plainly stated.**

The Judicial Officer (JO) affirmed the Default Decision by Administrative Law Judge Jill S. Clifton: (1) concluding Respondent violated the Beef Promotion Order and the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312); (2) assessing Respondent an \$11,000 civil penalty; (3) ordering Respondent to pay past-due assessments and late-payment charges to the Cattlemen's Beef Board; and (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations. The JO rejected Respondent's contention that he was not properly served with documents filed in the proceeding. The JO also rejected Respondent's contention that there were "other valid reasons" for setting aside the Initial Decision and Order and providing Respondent with opportunity for hearing. The JO stated the Rules of Practice require that each issue in an appeal petition must be plainly stated (7 C.F.R. § 1.145(a)). The JO dismissed Respondent's unadorned "other valid reasons" as a basis for setting aside the Default Decision and providing opportunity for hearing on the ground that Respondent failed to plainly state the issue.

Sharlene Deskins, for Complainant.

Respondent, Pro se.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 19, 2002. Complainant instituted the proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order issued under the Beef Promotion Act (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations issued under the Beef Promotion Act (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion 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].

Complainant alleges that Herman Camara, d/b/a Camara's New England Commission Auction, Inc., and also d/b/a Camara's Auction Sales [hereinafter Respondent]: (1) willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000; (2) willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) by failing to collect and remit assessments due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999; (3) violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999; and (4) willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports (Compl. ¶¶ II-IV).

On March 26, 2002, the Hearing Clerk served Respondent by ordinary mail with a copy of the Complaint, a copy of the Rules of Practice, and a service letter dated February 20, 2002.<sup>1</sup> Moreover, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts, personally served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and the Hearing Clerk's February 20, 2002, service letter on April 18, 2002.<sup>2</sup> 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)). The Hearing Clerk sent Respondent a letter dated June 20, 2002, informing him that his answer to the Complaint had not been filed within the time required in the Rules of Practice.<sup>3</sup> Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

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<sup>1</sup>See Memorandum to the File dated March 26, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

<sup>2</sup>See Return of Service dated April 22, 2002, signed by Carl A. Munroe, Deputy Sheriff, Bristol County Deputy Sheriffs' Office, New Bedford, Massachusetts; Notice of Service filed May 9, 2002.

<sup>3</sup>See letter dated June 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

On July 22, 2002, 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 Upon Admission of Facts by Reason of Default” [hereinafter Motion for Default Decision] and a “Proposed Decision and Order Upon Admission of Facts by Reason of Default” [hereinafter Proposed Default Decision]. On September 12, 2002, the Hearing Clerk served Respondent with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.<sup>4</sup> Respondent failed to file objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent a letter dated December 20, 2002, to Respondent informing him that no objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision had been filed within the time required in the Rules of Practice.<sup>5</sup> Respondent failed to respond to the Hearing Clerk’s December 20, 2002, letter.

On December 30, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a “Decision and Order Upon Admission of Facts by Reason of Default” [hereinafter Initial Decision and Order]: (1) concluding Respondent willfully violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312); (2) assessing Respondent an \$11,000 civil penalty; (3) ordering Respondent to pay past-due assessments and late-payment charges to the Cattlemen’s Beef Board; and (4) ordering Respondent to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Initial Decision and Order at 2-4).

On March 10, 2003, Respondent appealed to the Judicial Officer. On March 27, 2003, Complainant filed “Reply to Respondent’s Appeal of the ALJ’s Decision and Order by Reason of Default.” On March 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ’s Initial Decision and Order as the final Decision and

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<sup>4</sup>See Memorandum to the File dated September 12, 2002, from LaWuan Waring, Legal Technician, Office of Administrative Law Judges, United States Department of Agriculture.

<sup>5</sup>See letter dated December 20, 2002, from Tribble Greaves, Acting Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions

of law, as restated.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

....

#### CHAPTER 62—BEEF RESEARCH AND INFORMATION

....

##### § 2902. Definitions

For purposes of this chapter—

....

(3) the term “Board” means the Cattlemen’s Beef Promotion and Research Board established under section 2904(1) of this title;

....

(10) [t]he term “order” means a beef promotion and research order issued under section 2903 of this title[;]

....

(14) the term “qualified State beef council” means a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State;

....

(16) the term “Secretary” means the Secretary of Agriculture[.]

##### § 2903. Issuance of orders

(a) During the period beginning on January 1, 1986, and ending thirty days after the receipt of a proposal for a beef promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the

requirements for certification under section 2905 of this title or any interested person, including the Secretary.

(b) After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

#### **§ 2904. Required terms in orders**

An order issued under section 2903(b) of this title shall contain the following terms and conditions:

.....

(8)(A) The order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

(B) If an appropriate qualified State beef council does not exist to collect an assessment in accordance with paragraph (1), such assessment shall be collected by the Board.

.....

(11) The order shall require that each person making payment to a producer, any person marketing beef from cattle of the person's own production directly to consumers, and any importer of cattle, beef, or beef products maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this chapter, the order, or any regulation issued under this chapter. In addition, the Secretary shall authorize the use of information regarding persons paying producers that is accumulated under a law or regulation other than this chapter or regulations under this chapter.

.....

(12) The order shall contain terms and conditions, not inconsistent with the provisions of this chapter, as necessary to effectuate the provisions of the order.

#### **§ 2908. Enforcement**

**(a) Restraining order; civil penalty**

If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may—

- (1) issue an order to restrain or prevent a person from violating an order; and
- (2) assess a civil penalty of not more than \$5,000 for violation of such order.

7 U.S.C. §§ 2902(3), (10), (14), (16), 2903, 2904(8)(A)-(B), (11), (12), 2908(a) (footnotes omitted).

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

.....

**PART VI—PARTICULAR PROCEEDINGS**

.....

**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

.....

**FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT**

**SHORT TITLE**

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

**FINDINGS AND PURPOSE**

SEC. 2. (a) FINDINGS.—The Congress finds that—

- (1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;
- (2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

#### DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

#### CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any

penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL  
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

**SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

....

**PART 3—DEBT MANAGEMENT**

....

**Subpart E—Adjusted Civil Monetary Penalties**

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—(1) Agricultural Marketing Service.* . .

....

(xvi) Civil penalty for failing to remit any assessment or fee or for violating a program under the Beef Research and Information Act, codified at 7 U.S.C. 2908(a)(2), has a maximum of \$5,500.

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT  
OF AGRICULTURE**

....

**CHAPTER XI—AGRICULTURAL MARKETING SERVICE  
(MARKETING AGREEMENTS AND ORDERS;  
MISCELLANEOUS COMMODITIES),  
DEPARTMENT OF AGRICULTURE**

....

**PART 1260—BEEF PROMOTION AND RESEARCH**

## Subpart A—Beef Promotion and Research Order

### DEFINITIONS

....

#### § 1260.102 Secretary.

*Secretary* means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated, the authority to act in the Secretary's stead.

#### § 1260.103 Board.

*Board* means the Cattlemen's Beef Promotion and Research Board established pursuant to the Act and this subpart.

....

#### § 1260.106 Collecting person.

*Collecting person* means the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed by the Board and approved by the Secretary.

....

#### § 1260.115 Qualified State beef council.

*Qualified State beef council* means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.

....

#### § 1260.128 Act.

*Act* means the Beef Promotion and Research Act of 1985, Title XVI, Subtitle A of the Food Security Act of 1985, Pub. L. 99-198 and any amendments thereto.

....

### ASSESSMENTS

**§ 1260.172 Assessments.**

(a) *Domestic assessments.* (1) Except as prescribed by regulations approved by the Secretary, each person making payment to a producer for cattle purchased from such producer shall be a collecting person and shall collect an assessment from the producer, and each producer shall pay such assessment to the collecting person, at the rate of one dollar (\$1) per head of cattle purchased and such collecting person shall remit the assessment to the Board or to a qualified State beef council pursuant to § 1260.172(a)(5).

(5) Each person responsible for the remittance of the assessment pursuant to § 1260.172(a)(1) and (2) shall remit the assessment to the qualified State beef council in the State from which the cattle originated prior to sale, or if there is no qualified State beef council within such State, the assessment shall be remitted directly to the Board. . . . Assessments shall be remitted not later than the 15th day of the month following the month in which the cattle were purchased or marketed.

**§ 1260.175 Late-payment charge.**

Any unpaid assessments due to the Board pursuant to § 1260.172 shall be increased 2.0 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purposes of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the qualified State beef council or Board, whichever is earlier.

**Subpart B—Rules and Regulations**

**§ 1260.310 Domestic assessments.**

(a) A \$1.00 per head assessment on cattle sold shall be paid by the

producer of the cattle in the manner described in § 1260.311.

(b) If more than one producer shares the proceeds received for the cattle sold, each such producer is obligated to pay that portion of the assessments which are equivalent to the producer's proportionate share of the proceeds.

(c) Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen's Board as required in § 1260.312.

.....

**§ 1260.312 Remittance to the Cattlemen's Board or Qualified State Beef Council.**

Each person responsible for the collection and remittance of assessments shall transmit assessments and a report of assessments to the qualified State beef council of the State in which such person resides or if there is no qualified State beef council in such State, then to the Cattlemen's Board as follows:

(a) *Reports.* Each collecting person shall make reports on forms made available or approved by the Cattlemen's Board. Each collecting person shall prepare a separate report for each reporting period. Each report shall be mailed to the qualified State beef council of the State in which the collecting person resides, or its designee, or if there exists no qualified State beef council in such State, to the Cattlemen's Board. Each report shall contain the following information:

(1) The number of cattle purchased, initially transferred or which, in any other manner, is subject to the collection of assessment, and the dates of such transactions;

(2) The amount of assessment remitted;

(3) The basis, if necessary, to show why the remittance is less than the number of head of cattle multiplied by one dollar; and

(4) The date any assessment was paid.

(b) *Reporting periods.* Each calendar month shall be a reporting period and the period shall end at the close of business on the last business day of the month.

(c) *Remittances.* The remitting person shall remit all assessments to the qualified State beef council or its designee, or, if there is no qualified State beef council, to the Cattlemen's Board at P.O. Box 27-275; Kansas City, Missouri 64180-0001, with the report required in paragraph (a) of

this section not later than the 15th day of the following month. All remittances sent to a qualified State beef council or the Cattlemen's Board by the remitting persons shall be by check or money order payable to the order of the qualified State beef council or the Cattlemen's Board. All remittances shall be received subject to collection and payment at par.

7 C.F.R. §§ 3.91(a), (b)(1)(xvi); 1260.102-.103, .106, .115, .128, .172(a)(1), (a)(5), .175, .310, .312.

**ADMINISTRATIVE LAW JUDGE'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 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, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material 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**

1. Respondent, Herman Camara, is in the business of buying and selling livestock. Prior to October 1998, Camara's New England Commission Auction, Inc. operated as a corporation. In October 1998, Camara's New England Commission Auction, Inc. dissolved and ceased to operate as a corporation. Since October 1998, Respondent has operated his business as a sole proprietorship doing business under the name of Camara's New England Commission Auction, Inc. and also under the name of Camara's Auction Sales. Respondent's mailing address is 275 Hortonville Road, Swansea, Massachusetts 02777.

2. Respondent, at all times material to this Decision and Order, was the *collecting person* as defined in section 1260.106 of the Beef Promotion Order (7 C.F.R. § 1260.106); therefore, Respondent was required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to collect and remit assessments for cattle he bought or sold in the manner

provided in the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations.

3. Respondent willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 5,573 cattle on which Respondent collected assessments from February 15, 1995, through May 30, 1996, and February 15, 2000, through September 30, 2000. Respondent started to remit the assessments collected on the 5,573 cattle in March 2000 and continued to pay until October 2000. However, Respondent failed to pay the late-payment charges due for failing to pay the assessments in a timely manner as required by the Beef Promotion Order and thereby violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175). The amount of late-payment charges due on the 5,573 cattle totaled \$14,488.60 as of January 3, 2002. Each transaction constitutes a separate violation.

4. Respondent willfully violated section 1260.172 of the Beef Promotion Order and section 1260.310 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310) in that Respondent, as the collecting person, failed to collect and remit assessments due from the sale of 8,320 cattle sold from at least May 27, 1996, through December 27, 1999. Respondent violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) in that Respondent, as the collecting person, failed to pay the late-payment charges due on 8,320 cattle on which Respondent collected assessments from May 27, 1996, through December 27, 1999. The amount of assessments and late-payment charges due on the 8,320 cattle totaled \$22,880.25 as of January 3, 2002. Each transaction constitutes a separate violation.

5. Respondent willfully violated section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required information in required reports.

#### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact in this Decision and Order, Respondent has violated sections 1260.172 and 1260.175 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .175, .310, .312).

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

Respondent requests that I set aside the Initial Decision and Order and

provide him with opportunity for hearing. Respondent bases his requests on the purported “failure to obtain good service” and on “other valid reasons.” (Respondent’s Appeal Pet.)

As an initial matter, Respondent fails to identify, describe, or otherwise clarify the “other valid reasons” as a basis for his requests that I set aside the Initial Decision and Order and that I provide him with opportunity for hearing. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that each issue in an appeal petition “shall be plainly and concisely stated.” While Respondent’s unadorned “other valid reasons” may be a concise statement of an issue, I do not find the issue to be plainly stated. Moreover, I find Respondent’s “other valid reasons” too vague to address further, except to dismiss the issue as a basis for setting aside the Initial Decision and Order and providing Respondent with opportunity for hearing, on the ground that Respondent has failed to plainly state the issue, as required in section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)).

I also reject Respondent’s contention that he was not properly served in this proceeding. Section 1.147(c) of the Rules of Practice provides a document is deemed to be received by a party if it is sent by ordinary mail or personally served on a party, 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 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.

....

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

7 C.F.R. § 1.147(c)(1), (c)(3).

The Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter, dated February 20, 2002, by certified mail to Respondent. The United States Postal Service marked the certified mailing “unclaimed” and returned it to the Hearing Clerk.<sup>6</sup> On March 26, 2002, the Hearing Clerk properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk’s February 20, 2002, service letter by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).<sup>7</sup> Moreover, on April 18, 2002, Deputy Sheriff Carl A. Munroe of the Bristol County Deputy Sheriffs’ Office, New Bedford, Massachusetts, properly served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk’s February 20, 2002, service letter by personal service in accordance with section 1.147(c)(3)(ii) of the Rules of Practice (7 C.F.R. § 1.147(c)(3)(ii)).<sup>8</sup> 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)).

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.**

. . . .

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<sup>6</sup>See envelope with certified mail number 7099 3400 0013 8805 8287.

<sup>7</sup>See note 1.

<sup>8</sup>See note 2.

(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 Complaint served on Respondent 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. §§ 1.130-1.151. Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 3.

Similarly, the Hearing Clerk informed Respondent in the February 20, 2002, service letter, which accompanied the Complaint and the Rules of Practice, that a timely answer must be filed, as follows:

CERTIFIED RECEIPT REQUESTED

February 20, 2002

Camara's New England  
Commission Auction, Inc.  
also doing business as  
Camara's Auction Sales  
275 Hortonville Road  
Swansea, Massachusetts 02777

Gentlemen:

Subject: In re: Herman Camara, doing business as Camara's New  
England Commission Auction, Inc., and also doing business  
as Camara's Auction Sales, Respondent -  
BPRA Docket No. 02-0002

Enclosed is a copy of the Complaint, which has been filed with this office under the Beef Promotion and Research Act of 1985.

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 February 20, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Based on the date the Hearing Clerk properly served Respondent with the Complaint by ordinary mail (March 26, 2002), Respondent's answer was due no later than April 15, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 11 months 2 days after Respondent's answer was due. Based on the date Deputy Sheriff Munroe properly served Respondent with the Complaint by personal service (April 18, 2002), Respondent's answer was due no later than May 8, 2002, and Respondent's first filing in the proceeding was filed 10 months 9 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.

The Hearing Clerk sent a letter dated June 20, 2002, to Respondent informing him that his answer to the Complaint had not been received within

the allotted time.<sup>9</sup> Respondent failed to respond to the Hearing Clerk's June 20, 2002, letter.

On July 22, 2002, Complainant filed a Motion for Default Decision and a Proposed Default Decision. On September 12, 2002, the Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).<sup>10</sup> Respondent's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than October 2, 2002. Respondent's first filing in this proceeding is dated March 10, 2003, and was filed March 17, 2003, 5 months 15 days after Respondent's objections were due.

On December 30, 2002, the ALJ issued the Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,<sup>11</sup> generally there is no basis for

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<sup>9</sup>See note 3.

<sup>10</sup>See note 4.

<sup>11</sup>See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (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 Constitution of the United States); *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.*

(continued...)

setting aside a default decision that is based upon a respondent's failure to file a timely answer.<sup>12</sup> 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 first filing in this proceeding was filed 11 months 2 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, and the ALJ properly issued the Initial Decision and Order. 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 Constitution of the United States.<sup>13</sup>

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<sup>11</sup>(...continued)

*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).

<sup>12</sup>*See, e.g., In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents' answer was filed 3 months 9 days after the Hearing Clerk served the complaint on the respondents and the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act alleged in the complaint); *In re Wayne W. Coblenz*, 61 Agric. Dec. 330 (2002) (holding the default decision was properly issued where the respondent's first and only filing in the proceeding was filed 7 months 8 days after the Hearing Clerk served the complaint on the respondent and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Packers and Stockyards Act alleged in the complaint); *In re Stephen Douglas Bolton* (Decision as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 54 days after the Hearing Clerk served the complaint on the respondent and 34 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted violating 15 U.S.C. § 1824(2)(B), as alleged in the complaint).

<sup>13</sup>*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 Constitution of the United States 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.* (continued...)

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

**ORDER**

1. Respondent is assessed an \$11,000 civil penalty. The civil penalty shall be paid by certified check, cashier's check, or money order, made payable to the "Treasurer of the United States," and sent by a commercial carrier, such as FedEx or United Parcel Service, to:

Sharlene Deskins  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2343-South Building  
Mail Stop 1417  
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be sent to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check, cashier's check, or money order that payment is in reference to BPRA Docket No. 02-0002.

2. Respondent shall pay his past-due assessments and accrued late-payment charges to the Cattlemen's Beef Board. The amount of past-due assessments and late-payment charges totaled \$37,732.46. This total includes amounts Respondent has failed to pay the Cattlemen's Beef Board from January 2000 to April 2002. The payment shall be made by certified check, cashier's check, or money order, payable to the "Cattlemen's Beef Board" and shall be sent to:

Cattlemen's Beef Board  
P.O. Box 3316  
Englewood, Colorado 80155

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<sup>13</sup>(...continued)  
*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).

Respondent's payment of past-due assessments and late-payment charges shall be sent to, and received by, the Cattlemen's Beef Board within 60 days after service of this Order on Respondent.

3. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and, in particular, shall cease and desist from:

(a) failing to remit all assessments when due;

(b) failing to remit overdue assessments and late-payment charges on those assessments; and

(c) failing to submit mandatory reports and required information in mandatory reports.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

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**EQUAL ACCESS TO JUSTICE ACT**

**COURT DECISION**

**CHARLES DAVIDSON v. USDA.**

**No. 01-60573.**

**Filed January 22, 2003.**

(Cite as: 317 F.3d 503).

**EAJA – Substantially justified – Arbitrary and capricious, when not.**

Plaintiff filed for attorney fees and interest after being successfully in litigation resulting in being awarded claims against the FSA. The agency resisted Plaintiff's claims for disaster relief for 1994 based on a novel, but reasonable, legal argument. The court denied Plaintiff EAJA claim because to found that the FSA legal position was substantially justified and not arbitrary and capricious. A formal three step inquiry for the FSA to meet the burden of substantial justification is not required

**United States Court of Appeals,  
Fifth Circuit.**

Before KING, Chief Judge, and JONES and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This is the second appeal to this court by the plaintiff Charles Davidson, doing business as Davidson Farms (Davidson). Davidson previously appealed a grant of summary judgment in favor of the Farm Services Agency (FSA) that prohibited revision of his farm acreage report for 1994, thus preventing him from receiving disaster assistance from the FSA. *Davidson v. Glickman*, 169 F.3d 996 (5th Cir.1999). We vacated and remanded because the FSA based its position on a legislative rule that did not meet the notice and comment requirements of the Administrative Procedure Act (APA). *Id.* at 999. Davidson then filed a "motion for fees and other expenses and costs" in the district court.

In addition, both parties moved to have the case remanded to the FSA for a revised administrative determination in light of our holding. The district court granted that motion and stayed Davidson's motion for fees and expenses pending the completion of the administrative proceedings.

On remand to the FSA, the agency paid Davidson's claims for 1994 Disaster

Assistance Program (DAP) payments based on the revised acreage report, but denied his request for attorney's fees and interest. Davidson next filed a "motion for summary judgment awarding interest" in the district court, as well as a supplemental motion for attorney's fees under the Equal Access to Justice Act (EAJA). The district court denied Davidson's motion for fees, holding that the Government's position was substantially justified, and Davidson appealed. While that appeal was pending, the district court denied Davidson's motion for summary judgment on the interest issue. The FSA did not file a cross-motion for summary judgment on the interest issue and the district court did not enter judgment for either party. In addition, Davidson did not file a second notice of appeal (NOA), but, within thirty days, the parties filed a joint motion to stay the first appeal, supplement the record on appeal, and revise the briefing schedule. The parties also sought approval to waive "any further notice of appeal." The clerk of this court granted the joint motion. The parties did not seek, nor did the district court enter, a separate, final judgment on the interest issue.

After hearing oral argument, we held that we did not have jurisdiction over the interest issue because the district court's denial of Davidson's "motion for summary judgment awarding interest," was not a final judgment under 28 U.S.C. § 1291. We then made a limited remand to the district court, directing it to decide the interest issue and enter a final judgment. On remand, the district court denied Davidson interest and rendered judgment for the Government on this issue. Now that the district court has disposed of all issues, and a final judgment has been entered, we have jurisdiction under § 1291.

## I

[1] Davidson first appeals the district court's denial of attorney's fees. We employ an abuse of discretion standard to review a district court's decision under the EAJA that the Government's position was substantially justified, although underlying conclusions of law are subject to *de novo* review and factual conclusions are reviewed for clear error. *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 416 (5th Cir.1992) (citations omitted). After reviewing the circumstances of this case, we hold that the district court did not abuse its discretion in finding the Government was substantially justified in its position and we thus affirm the denial of attorney's fees.

[2] The EAJA, 28 U.S.C. § 2412(d)(1)(A), requires an award of attorney's fees to a claimant against the Government if: (1) the claimant is a "prevailing

party”; (2) the Government's position was not “substantially justified”; and (3) there are no special circumstances making the award unjust. *Sims v. Apfel*, 238 F.3d 597, 599-600 (5th Cir.2001). As a threshold matter, a plaintiff is a “prevailing party” under the EAJA “if [he] succeed[s] on any significant issue in litigation which achieves some of the benefit [he] sought in bringing suit.” *Id.* (citation omitted). In the present case, the FSA's administrative award to Davidson renders him a prevailing party.

[3] Next, the Government's position is “substantially justified” if it is “justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person.” *Id.* at 602 (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Substantial justification is a higher burden than that of sanctions for frivolousness; the Government's position must have a “reasonable basis both in law and fact.” *Pierce*, 487 U.S. at 565, 108 S.Ct. 2541, 101 L.Ed.2d 490. This standard is not overly stringent, however, and the position of the government will be deemed to be substantially justified “if there is a ‘genuine dispute’ ... or ‘if reasonable people could differ as [to the appropriateness of the contested action].’ ” <sup>1</sup> *Id.*

[4] The burden of proving substantial justification falls to the Government. *Herron v. Bowen*, 788 F.2d 1127, 1130 (5th Cir.1986). It must show, based on the record (including the record with respect to the decisions of the agency upon which the civil action is based), that it acted reasonably at all stages of the litigation. 28 U.S.C. § 2412(d)(2)(D); *SEC v. Fox*, 855 F.2d 247, 248, 251-52 (5th Cir.1988); *Herron*, 788 F.2d at 1130.

[5] Davidson argues the district court's denial of fees was error because the FSA's refusal to allow him to revise his farm acreage report was arbitrary and capricious, and thus not substantially justified. In chief, he claims it was unreasonable for the Government to rely on an FSA Handbook provision that it knew conflicted with the applicable regulation and had not been adopted pursuant to the notice and comment requirements of the APA. A summary of the Government's position is necessary to evaluate this argument.

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<sup>1</sup>Davidson contends that, in order for the government to meet its burden of substantial justification, it must show: (a) a reasonable basis in truth for the facts alleged; (b) a reasonable basis in law for the theory it propounded; and (c) a reasonable connection between the facts alleged and theory propounded. *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir.1993).

This formal three-step system has not been adopted by this circuit. Rather, the government is tasked simply with showing reasonableness, as defined by *Pierce*. See *Aguilar- Ayala*, 973 F.2d at 416.

At the time Davidson sought the disaster relief payments at issue, the federal regulation provided that reports of acreage could be revised “at any time for all crops and land uses.” 7 C.F.R. § 718.24 (1994). Rule 2-CP § 83 of the FSA Handbook, however, prohibited revision when the farmer would benefit from the revised report, so the FSA denied Davidson's request for disaster assistance. *See Davidson*, 169 F.3d at 998. According to the Government, the regulation was designed to allow prospective revisions of acreage reports but was not intended to allow farmers to later reap the rewards of retrospective disaster assistance, and the Handbook provision was designed to prevent this outcome. Throughout the administrative appeal process and ensuing litigation, the Government consistently argued for the rule in the Handbook because it was the only interpretation that prevented farmers from receiving windfalls.

Davidson emphasizes that the Government did not cite any case holding that the Handbook prevails in a conflict with a regulation. He reasons the Government knew the regulation was dominant, and thus the Government could not have been substantially justified in enforcing the Handbook provision instead. In this regard, Davidson misunderstands the Government's position. In part, the Government maintained the FSA Handbook was not in conflict with the applicable regulation because it was instead only an interpretation of that regulation. Such an interpretation was practical and necessary, from the Government's perspective, to prevent farmers from filing revisions solely to qualify for disaster assistance. Moreover, interpretative rules are not required to meet the notice and comment provisions of the APA, 5 U.S.C. § 553(b)(A), so the method by which the Handbook was adopted does not undermine the Government's position. While we did not accept the Government's argument that the Handbook provision was interpretative, that does not mean the Government was unreasonable in its belief that there was no conflict between the Handbook and the regulation.<sup>2</sup>

Likewise, the Government was unable to cite a case in support of its

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<sup>2</sup>Davidson contends that our reversal of the district court's judgment in the first appeal shows that the government's position was arbitrary and capricious. Nowhere in our prior decision did we hold that the government acted in an arbitrary and capricious manner. Moreover, even if we had found the government's actions to be arbitrary and capricious, this would not “necessarily mean that the government acted without substantial justification.” *Spawn v. W. Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir.1993) (quoting *Griffon v. United States Dep't of Health & Human Servs.*, 832 F.2d 51, 52 (5th Cir.1987)). In fact, in *Spawn*, we explicitly rejected the argument that our interpretation of the law on appeal was dispositive on the issue of whether the Government was substantially justified. *Id.* at 840.

argument because the issue was one of first impression, and therefore novel. This fact alone weighs in favor of substantial justification. *See Baker v. Bowen*, 839 F.2d 1075, 1081 (5th Cir.1988); *Herron*, 788 F.2d at 1132. The substantial justification standard should not be used to prevent the government from making novel arguments. Rather, the “standard was designed to allow the government to advance ‘in good faith ... novel but credible ... interpretations of the law that often underlie vigorous enforcement efforts.’” *Fox*, 855 F.2d at 252 (quoting *Russell v. Nat’l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir.1985)).

The Government's success in the early stages of the dispute is also relevant. Although not all the administrative rulings were in the Government's favor, we note that at least two reviewing officers found for the Government on the basis of the Handbook. In addition, the district court granted the Government's motion for a summary judgment on this issue. Davidson is correct in arguing that the district court's judgment in favor of the Government is not sufficient, in and of itself, to show that the Government's position was substantially justified. Nonetheless, the district court's ruling is a factor weighing in favor of the Government. *Spawn*, 989 F.2d at 840.

In sum, nothing in the record indicates that the district court abused its discretion in finding the Government's position was reasonable. Because we affirm the district court's holding that the government was substantially justified, we need not address the “special circumstances” prong of the EAJA.

## II

Davidson also challenges the district court's denial of his motion for summary judgment seeking an award of interest. We review a grant or denial of summary judgment *de novo*, using the same criteria employed by the district court. *Mongrue v. Monsanto Co.*, 249 F.3d 422, 428 (5th Cir.2001). Summary judgment is proper if, drawing all inferences in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed.R.Civ.P. 56(c).

[6] Interest is not recoverable in suits against the United States unless there is an express waiver of sovereign immunity with regard to an award of interest. *Gore, Inc. v. Glickman*, 137 F.3d 863, 870 (5th Cir.1998). The Prompt Payment Act, 31 U.S.C. § 3902, operates as such a waiver in specific, enumerated circumstances. Under § 3902(h)(2)(A), a farmer is entitled to

interest for any delay of “a payment to which producers ... are entitled under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.*)” Davidson contends the 1994 DAP payments he sought fall within this provision because the payments were authorized by the Agricultural Act of 1949 (“the ‘49 Act”). It is undisputed that the source legislation for the payments was the Agricultural Rural Development and Related Agencies Appropriations Act of 1995, Pub.L. No. 103-330, 108 Stat. 2448 (1994) (“the ‘94 Act”). The ‘94 Act provides, in pertinent part:

[s]uch sums as may be necessary from the Commodity Credit Corporation shall be available, through July 15, 1995, to producers under the same terms and conditions authorized in chapter 3, subtitle B, title XXII of Public Law 101-624 for 1994 crops ... affected by natural disasters....

108 Stat. at 2448-49. The key inquiry is whether the ‘94 Act, through this language, creates a payment to which Davidson is entitled “under the terms of an agreement entered into” under the ‘49 Act.<sup>3</sup>

[7] The district court found that Davidson was not entitled to summary judgment on this issue because he failed to establish that the DAP payments fell within the ‘49 Act, as required by the Prompt Payment Act, and thus he was not entitled to interest as a matter of law. At this stage of the proceedings, Davidson makes a variety of arguments, some new and some recycled, to support his assertion that the ‘94 Act falls within the ‘49 Act, but we find none of them persuasive. First, Davidson argues that the disaster relief payments fall under the ‘49 Act because the relevant disaster relief statutes are cited in the notes to 7 U.S.C. § 1421, which is the initial provision of the codified version of the ‘49 Act. Davidson is correct that Congress officially designated various disaster relief bills as notes to this provision (the statutes were not codified because of their temporary nature), but it is unclear that Congress made that decision for anything other than organizational reasons and we decline to take that designation as proof positive of legislative intent.

Next, Davidson suggests that an 1987 appropriations bill, Pub.L. No. 100-202, 101 Stat. 1329 (1987), supports his case because it notes that the

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<sup>3</sup>Davidson argues that the Government is precluded from arguing that the ‘49 Act does not apply because it did not assert this argument at the administrative level. He cites *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 (5th Cir.1991), to support this proposition. In *Christopher M.*, we simply held that an amicus curiae cannot raise issues already waived by the parties or issues not raised by either party unless exceptional circumstances existed. *Id.* at 1292-93. *Christopher M.* is not apposite here.

Commodity Credit Corporation (CCC) must pay an interest penalty under the Prompt Payment Act on all payments for obligations incurred after January 1, 1998. Davidson reasons that since the DAP payments are administered by the CCC and were owed to him in 1994, they necessarily fell within the Prompt Payment Act. This argument ignores the actual language of the bill, however, which provides that the CCC “shall pay an interest penalty, *determined on the basis of the provisions of the Prompt Payment Act*, on ... all payments...” 101 Stat. at 1329-336. This wording does not suggest that Congress intended to modify the scope or conditions of the Prompt Payment Act; rather, it seems Congress was simply reiterating that the CCC was only obligated to pay interest when the terms of the Prompt Payment Act were met.

Davidson also cites *Doane v. Espy*, 873 F.Supp. 1277 (W.D.Wis.1995), and *Huntsman Farms, Inc. v. Espy*, 928 F.Supp. 1451 (E.D.Ark.1996), in support of his construction of the relevant laws. Neither decision is applicable to this case. In *Doane*, the court allowed interest under the Prompt Payment Act for corn deficiency payments, but noted, in *dictum*, that disaster relief payments made pursuant to the Disaster Assistance Act of 1988, Pub.L. No. 100-387, 102 Stat. 924 (1988) (“the '88 Act”), were not covered by § 3902(h) of the Prompt Payment Act. In other words, the court reasoned that at least some disaster relief payments are not covered by the very same provision of the Prompt Payment Act at issue in this case because the payments do *not* fall under the '49 Act. *Doane*, 873 F.Supp. at 1278-79. In *Huntsman Farms*, the payments at issue were deficiency payments, a type of agricultural price support clearly covered by the Prompt Payment Act. *Huntsman Farms*, 928 F.Supp. at 1453-54, 1462; *see also* 31 U.S.C. § 3902(h)(2)(B)(vi) (referring specifically to deficiency payments).<sup>4</sup>

Likewise, the legislative history to the Prompt Payment Act Amendments of 1988, Pub.L. No. 100-496, 102 Stat. 2455 (1988), does not clearly support Davidson's position. Although Congress refers to “payments under the various support programs of the CCC” and the “various agricultural support programs administered by the CCC,” there is no clear indication that this general language encompasses disaster relief payments. *See* H.R.Rep. No. 100-784, at 21, 36 (1988), *reprinted in* 1990 U.S.C.C.A.N. 3036, 3049, 3064. In fact, if any meaning can be taken from this statute, the result cuts against Davidson's

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<sup>4</sup>Davidson cites two other cases, *Doty v. United States*, 109 F.3d 746 (Fed.Cir.1997), and *Gutz v. United States*, 45 Fed.Cl. 291 (Fed.Cl.1999), but they are also inapplicable and we decline to discuss them in this opinion.

position. Prior to 1988, § 3902(h) of the Prompt Payment Act, the provision at issue here, did not exist. During the amendment process, Congress added this section, as well as specific provisions, codified at 31 U.S.C. § 3902(h)(2)(B)(i)-(vii), governing the calculation of interest for various types of agricultural price support payments. Land diversion payments, deficiency payments, and loan agreements are all explicitly mentioned, among others, but there is no provision governing the calculation of interest for DAP payments or any other type of disaster relief payment. To compensate for this gap, Davidson asserts that his period of interest should be governed by § 3902(h)(2)(B)(vi), which governs “deficiency payments,” but offers no explanation as to why that is the appropriate provision. “Deficiency payments” are not simply untimely, or otherwise lacking, payments by the Government, but are a specific type of farm support payment, discussed in part at 7 U.S.C. § 1445j. We see no obvious connection between deficiency payments and disaster relief payments. To the extent Congress did not provide a formula for calculating interest on such *ad hoc* disaster relief payments, the obvious conclusion is that no such interest was intended.

Finally, Davidson cites 7 C.F.R. Part 777, noting that it refers to the '49 Act as the authorizing legislation for implementation of a USDA Disaster Payment Program. For example, 7 C.F.R. § 777.1 states that it implements a Disaster Payment Program for the 1990 crop year provided by section 201(k) of the Agricultural Act of 1949, as amended, and Dire Emergency Supplemental Appropriations Act for Fiscal year 1990. The purpose of the program is to make disaster payments to eligible producers ... who have suffered a loss of production ... as the result of a natural disaster in 1989.

*Id.* This language mirrors the language of the authorizing statute, the Dire Emergency Supplemental Appropriation and Disaster Assistance Spending Act of 1990, Pub.L. No. 101-302, 104 Stat. 213, 214 (1990) (“the '90 Spending Act”), and it does give us pause. Section 201(k), the provision of the '49 Act referred to, was originally created by the Food Security Act of 1985, Pub.L. No. 99-198, 99 Stat. 1354 (1985) (“the '85 Act”), and was codified at 7 U.S.C. § 1446(k). While it is clear that the '85 Act explicitly amended the '49 Act, the terms of the '85 Act only applied to the 1985 to 1990 crop years, not the 1994 crop at issue here. And the '90 Spending Act did nothing more than designate appropriations for this limited purpose and time period. Indeed, 7 U.S.C. § 1446(k) was dropped from the Code after it expired in 1990.

Furthermore, the '90 Spending Act is not a precursor of the '94 Act at issue in this case. The '94 Act, cited *supra*, refers explicitly to the Food, Agriculture,

Conservation, and Trace Act of 1990, Pub.L. No. 101-624, 104 Stat. 3359 (1990), which, in turn, states in § 2244 that disaster payments are available “to the extent that assistance was not made available under the Disaster Assistance Act of 1989.” 104 Stat. at 3967. The relevant provisions of the Disaster Assistance Act of 1989, Pub.L. No. 101-82, 103 Stat. 564 (1989) (“the ‘89 Act”), including § 104, do not refer to any previous legislation, and, in particular, give no indication that they amend or supplement the ‘49 Act. In sum, the ‘90 Spending Act seems to fall outside of a chain of disaster relief legislation passed during that period, and we are unable to conclude that any of the links in that chain are substantively connected to the ‘49 Act.

In the absence of a clearer connection between the ‘49 Act and the DAP payments at issue here, we hold that the payments fall outside the limited terms of the Prompt Payment Act, as embodied in 31 U.S.C. § 3902(h). We cannot award interest unless there is an express waiver of sovereign immunity, and we find no such waiver for this type of payment. To conclude otherwise would be beyond our judicial authority.

For the foregoing reasons, we find that the district court properly ruled that Davidson was not entitled to attorney's fees under the EAJA or interest under the Prompt Payment Act and we AFFIRM.

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**FEDERAL CROP INSURANCE ACT**

**DEPARTMENTAL DECISION**

**In re: CHARLES H. MCCLATCHEY, JR.**  
**FCIA Docket No. 02-0004.**  
**Decision and Order by Reason of Summary Judgment.**  
**Filed March 26, 2003.**

Donald McAmis, for Complainant.  
Respondent Pro se.  
*Decision and Order by Jill S. Clifton, Administrative Law Judge.*

**FCIA – Summary Judgment – False information – Willful and intentional.**

The ALJ determined that Respondent violated the Act based on his being convicted in a criminal court of charges of willful and intentional fraud relating to Federal Crop Insurance thus forming a basis for summary judgement upon his prior criminal conviction.

**Decision**

The Motion for Summary Judgment filed by the complainant, Federal Crop Insurance Corporation, is granted on the grounds that there are no genuine issues of material fact.

**Findings of Fact**

A jury for the U. S. District Court for the Northern District of Mississippi found on February 7, 2000 that the Respondent, Charles H. McClatchey, Jr., willfully and intentionally provided false information on or about January 11, 1995, to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501 *et seq.*) (the “Act”). Respondent has admitted that he was found guilty of such an act by jury verdict in the U.S. District Court for the Northern District of Mississippi. Respondent’s conviction was affirmed on appeal on April 19, 2001. 249 F.3d 348 (5th Cir. 2001). Certiorari was denied by the United States Supreme Court on October 1, 2001. 534 U.S. 896, 122 S.Ct. 217, 151 L.Ed. 2d 155 (2001).

**Conclusion**

The 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)).

**Order**

Pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of two years and from receiving any other benefit under the Act for a period of ten years. The period of disqualification shall be effective 35 days after this decision is served on the respondent unless there is an appeal to the Judicial Officer within 30 days after service pursuant to § 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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 of this Decision shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became effective on May 12, 2003. – Editor]

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**FOOD STAMP PROGRAM**

**COURT DECISIONS**

**MOHAMED MOHAMED THABIT AND AMIRAH ATTAYED THABIT  
v. USDA.**

**No. C-02-2329 SC.**

**Filed April 3, 2003.**

**(Cite as: 2003 WL 1798302 (N.D.Cal.)).**

**United States District Court,  
N.D. California.**

**FSP – Innocent owner, no defense – Trafficking – Strict liability, owner’s, for acts by  
authorized employees – Compliance policy, pre-existing, permits discretion in penalty.**

Court granted summary judgement motion thus holding that store owner’s employees engaged in prohibited food stamp program activities (“trafficking”) on nine occasions. Owner’s defense of innocence is ineffective regarding violations of the Food stamp program. In order to receive consideration to reduce civil penalties, the store owner must show credible evidence of pre-existing fraud prevention program. In order to avoid permanent disqualification, the store owner must demonstrate no personal participation, no knowledge in the trafficking violations, and an effective, pre-existing compliance policy.

CONTI, J.

**ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

On January 17, 2002, the United States Department of Agriculture's Food and Nutrition Service (“FNS” or “Defendant”) disqualified Cilles Liquor, a food and convenience store owned by plaintiffs Mohamed Mohamed Thabit and Amirah Attayed Thabit (“Plaintiffs”), from participation in the food stamp program. After an unsuccessful administrative appeal, Plaintiffs appealed the disqualification to this Court. For the following reasons, the Court now grants Defendant's motion seeking summary judgment upholding the disqualification.

**II. BACKGROUND**

In 1998, Plaintiffs purchased Cilles Liquors, a liquor and convenience store in Oakland. The previous store owners had participated in the food stamp

program, and Plaintiffs applied to accept food stamps. In June 1998, FNS approved their application. Originally Mohamed Thabit and his brother Ahmed Attayib operated Cilles Liquors alone, but in January 1999, according to Mohamed Thabit, his son Mutahar began working with Ahmed Attayib on afternoon/evening shifts.

From October 11, 2000 until April 4, 2001, an FNS investigator made ten visits to Cilles Liquors. Her reports state that during those visits she attempted to buy ineligible items and/or traffic in food stamps with the store clerks. On the first two visits, Mutahar Thabit allowed the investigator to purchase both eligible and ineligible items using food stamps. AR at 109-14. On the third visit, Mohamed Thabit refused to sell ineligible items. AR at 115-17. On subsequent visits, the investigator again purchased ineligible items, including liquor, from Mutahar Thabit, and on the last three visits Mutahar Thabit allowed her to exchange food stamps for cash. AR at 118-40. According to the investigator, another clerk was present during two of these trafficking incidents.

The investigator's reports do not state that Mohamed Thabit ever sold ineligible items or trafficked. Likewise, they do not state that trafficking or ineligible sales ever occurred while Mohamed Thabit was in the store. They do state that Mutahar Thabit never refused her requests to make ineligible purchases or sell food stamps.

On July 26, 2001, following these visits, another FNS investigator visited Cilles Liquors and introduced herself to Mohamed Thabit. Her report states that she informed him of an investigation against him and described its nature; according to Thabit, she informed him that his son had sold an ineligible item--a "wet burrito"--to a customer using food stamps. AR at 141; Thabit Decl. at 15. She then told him he would receive a letter in approximately sixty to ninety days. Mr. Thabit, according to the investigator's report, appeared to become angry with his son; according to his declaration, Mr. Thabit responded by telling his son that he could no longer work at the store or live in his house.

On November 16, 2001, FNS sent Plaintiffs a certified letter documenting the investigation and informing them that they might face permanent disqualification from participation in the food stamp program, that they had ten days to respond, and that they might, upon demonstration that they had an adequate program to prevent illegal sales involving food stamps, seek to have the penalty reduced from permanent disqualification to a monetary fine. AR at 37-38.

Plaintiffs sought and received extensions of the deadline responding to this letter, and they filed their written response on December 28, 2002. In the response, Mohamed Thabit noted that he had found no overages (excess income, which might be expected if a food stamp had been traded for less than its full value in currency) in the cash registers on the days the alleged violations occurred. He urged that a monetary penalty was appropriate because he was personally unaware of and uninvolved in the alleged misconduct, because he was not warned by FNS of the alleged misconduct, because he had fully cooperated with the investigator, and because he had an effective program in place to prevent violations. AR at 28-33. Describing the program, Thabit stated: I have established a policy in the store regarding accepting food stamps, anybody working in the store has to have good knowledge about food stamp regulations. I do a walkthru with any new clerk pointing out all the items and whether it is eligible or not, and after a complete walkthru, I test the individual making sure that he knows all the regulations he is supposed to know. No one works the cash register without this training. AR at 33.

Thabit did not, however, submit any documentation of training or testing and did not produce any other evidence of the existence or nature of his compliance program.

Despite Thabit's response, FNS rejected his request for a civil penalty and disqualified his store from participation in the program. It found that the evidence presented by Thabit was insufficient to demonstrate that the compliance program was in place prior to the violations or that Thabit had implemented an effective personnel training program.

Thabit sought administrative review, but the review officer affirmed FNS's initial decision.<sup>1</sup> Following this denial, the Thabits filed this action.

### III. LEGAL STANDARD

#### *A. Summary Judgment*

Summary judgment is proper only when there is no genuine issue of material

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<sup>1</sup>The review officer did note that FNS had incorrectly informed Thabit that he would be subject to a transfer penalty if he attempted to sell the store prior to receiving the FNS letter of disqualification. In fact, had he sold the store after receiving the charge letter but before receiving the letter of disqualification, he would not have been subject to a transfer penalty.

fact and, when viewing the evidence in the light most favorable to the nonmoving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56(e); *Cleary v. News Corp.*, 30 F.3d 1255, 1259 (9th Cir.1994). Once a summary judgment motion is made and properly supported, the nonmoving party may not rest on the mere allegations of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See* Fed R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, to withstand a proper motion for summary judgment, the nonmoving party must show that there are “genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

#### *B. The Food Stamp Program*

Congress founded the food stamp program in an effort to combat poverty-caused malnutrition. 7 U.S.C. § 2011. The program allows participants to use stamps to purchase eligible food items at participating stores. The Food Stamp Act contains provisions designed to ensure that stamps will only be used for their proper purposes; in response to fears that food stamps were chronically being used to purchase non-food items, or were being traded for cash, Congress enacted a scheme of stringent penalties for stores that allow impermissible use of stamps. 7 U.S.C. § 2021; *see Kim v. United States*, 121 F.3d 1269, 1272-73 (9th Cir.1997).

Specifically, section 2021(a) states that “any approved retail food store or wholesale food concern may be disqualified for a specified period of time from participation in the food stamp program ... on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter.” The regulations create a detailed penalty scheme, with the severity of the penalty depending upon a host of factors. *See* 7 C.F.R. § 278.6(e).

That scheme treats trafficking in food stamps with particular severity. 7 C.F.R. § 278.6(e) states that “[t]he FNS Regional Office . . . shall disqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.”<sup>2</sup> Section 2021(b) states that even the first trafficking disqualification

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<sup>2</sup> 7 C.F.R. § 271.2 states, in relevant part, “trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food.”

(continued...)

must be permanent unless “the Secretary determines that there is substantial evidence that such store or food concern had an effective policy and program in effect to prevent violations of the chapter and the regulations.”<sup>3</sup>

The trafficking violation need not be committed by the store owner, or even with the knowledge of the store owner, to justify permanent disqualification. *Kim*, 121 F.3d at 1272-73. The store owner's innocent ignorance may be considered in reducing a penalty from disqualification to a monetary fine; Section 2021(b)(3)(B) indicates that, as a component of any demonstration of an effective compliance program, a store owner must show that he was unaware of and uninvolved in any trafficking violations. This requirement is merely one component of showing an effective compliance policy, however, and if he does not show the other elements of an effective policy, an ignorant owner may still be disqualified because of violations about which he had no knowledge.

### *C. Judicial Review of FNS Decisions*

In the Ninth Circuit, FNS actions under the Food Stamp Act are reviewed using a bifurcated standard. “Whereas the FNS finding that a firm violated the Food Stamp Act is reviewed de novo, review of the sanction imposed by the FNS is governed by the arbitrary and capricious standard.” *Wong v. United States*, 859 F.2d 129, 132 (9th Cir.1988); *Lopez v. United States*, 962 F.Supp. 1225, 1230 (N.D.Cal.1997).

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<sup>2</sup>(...continued)

<sup>3</sup> Citing 7 C.F.R. § 278.6(e)(7), which allows FNS to send only a warning letter if “violations are too limited to warrant a disqualification,” Plaintiffs argue that disqualification is not a necessary response to a trafficking violation. This argument is consistent with the language of 7 U.S.C. § 2021(b), which states that a trafficking disqualification must be permanent unless certain conditions are met, not that a trafficking violation always must lead to a disqualification. This argument may be inconsistent, however, with the text of 7 C.F.R. § 278.6(e)(1), which unequivocally states that a firm “shall” be disqualified upon a trafficking violation. The Court need not resolve this possible inconsistency, for regardless of whether disqualification is a mandatory or discretionary response to trafficking, the statute, regulations, and caselaw all agree that it certainly is a permitted response, and additionally indicate, through the severity of the penalties imposed, that trafficking is a rather serious violation. See *Kim v. United States*, 121 F.3d 1269, 1272-73 (9th Cir.1997) (discussing the evolution of the remedial scheme for trafficking violations). Accordingly, whether or not FNS is required to disqualify a store where trafficking took place, there is no doubt that it could do so.

In addition to applying to FNS's discretionary decisions about the severity of the penalty imposed, the arbitrary and capricious standard applies to the Court's review of FNS's decision regarding the adequacy of a firm's compliance program. The adequacy of such a program does appear to be a question of fact, and in *Wong* the Ninth Circuit clarified that underlying facts, even if relevant only to the severity of the penalty imposed, must be reviewed de novo. 859 F.2d at 132. The Food Stamp Act, however, specifically commits to FNS's discretion determinations about the adequacy of compliance programs. Section 2021(b)(3)(B) states that "the Secretary shall have discretion to impose a civil money penalty . . . if the Secretary determines that there is substantial evidence that such store or concern had an effective policy and program in effect . . ." Accordingly, this Court, in reviewing that determination, must ask only whether the Secretary was arbitrary or capricious in his assessment of the evidence before him regarding Plaintiffs' compliance program, and will not conduct de novo review of the program's adequacy.

#### IV. DISCUSSION

##### *A. The Existence of Violations*

Since this is only a motion for summary judgment, Plaintiffs need only show disputed issues of material fact, and do not yet need to demonstrate by a preponderance of the evidence that the violations in question did not occur. Plaintiffs fail to meet this standard. In response to the detailed, sworn statements of the FNS investigators, Plaintiffs produce only the generalized assertion that such violations were against policy and would not have occurred and the somewhat more specific assertion that they found no overages in the cash registers on the days in question. The former assertion is far too general and conclusory to create an issue of material fact, and the latter, while perhaps providing a scintilla of circumstantial evidence that the violations in question might not have occurred, does not directly rebut the specific statements and observations of the investigators. *See Wehab v. Yeutter*, 743 F.Supp. 1353 (N.D.Cal.1990).

##### *B. The Severity of the Penalty*

Likewise, Plaintiffs do not demonstrate the existence of any genuine issues of material fact regarding FNS's imposition of the penalty. The regulations clearly empower FNS to disqualify a firm upon a finding of trafficking, and empower FNS to determine whether the firm had produced substantial evidence of an

effective compliance policy. Here, FNS does not dispute Plaintiff's assertion that he provided a written statement describing his "walkthru" training, and Plaintiff does not dispute FNS's contention that he had provided no other documentation, other than his brief statement, of that policy or of the completion of that training. Based on that record, and on FNS's observations that trafficking was in fact occurring--sometimes when two of the three store employees were present--this Court cannot say that FNS was arbitrary and capricious in finding the compliance program inadequate.

Plaintiffs add a host of other implications of factual uncertainties and possible improprieties, but none persuade the Court that any genuine issues of material fact remain. Noting the agency's failure to warn Mr. Thabit, its withdrawal of what might have been a warning letter in favor of a charge letter, the somewhat odd "hot burrito" episode, the concurrence of its enforcement actions with the period shortly following the 9/11 bombings, and FNS's incorrect statement regarding the transfer penalty, Plaintiffs suggest that the severity of their penalty may arise out of an impermissible agency animus against persons of Middle Eastern descent. Plaintiffs have produced no other evidence of racial or religious animus, however, and together all of these facts show only an agency engaged in a lawful enforcement proceeding, albeit a proceeding marred by one incorrect explanation of the law, at a time of heightened prejudice against people of Middle Eastern descent. Such facts fall well short of creating a genuine issue of fact as to the legality of the agency's justifications for the harsh but lawful penalty it selected.

### *C. The Transfer of Ownership Penalty*

At the end of their opposition brief, Plaintiffs assert that the Court also should deny summary judgment because factual issues remain regarding whether a transfer of ownership penalty is constitutional. According to Plaintiffs, FNS seeks to impose, pursuant to 7 U.S.C. § 2021(e)(1), a penalty of \$75,248; Plaintiffs argue that this penalty is grossly disproportionate to the degree of the offense and thus violates the Eighth Amendment.

Before the Court may address this issue, it must be faced with a ripe dispute. Here, Plaintiffs have introduced no evidence that they intend to sell the store and have provided neither evidence nor discussion explaining when and how FNS attempted or is attempting to impose the penalty. Plaintiffs did not even hint at this contention in their original complaint, which ostensibly sought review only of the disqualification decision. Plaintiffs have not set forth a ripe

dispute, and the Court may not address this argument.

#### V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED.

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**DAIFAH KASSEM, PRESIDENT AND SENECA STREET MINI MART  
v. USDA.**

**No. 02-CV-0546E(F).**

**Filed April 15, 2003.**

**(Cite as: 2003 WL 21382906 (W.D.N.Y.)).**

**FSP – Innocent owner, no defense as – Arbitrary and capricious, when not – Trafficking – Strict liability, owner's, for acts by authorized employees – Compliance policy, pre-existing, permits discretion in penalty.**

Store owner's employees engaged in prohibited food stamp program activities on six occasions. Owner's defense of innocence is ineffective regarding violations of the Food Stamp program (trafficking). In order to receive consideration regarding civil penalties, the store owner must show credible evidence of pre-existing fraud prevention program. The USDA sanction is not arbitrary and capricious when it is prescribed by regulation or statute.

**United States District Court,  
W.D. New York.**

**MEMORANDUM and ORDER<sup>1</sup>**

ELFVIN, J.

Plaintiffs<sup>2</sup> commenced this action pursuant to 7 U.S.C. § 2023(a)(13) (1999 Supp.2003) on July 30, 2002 in order to challenge their disqualification by the U.S. Department of Agriculture ("USDA") from continued participation in the

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<sup>1</sup> This decision may be cited in whole or in any part.

<sup>2</sup> Plaintiffs are Seneca Street Mini Mart and its President, Daifah Kassem. Plaintiffs will be collectively referred to as either "plaintiffs" or "Kassem."

Federal Food Stamp Program (“FFSP”).<sup>3</sup> The USDA filed a motion for summary judgment October 28, 2002, to which plaintiffs made no reply.<sup>4</sup> The USDA's motion was submitted on the papers January 31, 2003.<sup>5</sup> For the reasons set forth below, defendant's motion for summary judgment will be granted.

Plaintiffs have not filed any papers in opposition to the USDA's motion for summary judgment. This Court must nonetheless determine whether the USDA has satisfied its burden under Rule 56 of the Federal Rules of Civil Procedure (“FRCvP”) by “demonstrating that no material issue of fact remains for trial.” *Amaker v. Foley*, 274 F.3d 677, 680-681 (2d Cir.2001); *Bon Supermarket & Deli v. U.S.*, 87 F.Supp.2d 593, 600 (E.D.Va.2000) (same). Inasmuch as plaintiffs have not refuted the USDA's LRCvP 56 Statement, the facts contained therein are deemed admitted. *See Bon*, at 600 n. 12; note 4 *supra*. Indeed, the facts of this case - which are primarily taken from the administrative record - are straightforward and undisputed.<sup>6</sup>

Kassem is the President of Seneca Street Mini Mart, a convenience store that participated in the FFSP until plaintiffs' disqualification in March 2002. By

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<sup>3</sup> The USDA and its sub-unit responsible for the FFSP - the Food and Nutrition Service (“FNS”) - will be collectively referred to as the “USDA.” Although its role has remained relatively unchanged, the FNS has been known by different names since the advent of the FFSP. *See Ahmed v. U.S.*, 47 F.Supp.2d 389, 390 n. 1 (W.D.N.Y.1999) (noting that the “agency that administers the Food Stamp Program has undergone several changes in nomenclature” and discussing such changes).

<sup>4</sup> Plaintiffs' counsel did, however, send this Court a letter dated January 31, 2003, which stated that “[w]ith respect to the defendant's motion for summary judgment, I have not been able to receive any assistance from my clients in preparing a response. Thus, I take no position on the motion and have submitted no papers.” Accordingly, plaintiffs violated Rule 56 of the Local Rules of Civil Procedure (“LRCvP”) by failing to submit an opposing statement of material facts; they also violated LRCvP 7.1(e) by failing to submit a memorandum of law or any affidavit in opposition to the USDA's motion for summary judgment. *See Chase v. Kaufmann's*, 2003 WL 251949 at n. 5 (W.D.N.Y.2003); *see also Brainard v. Freightliner Corp.*, 2002 WL 31207467, at n. 7 (W.D.N .Y.2002) (discussing LRCvP 56 and LRCvP 7.1(e) and citing cases). Accordingly, the facts set forth in the USDA's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried (“LRCvP 56 Statement”) are deemed admitted where not controverted by the record. *Ibid*.

<sup>5</sup> Plaintiff's counsel did not attend the oral argument scheduled for January 31, 2003 and defense counsel submitted its motion for summary judgment on the papers.

<sup>6</sup> Plaintiffs have produced no evidence whatsoever.

letter dated February 11, 2002, the USDA sent Kassem a letter outlining numerous violations stemming from thirteen transactions and informing plaintiffs that the USDA was considering disqualifying them from further participation in the FFSP and/or the imposition of a civil monetary penalty (“Violation Notice”).<sup>7</sup> The Violation Notice indicated that employees of the store had accepted food stamps for ineligible items (i.e., beer and non-food items) and had trafficked food stamps (i.e., bought food stamps at discounted prices) on six occasions.<sup>8</sup> The Violation Notice informed plaintiffs, *inter alia*, that they must submit a request for such penalty within ten days of their receipt of the Violation Notice in order to be *eligible for consideration* for the civil monetary penalty - as opposed to permanent disqualification.<sup>9</sup>

Plaintiffs' responded via counsel in a letter dated February 22, 2002.<sup>10</sup> Plaintiffs' response indicated that Kassem was out of the country and that Kassem's daughter, Kathy Hussein, was plaintiffs' agent. Hussein submitted an affidavit to the USDA that stated, *inter alia*, that “[w]hile I am not in a position to deny the allegations, I can assure the Department that any such lapses were not in accordance with store policy and training; that the employees involved have been trained and instructed in proper procedures for handling Food Stamps transaction [sic], and that they have been cautioned on pain of termination, not to repeat their behavior.” Admin. Rec. at 58; Hussein Aff., at ¶ 4. Hussein also

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<sup>7</sup> The thirteen violations resulted from the USDA's investigation, which included undercover transactions by shoppers who were either agents of the USDA or cooperating witnesses. *See* Admin. Rec., at 9-45, 51-56.

<sup>8</sup> The Violation Notice charged plaintiffs with violation of 7 C.F.R. § 278.2(a), which prohibits stores from, *inter alia*, accepting food stamps in exchange for ineligible items or exchanging food stamps for cash (i.e., trafficking). *See generally* *Bon*, at 601 (discussing trafficking); 7 C.F.R. § 271.2 (defining “trafficking” as “buying or selling [of benefits coupons] for cash or consideration other than eligible food”); *ibid* (defining “eligible food” as “any food or food product intended for human consumption except alcoholic beverages, tobacco,”). Plaintiffs accepted food stamps for ineligible items including laundry products, cleaning agents, beer and hard lemonade.

<sup>9</sup> *See* 7 U.S.C. § 2021(b)(3)(B); 7 C.F.R. § 278.6(i).

<sup>10</sup> Plaintiffs' response appears to have been timely inasmuch as it was sent within ten days of receipt - which occurred on February 19, 2003. In any event, the USDA does not claim otherwise and this Court deems plaintiffs' response to have been timely submitted.

requested a civil monetary penalty.

By letter dated March 15, 2002, the USDA informed plaintiffs, *inter alia*, that they were permanently disqualified from the FFSP and that they were deemed ineligible for a civil monetary penalty because plaintiffs failed to submit the requisite documentation. By letter dated March 28, 2002, Kassem requested an administrative review of plaintiffs' disqualification. Beverly King, an Administrative Review Officer at the USDA, reviewed plaintiffs' disqualification and in a letter dated June 20, 2002 sustained such disqualification. King's letter also informed plaintiffs of their right to file suit in federal court, which they did July 30, 2002.

Rule 56(c) of the Federal Rules of Civil Procedure ("FRCvP") states that summary judgment may be granted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In other words, after discovery and upon a motion, summary judgment is mandated "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is thus appropriate where there is "no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).<sup>11</sup>

With respect to the first prong of *Anderson*, a genuine issue of material fact exists if the evidence in the record "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, at 248.<sup>12</sup> Stated another way, there is "no genuine issue as to any material fact" where there is a "complete failure of proof concerning an essential element of the nonmoving party's case." *Celotex*, at 323. Under the second prong of *Anderson*, the disputed fact must be

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<sup>11</sup> Of course, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the moving party makes such a showing, the non-moving party must then come forward with evidence of specific facts sufficient to support a jury verdict in order to survive the summary judgment motion. *Ibid.*; FRCvP 56(e).

<sup>12</sup> See also *Anderson*, at 252 ("The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [movant].")

material, which is to say that it “might affect the outcome of the suit under the governing law.” *Anderson*, at 248.

Furthermore, “[i]n assessing the record to determine whether there is a genuine issue as to any material fact, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought.” *St. Pierre v. Dyer*, 208 F.3d 394, 404 (2d Cir.2000) (citing *Anderson*, at 255). Nonetheless, mere conclusions, conjecture, unsubstantiated allegations or surmise on the part of the non-moving party are insufficient to defeat a well-grounded motion for summary judgment. *Goenaga*, at 18.<sup>13</sup> Indeed, “[s]ummary judgment has been held to be appropriate on *de novo* judicial review of a disqualification of a retail food store from participating in the food stamp program if no genuine issue of material fact exists.” *Haskell v. United States Dep’t of Agriculture*, 743 F.Supp. 765, 767 (D.Kan.1990), *aff’d*, 930 F.2d 816 (10th Cir.1991); *Nagi v. U.S. Dep’t of Agriculture*, 1997 WL 252034, at (S.D.N.Y.1997) (granting summary judgment in favor of USDA and sustaining permanent disqualification).<sup>14</sup>

Turning to the merits, section 2023(a)(13) provides:

“If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint *against* the *United States* in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination.”

7 U.S.C. § 2023(a)(13) (2003) (emphasis added).

Inasmuch as the USDA - as opposed to the United States - is the only named defendant, this action fails for lack of subject matter jurisdiction. *See De La Nueces v. U.S.*, 1992 WL 58851, at \*1 (S.D.N.Y.1992) (dismissing suit against defendant USDA for lack of subject matter jurisdiction because complaint

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<sup>13</sup>See footnote 11.

<sup>14</sup>See also *Ruszczuk v. Secretary of U.S. Dept. of Agriculture*, 662 F.Supp. 295, 295 (W.D.N.Y.1986) (granting summary judgment in favor of USDA).

improperly named the USDA as a defendant).<sup>15</sup> Accordingly, this action will be dismissed.

In any event, this action also fails on the merits. As noted above, this Court must review *de novo* whether plaintiffs violated the FFSP. 7 U.S.C. § 2023(a)(15); *Ibrahim v. U.S.*, 834 F.2d 52, 53 (2d Cir.1987).<sup>16</sup> Plaintiffs do not deny that the alleged violations occurred. *See* Admin. Rec. at 58; Hussein Aff., at ¶ 4; Compl. at ¶¶ 7-9. This fact coupled with a *de novo* review of the Administrative Record leads this Court to conclude that the violations did occur as alleged.

Plaintiffs do, however, challenge the sanction of permanent disqualification. The sole issue to be determined is whether the sanction imposed by the USDA was arbitrary and capricious. *See Lawrence v. United States*, 693 F.2d 274, 276 (2d Cir.1982); *Willy's Grocery v. United States*, 656 F.2d 24 (2d Cir.1981), *cert. denied*, 454 U.S. 1148 (1982); *Nagi*, at \*2. An agency's decision is arbitrary and capricious if it was “unwarranted in law or without justification in fact.” *Willy's Grocery*, at 26. Where, however, the USDA has followed the applicable laws and regulations, its decision may not be overturned as arbitrary and capricious. *Ibid.*<sup>17</sup>

The USDA's decision to permanently disqualify plaintiffs was not arbitrary and capricious. Indeed, it is well-established that a store owner is responsible for *any* violations of the Food Stamp Act and regulations by the store's employees. *See* 7 C.F.R. § 278.6(e)(1)(i); *J.C.B. Super Markets Inc. v. United States*, 530 F.2d 1119, 1122 (2d Cir.1976) (“The abuse of [the FFSP] by

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<sup>15</sup>*See also Junel Food Ctr. Corp. v. U.S. Dep't of Agriculture*, 1997 WL 150998, at \*2 (S.D.N.Y.1997) (“the USDA is not a suable entity under section 2023, as the statute provides that the complaint is to be filed against the *United States*”); *J.C. Food & Liquor v. United States et al.*, 1997 WL 55960 (N.D.Ill.1997) (dismissing case against USDA with prejudice for lack of subject matter jurisdiction).

<sup>16</sup>*See also Nagi*, at \*2; *Bon*, at 599 n. 9 (noting that the FFSP had been amended, although the requirement of *de novo* review has remained substantively unchanged).

<sup>17</sup>*See also Nagi*, at \*2; *Hernandez v. U.S. Dep't of Agriculture*, 961 F.Supp. 483, 488 (W.D.N.Y.1997); *Ai Hoa Supermarket, Inc. v. United States*, 657 F.Supp. 1207, 1208 (S.D.N.Y.1987).

employees authorized to act by [the corporation] suffices to inculcate the corporation.”).<sup>18</sup> It is undisputed that plaintiffs' employees committed the alleged violations and that plaintiffs are responsible for such violations. Accordingly, in order to determine whether the sanction of permanent disqualification was arbitrary and capricious, this Court must examine 7 U.S.C. § 2021(b)(3)(B); 7 C.F.R. § 278.6(f).

The USDA's sanction was not arbitrary and capricious because the USDA was simply following the applicable regulations in imposing permanent disqualification. *See Willy's Grocery*, at 26 (finding that USDA sanction was not arbitrary and capricious because the USDA properly applied its regulations); *Lawrence*, at 277 (holding that a disqualification policy was not arbitrary and capricious because the USDA “(1) wrote it down and (2) uses it all the time and against everyone”). Under 7 U.S.C. § 2021(b)(3)(B), the USDA may impose permanent disqualification upon

“the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern, except that the Secretary shall have the *discretion to impose a civil money penalty* of up to \$20,000 for each violation (except that the amount of civil money penalties imposed for violations occurring during a single investigation may not exceed \$40,000) in lieu of disqualification under this subparagraph, for such purchase of coupons or trafficking in coupons or cards that constitutes a violation of the provisions of this chapter or the regulations issued pursuant to this chapter, *if the Secretary determines* that there is *substantial evidence* that such store or food concern had an *effective policy* and program in effect *to prevent violations* of the chapter and the regulations.” (emphasis added).

*See also Nagi*, (applying 7 U.S.C. § 2021(b)(3)(B) and sustaining the USDA's sanction of permanent disqualification because plaintiffs “failed to

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<sup>18</sup>*See also Kim v. U.S.*, 121 F.3d 1269, 1273 (9th Cir.1997) (holding that “innocent store owners whose stores lack [an effective policy to prevent trafficking] remain subject to permanent disqualification” and noting that this holding has been unanimously adopted by every circuit court of appeals to have addressed the issue); *Freedman v. U.S. Dep't of Agriculture*, 926 F.2d 252, 257-258 (3d Cir.1991) (holding that owners are strictly liable for trafficking violations by store personnel); *Bon*, at 601 (same); *Hernandez*, at 485-486 (noting that there is no “innocent owner” defense with respect to permanent disqualifications); *Four Star Grocery v. United States*, 607 F.Supp. 1375, 1376 (S.D.N.Y.1985) (holding store owner liable for employee's trafficking of food stamps).

allege, much less demonstrate, that [the store] had such a policy or program”). Likewise, plaintiffs have neither alleged nor demonstrated that they had “an effective policy and program in effect to prevent violations” of the FFSP and the applicable regulations. Indeed, the Complaint merely alleges that the violations “were not in accordance with store policy and training; that the employees involved have been trained and instructed in proper procedures for handling Food Stamps transaction [sic].”<sup>19</sup> The Complaint and Hussein's Affidavit,<sup>20</sup> however, are patently deficient under 7 C.F.R. § 278.6(i) because they fail to demonstrate, *inter alia*, that a compliance policy and program were in effect *prior to* the trafficking violations. *See* 7 C.F.R. § 278.6(i); *Traficanti v. U.S.*, 227 F.3d 170, 174-176 (4th Cir.2000) (affirming imposition of permanent disqualification because store owner failed to submit written documentation of an effective fraud prevention program).<sup>21</sup> Consequently, the USDA lacked the discretion to impose a civil monetary penalty on plaintiffs in lieu of permanent disqualification. *See* 7 U.S.C. § 2021(b)(3)(B); *Bon*, at 602- 603 (holding that the USDA lacked the discretion to impose civil monetary penalty because plaintiff had not submitted *supporting documentation* as required under 7 C.F.R.

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<sup>19</sup>Such allegations simply parrot the inadequate boilerplate contained in the Hussein Affidavit.

<sup>20</sup>Hussein's Affidavit is deficient because, *inter alia*, it is not based on personal knowledge. *See Kim*, at 1276-1277 (finding that affidavit failed to raise a genuine issue of material fact where it was not based upon personal knowledge).

<sup>21</sup>The Complaint and Hussein's Affidavit also fail to satisfy other requirements set forth by 7 C.F.R. § 278.6(i). Indeed, under 7 C.F.R. § 278.6(i) plaintiffs must demonstrate by substantial evidence the following four criteria: (1) the store “shall have developed an effective compliance policy as specified in § 278.6(i)(1) [which requires “written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this Part 278 of current FSP regulations and current FSP policy on the proper acceptance and handling of food coupons”]”; (2) the “firm shall establish that both its *compliance policy and program were in operation* at the location where the violation(s) occurred *prior to the occurrence of violations* cited in the charge letter sent to the firm” and that “such policy statements shall be *considered only if documentation* is supplied which establishes that the policy statements were provided to the violating employee(s) *prior to* the commission of the violation”; (3) the “firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2) [which requires the store to, *inter alia*, “*document its training activity* by submitting to FNS its dated training curricula and records of dates training sessions were conducted”]”; and (4) “Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct of or approval of trafficking violations”. *See* 7 C.F.R. § 278.6(i) (emphasis added); *Traficanti*, at 174-176 (holding that 7 C.F.R. § 278.6(i) requires owners to provide “written documentation proving that it had [an effective compliance policy] and program before the violations”); *Bon*, at 602 n. 14.

§ 278.6(i)). Accordingly, the USDA's sanction was not arbitrary and capricious and will be sustained.<sup>22</sup>

Accordingly, it is hereby *ORDERED* that defendant's motion for summary judgment is granted, that the Complaint is dismissed, that plaintiffs shall reimburse the USDA for \$1,320 in trafficked food coupons within thirty days of this Order and that the Clerk of the Court shall close this case.

IT IS SO ORDERED.

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<sup>22</sup>*See Bon*, at 600-603 (holding that the USDA was “required to impose permanent disqualification” because of plaintiff’s failure to submit supporting documentation); *Haskell*, at 771-772; *Nagi*, at \*3. Moreover, *Ahmed* - *supra* note 3 - is distinguishable because the Hussein affidavit did not describe plaintiffs’ compliance program; it merely stated that one existed. Accordingly, there is no evidence whatsoever of whether plaintiffs’ compliance program - even assuming one existed - was *effective* or that it existed *prior* to the violations.

**HORSE PROTECTION ACT**

**COURT DECISION**

**DERWOOD STEWART, RHONDA STEWART, d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND STEWART'S NURSERY FARM STABLES v. USDA.**

**No. 01-4204.**

**Filed May 15, 2003.**

**(Cite as: 64 Fed. Appx. 941).**

**HPA – Entering – Timeliness, appeal – Penalties, reasonableness of.**

Owner of a sore horse who personally participated in certain steps (but not all) involved in entering a horse in a show violated section 5(2)(B) of the Act. Allowing the Complainant to have additional time to file an appeal following a timely oral request to do so was within discretion of the Judicial Officer (JO). Unless “unwarranted in law” or “without justification in fact,” the JO’s determination of the length of sanction to be applied will not be disturbed.

**United States Court of Appeals,  
Sixth Circuit**

Before NELSON and COLE, Circuit Judges, and ROSEN, District Judge.\*

**OPINION**

COLE, Circuit Judge.

Petitioner Derwood Stewart petitions this Court for review of a decision of the Secretary of the United States Department of Agriculture (“USDA”) finding that he violated the Horse Protection Act (“HPA”), 15 U.S.C. §§ 1821-31, when he entered his horse in a horse show while “sore.”

For the reasons that follow, we DENY Stewart's petition for review.

**I. BACKGROUND**

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\* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

The HPA was enacted to prohibit the practice of deliberately inflicting pain on a horse to reproduce the high-stepping gait of a champion Tennessee Walking Horse. See *Baird v. United States Dep't of Agric.*, 39 F.3d 131, 132 n. 1 (6th Cir.1994). Soring occurs when an injury to or sensitization of a horse's legs, rather than training or breeding, is used to induce the desired gait. *Rowland v. United States Dep't of Agric.*, 43 F.3d 1112, 1113 (6th Cir.1995). A horse is presumed to be sore if it exhibits abnormal sensitivity in both of its forelimbs or both of its hindlimbs. 15 U.S.C. § 1825(d)(5). Managers of horse shows appoint Designated Qualified Persons (“DQPs”) to inspect horses for compliance with the HPA. 15 U.S.C. § 1823; 9 C.F.R. §§ 11.1, 11.7. The showing, exhibiting, or entering into a show of any sore horse is prohibited by the HPA. 15 U.S.C. § 1824(2).

In 1988, Stewart owned seven Tennessee Walking Horses, including one named “JFK's O My Jackie O” (“Jackie O”). Stewart's horses were boarded with and trained by Don Milligan. At that time, Jessie Smith was working for Milligan as a horse trainer. In mid-1998, Stewart moved his horses to his own barn and hired Smith to train them. Stewart instructed Smith not to abuse his horses “in any shape, form, or fashion.”

In late October 1998, Jackie O was entered in the 30th Annual National Walking Horse Trainers Show (“the Show”) in Shelbyville, Tennessee. On October 28, 1998, as part of the pre-exhibition inspection, Jackie O was found to be sore. Stewart was not present at the examination of Jackie O. When Stewart learned that Jackie O had been found to be sore, he fired Smith.

The Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the USDA, filed a complaint charging Stewart, his daughter Rhonda Stewart, and the additional respondents (together, the “family business”), with violating the HPA. Following an administrative hearing, the Chief Administrative Law Judge (“ALJ”) dismissed the complaints against Rhonda Stewart and the family business, but determined that Stewart violated the HPA and assessed a \$2,000 penalty against him. Both Stewart and the USDA appealed the decision to the Secretary, and a Judicial Officer to whom the Secretary delegated authority over the case generally adopted the ALJ's decision, but modified the decision to increase the penalty to \$2,200 and to disqualify Stewart from showing horses for one year. Stewart now appeals that decision.

## II. ANALYSIS

*A. Violation of § 1824(2)(B)*

Our review of an administrative decision regarding the HPA is limited to a determination of whether proper legal standards were used and whether substantial evidence exists to support the decision. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir.1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, means more than a scintilla of evidence but less than a preponderance, and must be based on the record taken as a whole. *Id.*

Section 5(2)(A) of the HPA prohibits any person from showing or exhibiting, in any horse show or exhibition, any horse which is sore. *See* 15 U.S.C. § 1824(2)(A). Section 5(2)(B) prohibits any person from entering for the purpose of showing or exhibiting, in any horse show or exhibition, any horse which is sore. *See* 15 U.S.C. § 1824(2)(B). Section 5(2)(C) prohibits any person from selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore. *See* 15 U.S.C. § 1824(2)(C). Section 5(2)(D) prohibits any horse owner from allowing another person to do one of the acts prohibited in sections 5(2)(A), 5(2)(B), and 5(2)(C). *See* 15 U.S.C. § 1824(2)(D). The amended complaint filed by the USDA alleged that Stewart violated section 5(2)(B) by entering a sore horse, and that Rhonda Stewart and the family business violated 5(2)(D) by allowing the entry of a sore horse. The ALJ found that Stewart violated section 5(2)(B), and dismissed the complaints against Rhonda Stewart and the family business.

[1] Stewart argues that he is not liable under section 5(2)(B) because Jackie O was entered into the show by Smith, and Stewart therefore did not enter a sore horse. Stewart contends that, for purposes of the HPA, “entry” has been held to encompass all requirements, including inspection and time necessary to complete these requirements. In support of this proposition, Stewart cites *Elliott v. Administrator, Animal and Plant Health Inspection Service*, 990 F.2d 140, 145 (8th Cir.1993). As the Judicial Officer noted, however, nothing in *Elliott* requires that all steps or any particular step in the process of entry must be personally completed by the owner of the horse, rather than by the trainer, in order to conclude that the owner entered the horse. Indeed, requiring an individual to have personally performed every step of the entry process in order to qualify as having entered the horse for HPA purposes would result in the untenable holding that if two individuals divide the entry responsibilities, both are able to escape liability under section 5(2)(B).

[2] In the present case, the Judicial Officer found, and the evidence in the record demonstrated, that Stewart decided to exhibit Jackie O at the Show, paid the entry fee to enter Jackie O, and provided the means to transport Jackie O there. Thus, substantial evidence existed to support the claim that Stewart entered Jackie O in the Show. Additionally, Stewart does not contest the finding that Jackie O was sore. Accordingly, we do not find error in the Judicial Officer's determination that Stewart entered Jackie O in the Show while sore.

Stewart also argues that this Court's decision in *Baird* requires a finding that he has no liability due to the fact that he was unaware that the horse was sore. Such a finding, Stewart contends, would result in a strict liability standard, which this Court held in *Baird* should not be imposed. The alleged violation in *Baird*, however, was of section 5(2)(D), where the owner allowed his horse to be entered in a show and was unaware that the horse was sore, but did not himself enter the horse. *See Baird*, 39 F.3d at 132. Here, the Judicial Officer found Stewart liable, not for allowing the entry of Jackie O, but for actually entering Jackie O, and the Judicial Officer was therefore correct in finding *Baird* to be inapposite.

*B. Timeliness of USDA's Appeal to the Secretary*

[3] Stewart also argues that the Judicial Officer erred in failing to dismiss the USDA's appeal as untimely. The administrative regulations governing these proceedings state that a party may file an appeal of the ALJ's decision within thirty days after receiving service of the decision. 7 C.F.R. § 1.145(a). The ALJ's decision was filed with the hearing clerk on May 31, 2001. On June 28, 2001, the USDA requested an extension of time for filing an appeal. The Judicial Officer granted this request, extending the time for filing until July 20, 2001. The USDA again requested an extension of time for filing an appeal on July 20, 2001, by leaving a voicemail at the Office of the Judicial Officer before 4:30 p.m., the time at which the hearing clerk's office closes. The request for an extension of time was granted on July 23, 2001, extending the time in which the appeal could be filed until July 23, 2001. The USDA's appeal was then filed on this date.

We review a federal agency's interpretation of an administrative regulation for an abuse of discretion. *See Oakland County Bd. of Comm'rs v. United States Dep't of Labor*, 853 F.2d 439, 442 (6th Cir.1988). In this case, the find that the Judicial Officer did not abuse his discretion in granting the extensions of time to the USDA, or in finding that the appeal by the USDA was timely filed.

*C. One-Year Period of Disqualification*

[4] Lastly, Stewart contends that there was not substantial evidence to support the Judicial Officer's decision to impose a one-year disqualification period.<sup>1</sup> "Determination of a sanction to be applied by an administrative agency, if within the bounds of its lawful authority, is subject to very limited judicial review." *Woodard v. United States*, 725 F.2d 1072, 1077 (6th Cir.1984). This Court must only determine whether the Judicial Officer's decision was "unwarranted in law" or "without justification in fact." *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 186, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). The period of disqualification imposed is authorized by 15 U.S.C. § 1825(c) and warranted by Stewart's violation of 15 U.S.C. § 1824(2)(B). Accordingly, the decision to impose the one-year disqualification period was proper.

III. CONCLUSION

For the foregoing reasons, we DENY Stewart's petition.

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**WILLIAM J. REINHART v. USDA.**  
**No. 02-1261.**  
**Filed April 21, 2003.**

**(Cite as: 123 S.Ct. 1802).**

**HPA – Certiorari denied.**

**Supreme Court of the United States**

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

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<sup>1</sup>The Judicial Officer not only imposed a one-year period of disqualification which had not been imposed by the ALJ, but also increased the fine from \$2,000 to \$2,200, pursuant to the Federal Civil Penalties Inflation Adjustment Act. 28 U.S.C. § 2461. While Stewart appeals the decision to impose the one-year disqualification, he does not appeal the increase in the monetary penalty.

**HORSE PROTECTION ACT**  
**DEPARTMENTAL DECISIONS**

**In re: WILLIAM J. REINHART AND REINHART STABLES.**  
**HPA Docket No. 99-0013.**  
**Rulings Denying Complainant's Motion to Lift Stay Order and**  
**Respondent's Motion to Amend Case Caption.**  
**Filed February 4, 2003.**

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.  
*Rulings issued by William G. Jenson, Judicial Officer.*

**HPA – Stay order granted during appeal period.**

The Judicial Officer (JO) granted Respondent's motion for Stay Order during the pendency of his appeal to the Supreme Court. JO declined to modify the case caption by adding a fictitious trade name as requested by Respondent since it did not affect Respondent's substantive rights during pendency of appeal stating that appeal courts should not be presented with a moving target such as a name change.

On November 9, 2000, I issued a Decision and Order concluding William J. Reinhart, d/b/a Reinhart Stables [hereinafter Respondent], violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000). On May 30, 2001, Respondent requested a stay of the Order in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), pending the outcome of proceedings for judicial review. The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], failed to file a timely response to Respondent's request for a stay. On June 20, 2001, I stayed the Order issued in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), pending the outcome of proceedings for judicial review. *In re William J. Reinhart*, 60 Agric. Dec. 267 (2001) (Stay Order).

On December 30, 2002, Complainant requested that I lift the June 20, 2001, Stay Order on the ground that proceedings for judicial review have concluded (Motion to Lift Stay Order). On January 27, 2003, Respondent filed "Respondent's Response in Opposition to Motion to Lift Stay Order" stating he filed a petition for a writ of certiorari with the Supreme Court of the United

States on December 17, 2002, which petition is still pending in the Court.\* Respondent asserts proceedings for judicial review are not concluded; therefore, Complainant's Motion to Lift Stay Order should be denied. On January 29, 2003, the Hearing Clerk transmitted the record to me for a ruling on Complainant's Motion to Lift Stay Order.

The Office of the Clerk of the Supreme Court of the United States informed the Office of the Judicial Officer that Respondent attempted to file a petition for a writ of certiorari with the Supreme Court of the United States in December 2002. However, the Supreme Court of the United States returned the petition to Respondent for correction with instructions that the corrected petition for a writ of certiorari must be filed within 60 days. The time for Respondent's filing a corrected petition for a writ of certiorari has not yet expired. Therefore, I deny Complainant's Motion to Lift Stay Order.

In addition to opposing Complainant's Motion to Lift Stay Order, Respondent moves to amend the case caption to eliminate the reference to "Reinhart Stables" on the ground that I did not conclude that Reinhart Stables violated the Horse Protection Act (Respondent's Response in Opposition to Motion to Lift Stay Order at 2). Complainant declined the opportunity to respond to Respondent's motion to amend the case caption.

My conclusion that Reinhart Stables did not violate the Horse Protection Act is not a basis for amending the case caption to eliminate the reference to "Reinhart Stables." However, I also concluded in the November 9, 2000, Decision and Order that Reinhart Stables was merely a name under which William J. Reinhart did business. *In re William J. Reinhart*, 59 Agric. Dec. 721, 731, 738, 766-68 (2000). Based on the conclusion that Reinhart Stables was merely a name under which William J. Reinhart was conducting business, Reinhart Stables may not be a proper party in this proceeding. Nonetheless, I am reluctant to disturb any decision and order while it may be the subject of judicial review. Generally, courts should not be presented with a "moving target" when reviewing a decision and order.<sup>1</sup> Therefore, I deny Respondent's motion to amend the case caption.

Based on my review of the record, I find that my ruling denying Respondent's motion to amend the case caption has no effect on Respondent. Respondent is free to renew his motion to amend the case caption after

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\*See *William J. Reinhart v. USDA*, 123 S. Ct. 1802 preceding this page where certiorari was denied. – Editor

<sup>1</sup>See *In re Jerry Goetz*, 60 Agric. Dec. 234, 237-38 (2001) (Ruling Denying Complainant's Mot. to Lift Stay).

proceedings for judicial review are concluded.

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**In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND  
SILVERSTONE TRAINING, L.L.C.  
HPA Docket No. 02-0002.  
Decision and Order as to Phillip Trimble.  
Filed March 27, 2003.**

**HPA – Default – Failure to file timely answer – Entering – Civil penalty – Disqualification –  
Due process service, last known address for – Actual notice, lack of, not always required for  
due process.**

The Judicial Officer (JO) affirmed the Default Decision by Chief Administrative Law Judge James W. Hunt assessing Respondent a \$2,200 civil penalty and disqualifying Respondent for one year because Respondent entered, for the purpose of showing or exhibiting in a horse show, a horse which was sore, as defined in 9 C.F.R. § 11.3(a), in violation of 15 U.S.C. § 1824(2)(B). The JO rejected Respondent's contention that he did not have notice of the complaint until February 3, 2003. The JO stated the Hearing Clerk properly served Respondent with the complaint on February 10, 2002, in accordance with 7 C.F.R. § 1.147(c)(1), by mailing the complaint by certified mail to Respondent's last known principal place of business where someone signed for the complaint. The JO stated, under these circumstances, Respondent is deemed to have had notice of the complaint on February 10, 2002. The JO also rejected Respondent's contention that he was denied due process. The JO stated the Rules of Practice are reasonably calculated to apprise parties of the pendency of an action and afford them an opportunity to be heard. Therefore, the Rules of Practice, which were followed in the proceeding, meets the requirements of due process.

Sharlene Deskins, for Complainant.  
Brenda S. Bramlett, for Respondent.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

#### **PROCEDURAL HISTORY**

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on February 4, 2002. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection 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].

Complainant alleges that on April 29, 2000, Phillip Trimble [hereinafter

Respondent],<sup>1</sup> in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), entered, for the purpose of showing or exhibiting, a horse known as “Pushover The Top” as entry number 186 in class number 48 at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show, in Panama City Beach, Florida, while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)) (Compl. ¶ II(6)).

The Hearing Clerk served Respondent with a copy of the Complaint, a copy of the Rules of Practice, and a service letter on February 10, 2002.<sup>2</sup> 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 March 11, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been filed within the time required in the Rules of Practice.<sup>3</sup>

On October 11, 2002, 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” [hereinafter Proposed Default Decision]. On November 19, 2002, the Hearing Clerk served Respondent with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.<sup>4</sup> Respondent failed to file objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 30, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a “Decision and Order as to Phillip Trimble and Silverstone Training, L.L.C. Upon Admission of Facts by Reason of Default”

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<sup>1</sup>Some of the filings in this proceeding indicate the correct spelling of Respondent’s name may be “Philip Trimble” (See February 10, 2003, Affidavit of Philip Sebastian Trimble). References in this Decision and Order as to Phillip Trimble to “Phillip Trimble” and to “Philip Trimble” are to Respondent.

<sup>2</sup>See Domestic Return Receipt for Article Number 7099 3400 0014 4584 7816.

<sup>3</sup>See letter dated March 11, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent.

<sup>4</sup>See Memorandum to the File dated November 19, 2002, signed by Lolita Ellis, Assistant Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture.

[hereinafter Initial Decision and Order]: (1) finding that on April 29, 2000, Respondent entered a horse known as “Pushover The Top” for the purpose of showing or exhibiting the horse as entry number 186 in class number 48 at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show, in Panama City Beach, Florida, while the horse was sore; (2) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering “Pushover The Top” while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)); (3) assessing Respondent a \$2,200 civil penalty; and (4) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 2-3).

On February 20, 2003, Respondent appealed to the Judicial Officer. On March 17, 2003, Complainant filed “Opposition to Respondents’ Motion to Set Aside the Decision and Order as to Phillip Trimble” [hereinafter Response to Appeal Petition]. On March 18, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and 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 Chief ALJ’s Initial Decision and Order as it relates to Respondent as the final Decision and Order as to Phillip Trimble.<sup>5</sup> Additional conclusions by the Judicial Officer follow the Chief ALJ’s findings of fact and conclusions of law, as restated.

#### **APPLICABLE STATUTORY AND REGULATORY 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—

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<sup>5</sup>The Initial Decision and Order relates to both Respondent and Silverstone Training, L.L.C. Silverstone Training, L.L.C., did not appeal the Initial Decision and Order. Therefore, this final Decision and Order only relates to Respondent.

(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.

.....  
**(c) 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).

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

.....

**PART VI—PARTICULAR PROCEEDINGS**

.....

**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties

## Inflation Adjustment Act of 1990"

## FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

## DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION  
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL  
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) **DEFINITION.**—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

#### ANNUAL REPORT

**SEC. 6.** Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

**LIMITATION ON INITIAL ADJUSTMENT.**—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

### **TITLE 7—AGRICULTURE**

#### **SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

....

#### **PART 3—DEBT MANAGEMENT**

....

#### **Subpart E—Adjusted Civil Monetary Penalties**

#### **§ 3.91 Adjusted civil monetary penalties.**

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*— . . . .

....

(2) *Animal and Plant Health Inspection Service.* . . . .

....

(vii) Civil penalty for a violation of Horse Protection Act, codified

at 15 U.S.C. 1825(b)(1), has a maximum of \$2,200[.]

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 11—HORSE PROTECTION REGULATIONS**

**§ 11.1 Definitions.**

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as “Webster’s.”

*Act* means the Horse Protection Act of 1970 (Pub. L. 91-540) as amended by the Horse Protection Act Amendments of 1976 (Pub. L. 94-360), 15 U.S.C. 1821 *et seq.*, and any legislation amendatory thereof.

*Sore* when used to describe a horse means:

- (1) An irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (3) 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
- (4) 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.

§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be “sore” and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

9 C.F.R. §§ 11.1, .3(a) (footnote omitted).

**CHIEF ADMINISTRATIVE LAW JUDGE’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 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, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint that relate to Respondent are adopted as Findings of Fact, and this Decision and Order as to Phillip Trimble is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent is an individual whose mailing address is 1825 41A,

Shelbyville, Tennessee 37160. At all times material to this Decision and Order as to Phillip Trimble, Respondent was the trainer of a horse known as “Pushover The Top.”

2. Respondent entered “Pushover The Top” for the purpose of showing or exhibiting the horse as entry number 186 in class number 48, on April 29, 2000, at the 2nd Annual Gulf Coast Charity Celebration Walking Horse Show in Panama City Beach, Florida, while the horse was sore.

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the facts set forth in the Findings of Fact in this Decision and Order as to Phillip Trimble, Respondent has violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering “Pushover The Top” while the horse was *sore* as defined in section 11.3(a) of the Horse Protection Regulations (9 C.F.R. § 11.3(a)).

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

Respondent raises two issues in his “Motion to Set Aside the Decision and Order as to Philip Trimble” [hereinafter Appeal Petition]. First, Respondent asserts he had no notice that the Complaint had been filed until February 3, 2003, when Paul Warren, a United States Department of Agriculture representative, personally served Respondent with the Initial Decision and Order, Complainant’s Motion for Default Decision, and a cover letter from the Hearing Clerk (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶¶ 3-5).

On February 5, 2002, the Hearing Clerk sent a copy of the Complaint, a copy of the Rules of Practice, and a service letter by certified mail to Respondent at 1825 41A, Shelbyville, Tennessee 37160. Alfonso Avila signed the Domestic Return Receipt attached to the envelope containing the Complaint, Rules of Practice, and service letter and indicated on the Domestic Return Receipt that the United States Postal Service delivered the certified mailing on February 10, 2002.<sup>6</sup> Respondent asserts: (1) he has not lived at 1825 41A, Shelbyville, Tennessee, since January 16, 2001, when he was employed by Silverstone Stables; and (2) from January 16, 2001, to the present, he has resided at 335 Malone Road, Pulaski, Tennessee, where he is employed by Trimble Stables. Respondent argues, based on these facts, the Hearing Clerk

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<sup>6</sup>See note 2.

failed to properly serve him with the Complaint. (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶¶ 1-2; Official Mail Forwarding Change of Address Form.)

Complainant responds that the Hearing Clerk properly served Respondent with the Complaint because, at the time the Hearing Clerk mailed the Complaint to Respondent, Respondent's last known principal place of business was 1825 41A, Shelbyville, Tennessee 37160 (Response to Appeal Pet. at 3). In support of this response, Complainant attached to the Response to Appeal Petition, an affidavit given by Michael K. Nottingham, a United States Department of Agriculture investigator, on June 15, 2000, in which he states he interviewed Respondent on June 15, 2000, at Silverstone Stables, Shelbyville, Tennessee. Complainant also attached to the Response to Appeal Petition an unsigned statement, which Respondent gave to Michael K. Nottingham on June 15, 2000, in which Respondent states his address is 1825 41A, Shelbyville, Tennessee, 37160, where he has been employed by Silverstone Training Center as a horse trainer for 2 years (Affidavit of Michael K. Nottingham; Unsigned Statement of Phillip Trimble).

Section 1.147(c)(1) of the Rules of Practice provides that a complaint is deemed to be received by a party on the date of delivery by certified mail to the last known principal place of business of the party, 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 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).

Based on the record before me, I conclude the United States Postal Service delivered the Complaint by certified mail on February 10, 2002, to Respondent's last known principal place of business. Alfonso Avila signed the Domestic Return Receipt attached to the envelope containing the Complaint.<sup>7</sup> The Hearing Clerk properly serves a document in accordance with the Rules of Practice when a party to a proceeding, other than the Secretary, is served with a certified mailing at the party's last known principal place of business and someone signs for the document.<sup>8</sup> Therefore, the Hearing Clerk properly served Respondent with the Complaint in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) on February 10, 2002, and Respondent is deemed to have had notice of the Complaint on February 10, 2002.

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 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

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<sup>7</sup>See note 2.

<sup>8</sup>*In re Roy Carter*, 46 Agric. Dec. 207, 211 (1987); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573, 1576 (1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Joseph Buzun*, 43 Agric. Dec. 751, 754-56 (1984).

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 February 10, 2002, 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 3.

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

February 5, 2002

Darrall S. McCulloch  
288 Kent Road  
Tallassee, Alabama 36078

Phillip Trimble  
Silverstone Training, L.L.C.  
1825 41A  
Shelbyville, Tennessee 37160

Dear Messrs. McCulloch and Trimble:

Subject: In re: Darrall S. McCulloch, Phillip Trimble and Silverstone Training, L.L.C.; Respondents - HPA Docket No. 02-0002

Enclosed is a copy of the Complaint, which has been filed with this

office under the Horse Protection Act.

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 February 5, 2002, from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Respondent (emphasis in original).

Respondent's answer was due no later than March 4, 2002.<sup>9</sup> Respondent's first filing in this proceeding is dated February 13, 2003, and was filed February 20, 2003, 1 year 10 days after the Hearing Clerk served Respondent with the Complaint and 11 months 16 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.

On March 11, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the allotted time.<sup>10</sup> Respondent failed to respond to the Hearing Clerk's March 11, 2002, letter. On October 11, 2002, Complainant filed a Motion for Default Decision

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<sup>9</sup>Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) provides that an answer must be filed within 20 days after service of the complaint. Twenty days after February 10, 2002, was March 2, 2002. However, March 2, 2002, was a Saturday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

...  
 (h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Saturday, March 2, 2002, was Monday, March 4, 2002. Therefore, Respondent was required to file his answer no later than March 4, 2002.

<sup>10</sup>See note 3.

and a Proposed Default Decision. On November 19, 2002, the Hearing Clerk served Respondent with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail in accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)).<sup>11</sup> Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 30, 2002, the Chief ALJ issued the Initial Decision and Order in which the Chief ALJ found Respondent admitted the allegations in the Complaint by reason of default.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,<sup>12</sup> generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file

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<sup>11</sup>See note 4.

<sup>12</sup>See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (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 Constitution of the United States); *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).

a timely answer.<sup>13</sup> 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 first filing in this proceeding was filed 1 year 10 days after the Hearing Clerk served Respondent with the Complaint and 11 months 16 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, and the Chief ALJ properly issued the Initial Decision and Order.

Second, Respondent contends his constitutional right to due process has been violated and requests the opportunity to answer the Complaint (Appeal Pet.; Affidavit of Philip Sebastian Trimble ¶ 5).

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central*

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<sup>13</sup>See generally *In re Stephen Douglas Bolton* (Decision and Order as to Stephen Douglas Bolton), 58 Agric. Dec. 254 (1999) (holding the default decision was properly issued where the respondent's first filing in the proceeding was filed 54 days after the complaint was served on the respondent and 34 days after the respondent's answer was due 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 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)).

*Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).<sup>14</sup> The Rules of Practice, which provides for service by certified mail to a respondent's last known principal place of business or last known residence, which procedure was followed in this proceeding, meets the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Spiegel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E. 2d 1344, 1346 (1982), the court held:

It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. See *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

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<sup>14</sup>See also *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (due process does not require receipt of actual notice in every case).

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.<sup>15</sup>

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

### ORDER

1. Respondent is assessed a civil penalty of \$2,200. 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 Deskins  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2343-South Building  
Washington, DC 20250-1417

Respondent’s payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0002.

2. Respondent is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. “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

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<sup>15</sup>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).

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. This disqualification shall continue until the civil penalty assessed in paragraph 1 of this Order and any costs associated with collecting the civil penalty are paid in full.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

3. Respondent has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.<sup>16</sup> The date of this Order is March 27, 2003.

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**In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND  
SILVERSTONE TRAINING, L.L.C.  
HPA Docket No. 02-0002.  
Stay Order as to Phillip Trimble.  
Filed April 25, 2003.**

Sharlene Deskins, for Complainant.  
Brenda S. Bramlett, for Respondent.  
*Order issued by William G. Jenson, Judicial Officer.*

**HPA – Stay order.**

On March 27, 2003, I issued a Decision and Order as to Phillip Trimble: (1) concluding that Phillip Trimble [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a \$2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. \_\_\_\_ (Mar. 27, 2003).

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<sup>16</sup>See 15 U.S.C. § 1825(b)(2), (c).

On April 18, 2003, Respondent filed a notice of appeal and petition for review of *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. \_\_\_\_ (Mar. 27, 2003), in the United States Court of Appeals for the Sixth Circuit.<sup>1</sup> On April 22, 2003, Respondent filed “Motion for Stay of Order” [hereinafter Motion for Stay] requesting a stay of the Order in *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. \_\_\_\_ (Mar. 27, 2003), pending judicial review. On April 23, 2003, Sharlene Deskins, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], by telephone, informed Gloria Derobertis, a legal technician employed by the Office of the Judicial Officer, that Complainant does not object to Respondent’s Motion for Stay.

In accordance with 5 U.S.C. § 705, Respondent’s Motion for Stay is granted.

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

#### **ORDER**

The Order issued in *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. \_\_\_\_ (Mar. 27, 2003), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Phillip Trimble shall remain effective until the Judicial Officer lifts it or a court of competent jurisdiction vacates it.

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<sup>1</sup>*Trimble v. United States Dep’t of Agric.*, No. 03-3568 (6th Cir. Apr. 18, 2003).

**INSPECTION AND GRADING ACT**

**COURT DECISION**

**AMERICAN RAISIN PACKERS, INC. v USDA.**

**No. 02-15602.**

**Filed May 29, 2003.**

**(Cite as: D.C. No. CV-01-05606, (9th Cir.(Cal.)).**

**I&G – Negligent misconduct – Debarment – Unintentional misrepresentation.**

The debarment of a Raisin processor by the USDA from participating in government contracts due to mis-labeling incident was reasonable even though intentional mislabeling was not shown. Negligent misconduct involving the mis-labeling was shown.

**United States Court of Appeals,  
Ninth Circuit**

Before HAWKINS and W. FLETCHER, Circuit Judges, and BREYER,\*  
District Judge.

**MEMORANDUM\*\***

The decision of the United States Department of Agriculture (“USDA”) to debar American Raisin Packers (“American Raisin”) for the unintentional misrepresentation of samples submitted for inspection was reasonable. The USDA’s interpretation of 7 C.F.R. § 52.54(a)(1)(ii) as encompassing both innocent and willful misrepresentation was both rational and consistent with the purpose of the regulation. *See Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1074 (9th Cir.2001).

American Raisin’s contention that 7 U.S.C. § 1622(h) prohibits debarment for innocent or negligent misconduct is unavailing. Section 1622(h) provides ample authority for the promulgation of Section 52.54, in addition to

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\*Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

\*\*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

establishing penalties for other abuses. American Raisin's claim that 5 U.S.C. § 558 requires that a party be given an opportunity to cure its misrepresentation before it is debarred also fails because Section 558 applies only to the revocation of a license and is not otherwise applicable to the facts of this case.

Accordingly, we affirm the district court's summary judgment grant to USDA.

AFFIRMED.

**PLANT VARIETY PROTECTION ACT**

**DEPARTMENTAL DECISION**

**In re: J.R. SIMPLOT COMPANY.  
PVPA Docket No. 02-0001.  
Decision and Order.  
Filed April 14, 2003.**

**PVPA – Plant variety protection – Assignment of plant variety protection application –  
Disavowal of statement – Delegation of authority to judicial officer.**

The Judicial Officer (JO) dismissed with prejudice Petitioner's appeal of the Commissioner of the Plant Variety Protection Office's refusal to record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner, and refusal to disavow a statement attributed to a Plant Variety Protection Office employee. The JO stated that, under the Plant Variety Protection Act, he had only been delegated authority to perform the functions of the Secretary of Agriculture under 7 U.S.C. § 2443 to hear appeals by applicants of the Commissioner's refusal to grant their applications for plant variety protection.

Robert A. Ertman, for Commissioner.

Richard G. Stoll and Richard C. Peet, for Petitioner.

Initial decision issued by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, AMS, USDA.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

J.R. Simplot Company [hereinafter Petitioner] requested that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93<sup>1</sup> from AgriBioTech, Inc. to Petitioner; (2) the Plant Variety Protection Office recognize Petitioner as the owner of the application for a certificate of plant variety protection for Lofts L-93;<sup>2</sup> and (3) the Plant Variety Protection Office and Dr. Thomas Salt, a senior plant variety plant examiner employed by the Plant Variety Protection Office, disavow the statement “[a]nybody is free to grow and market the turfgrass” attributed to Dr. Salt in the April 5, 2002, issue

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<sup>1</sup>Lofts L-93, also referred to a “L-93,” is the varietal name of a variety of creeping bentgrass.

<sup>2</sup>The application for a certificate of plant variety protection for Lofts L-93 is identified by the Plant Variety Protection Office as PVP Application No. 9600256.

of *Golf Week's Superintendent News*.<sup>3</sup> The Commissioner denied Petitioner's request to record the assignment of PVP Application No. 9600256 and denied Petitioner's request that the Plant Variety Protection Office disavow the statement attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News*.<sup>4</sup>

On July 15, 2002, Petitioner filed "Petition Under 7 C.F.R. § 97.300 For Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition] pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act] and the regulations promulgated pursuant to the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations] (Pet. at 3). Petitioner seeks reversal of the Commissioner's denial of Petitioner's requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News* (Pet. at 3).

On August 23, 2002, the Commissioner filed "Answer to Petition for Recording Abandoned Application" [hereinafter Answer] contending I have no jurisdiction to consider Petitioner's Petition and, if I conclude I do have jurisdiction to consider Petitioner's Petition, the Petition should be denied (Answer at 2-4). On September 10, 2002, Petitioner filed "Simplot's (1) Reply to Commissioner's Answer to Petition for Recording of Application and (2) Suggestion That Petition Be Deferred Pending Disposition of Upcoming Related Petition."

Petitioner requested an informal conference pursuant to section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)). On January 2, 2003, I held an informal conference.<sup>5</sup> Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the

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<sup>3</sup>See letter dated April 17, 2002, from Gary M. Zinkgraf, to Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Commissioner].

<sup>4</sup>See letter dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf.

<sup>5</sup>The January 2, 2003, informal conference was also held in connection with a related proceeding, *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

Commissioner.

On February 18, 2003, pursuant to section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443), I requested that the Plant Variety Protection Board provide me with written advice regarding Petitioner's Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to consider the Petition.<sup>6</sup> Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, "were fair and consistent with their [sic] handling of PVP applications" and to recommend that PVP Application No. 9600256 for Lofts L-93 "should not be revived" (Transcript of the March 5, 2003, Plant Variety Protection Board Hearing at 78-80). On April 11, 2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

### TITLE 7—AGRICULTURE

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#### CHAPTER 57—PLANT VARIETY PROTECTION

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#### SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND CERTIFICATES OF PROTECTION

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#### PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

#### § 2441. Examination of application

The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as

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<sup>6</sup>The Plant Variety Protection Board also considered a related petition filed by Petitioner in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

hereinafter provided.

**§ 2442. Notice of refusal; reconsideration**

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

**§ 2443. Initial appeal**

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

7 U.S.C. §§ 2441-2443.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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**SUBTITLE B—REGULATIONS OF THE DEPARTMENT  
OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE  
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),  
DEPARTMENT OF AGRICULTURE**

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**SUBCHAPTER E—COMMODITY LABORATORY**

## TESTING PROGRAMS

### PART 97—PLANT VARIETY AND PROTECTION

#### SCOPE

##### § 97.1 General.

Certificates of protection are issued by the Plant Variety Protection Office for new, distinct, uniform, and stable varieties of sexually reproduced or tuber propagated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

#### DEFINITIONS

##### § 97.2 Meaning of words.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

*Abandoned application.* An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

*Act.* The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

*Applicant.* The person who applied for a certificate of plant variety protection.

*Application.* An application for plant variety protection under the Act.

*Assignee.* A person to whom an owner assigns his/her rights in whole or in part.

*Certificate.* A certificate of plant variety protection issued under the

Act by the Office.

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*Commissioner.* The Examiner in Chief of the Office.

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*Office or Plant Variety Protection Office.* The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

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*Owner.* A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

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#### THE APPLICATION

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#### **§ 97.18 Applications handled in confidence.**

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(c) Decisions of the Commissioner on abandoned applications not otherwise open to public inspection (see paragraph (b) of this section) may be published or made available for publication at the Commissioner's discretion. When it is proposed to release such a decision, the applicant shall be notified directly or through the attorney or agent of record, and a time, not less than 30 days, shall be set for presenting objections.

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#### EXAMINATIONS, ALLOWANCES, AND DENIALS

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#### **§ 97.107 Reconsideration and final action.**

If, upon reconsideration, the application is denied by the Commissioner, the applicant shall be notified by the Commissioner of the reason or reasons for denial in the same manner as after the first examination. Any such denial shall be final unless appealed by the applicant to the Secretary within 60 days from the date of denial, in accordance with §§ 97.300-97.303. If the denial is sustained by the Secretary on appeal, the denial shall be final subject to appeal to the courts, as provided in § 97.500.

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#### PROTEST PROCEEDINGS

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#### **§ 97.201 Protest proceedings.**

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(e) As soon as practicable after the petition or the petition and answer are filed, or after the expiration of any period for filing sworn statements or affidavits, the Commissioner shall issue a decision as to whether the protests are upheld or denied. The Commissioner may, following the protest proceeding, cancel any certificate issued and may grant another certificate for the same variety to a person who proves to the satisfaction of the Commissioner, that he or she is the breeder or discoverer. The decision shall be served upon the parties in the manner provided in § 97.403.

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PRIORITY CONTEST

**§ 97.220 Decision by the Commissioner.**

(a) When a priority contest is concluded on the basis of preliminary statements, or proposed findings of fact, conclusions and notice of priority shall be issued by the Commissioner to the interested parties, giving them a specified period, not less than 30 days, to show cause why such proposed findings of fact, conclusions, and notice of priority should not be made final. Any response made during the specified period will be considered by the Commissioner. Additional affidavits or exhibits will not be considered, unless accompanied by a showing of good cause acceptable to the Commissioner. Thereafter, final findings of act, conclusions, and notice of priority shall be issued by the Commissioner.

(b) The decision shall be entered by the Commissioner against a party whose preliminary statement alleges a date of determination later than the filing date of the other party's application.

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APPEAL TO THE SECRETARY

**§ 97.300 Petition to the Secretary.**

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

7 C.F.R. §§ 97.1, .2, .18(c), .107, .201(e), .220, .300(a) (footnote omitted).

**Discussion**

Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture “where an appeal is filed under section 63 of the Plant Variety Protection Act (7 U.S.C. 2443).”<sup>7</sup> Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides that an applicant for plant variety protection may appeal to the Secretary of Agriculture the Plant Variety Protection Office’s refusal to grant the applicant’s application for plant variety protection.

In this proceeding, Petitioner appeals the Commissioner’s denial of Petitioner’s requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement “[a]nybody is free to grow and market the turfgrass” attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week’s Superintendent News* (Pet. at 3). The Commissioner’s refusal to record an assignment is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). The Commissioner’s refusal to disavow a statement attributed to a Plant Variety Protection Office employee is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). Therefore, I have no authority to entertain Petitioner’s Petition.

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

### ORDER

Petitioner’s Petition is dismissed with prejudice. This Order shall become effective on the day after service of this Order on Petitioner.

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**In re: J.R. SIMPLOT COMPANY.**  
**PVPA Docket No. 02-0002.**  
**Decision and Order.**  
**Filed June 2, 2003.**

PVPA – Plant variety protection – Abandoned application – Revival of application – Appeal – Procedural rule – Substantive rule – Waiver of procedural rule – Authority – Basis for rule – Legal authority for rule – Recusal.

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<sup>7</sup>42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

The Judicial Officer (JO) affirmed Commissioner Paul M. Zankowski's denial of Petitioner's request for revival of an abandoned application for plant variety protection for a variety of creeping bentgrass known as "Lofts L-93." The JO agreed with the Commissioner that Petitioner's request for revival of the abandoned application was not filed within 3 months of abandonment as required by 7 C.F.R. § 97.22. The Judicial Officer rejected Petitioner's contentions that: (1) equity and justice required waiver of the 3-month deadline in 7 C.F.R. § 97.22; (2) the 3-month deadline in 7 C.F.R. § 97.22 was contrary to the Plant Variety Protection Act; (3) the Secretary of Agriculture had no authority to issue 7 C.F.R. § 97.22; (4) the United States Department of Agriculture did not explain the basis for or reference the legal authority for 7 C.F.R. § 97.22 in the relevant rulemaking documents; (5) 7 C.F.R. § 97.22 is so unclear that it cannot be enforced; and (6) Dr. Virginia Lehman, a member of the Plant Variety Protection Board and a person involved with the development of Lofts L-93, did not recuse herself from the Plant Variety Protection Board hearing conducted to provide advice to the Judicial Officer regarding Petitioner's Petition. It is a well established principal that agencies must follow their own regulations.

Robert A. Ertman, for Commissioner.

Richard G. Stoll and Richard C. Peet, for Petitioner.

Initial decision issued by Paul M. Zankowski, Commissioner, Plant Variety Protection Office, Science and Technology Programs, AMS, USDA.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

In June 2002, J.R. Simplot Company [hereinafter Petitioner] requested revival of an abandoned application for plant variety protection that had previously been filed with the Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Plant Variety Protection Office].<sup>1</sup> The application for plant variety protection that is the subject of Petitioner's request is for a variety of creeping bentgrass known as "Lofts L-93." The Plant Variety Protection Office designated the application as "PVP Application No. 9600256." Petitioner made its request pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act], and the regulations issued under the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations]. In July 2002, the Commissioner denied Petitioner's request stating PVP Application No. 9600256 had been abandoned on November 15, 2000, and the 3-month period for revival of abandoned plant variety protection applications, provided in 7 C.F.R. §

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<sup>1</sup>Letter dated June 28, 2002, from Richard C. Peet, to Paul M. Zankowski, Commissioner, Plant Variety Protection Office [hereinafter the Commissioner].

97.22, had expired on February 16, 2001.<sup>2</sup>

On September 20, 2002, Petitioner filed a “Petition Under 7 C.F.R. § 97.300 for Revival of PVP Application No. 9600256 in the Name of J.R. Simplot Company” [hereinafter Petition]. Petitioner requests that I: (1) waive the 3-month bar for revival of plant variety protection applications in 7 C.F.R. § 97.22 because the application of the bar under the facts in this proceeding would be unjust and inequitable; (2) grant Petitioner’s request for a revival of PVP Application No. 9600256 as a pending application; (3) direct the Commissioner to arrange a schedule with Petitioner’s representatives for the completion of the examination of PVP Application No. 9600256; and (4) direct the Commissioner to amend the public record to reflect that PVP Application No. 9600256 is still pending (Pet. at 30-31).

On December 4, 2002, the Commissioner filed an “Answer to Petition for Revival of Abandoned Application” [hereinafter Answer] requesting that I deny the Petition (Answer at 11). On December 10, 2002, Petitioner filed “Simplot’s Reply to Commissioner’s Answer to Simplot’s Petition for Revival of Application No. 9600256.”

Petitioner requested an informal conference pursuant to 7 C.F.R. § 97.300(d). On January 2, 2003, I held an informal conference in connection with the instant proceeding and a related proceeding captioned *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the Commissioner.

On February 18, 2003, pursuant to 7 U.S.C. § 2443, I requested that the Plant Variety Protection Board provide me with written advice regarding the Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition filed in the instant proceeding and Petitioner’s “Petition Under 7 C.F.R. § 97.300 for Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company” filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001. Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In*

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<sup>2</sup>Letter dated July 25, 2002, from the Commissioner to Richard C. Peet (Ex. B, attached to Pet.).

*re J.R. Simplot Company*, PVPA Docket No. 02-0002, “were fair and consistent with their [sic] handling of PVP applications” and to recommend that PVP Application No. 9600256 “should not be revived” (Transcript of the Plant Variety Protection Board Hearing at 78-80). On April 11, 2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

### TITLE 7—AGRICULTURE

.....

#### CHAPTER 57—PLANT VARIETY PROTECTION

##### SUBCHAPTER I—PLANT VARIETY PROTECTION OFFICE

###### PART A—ORGANIZATION AND PUBLICATIONS

#### § 2321. Establishment

There is hereby established in the Department of Agriculture an office to be known as the Plant Variety Protection Office, which shall have the functions set forth in this chapter.

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#### § 2326. Regulations

The Secretary may establish regulations, not inconsistent with law, for the conduct of proceedings in the Plant Variety Protection Office after consultations with the Plant Variety Protection Board.

#### § 2327. Plant Variety Protection Board

##### (a) Appointment

The Secretary shall appoint a Plant Variety Protection Board. The Board shall consist of individuals who are experts in various areas of varietal development covered by this chapter. Membership of the Board shall include farmer representation and shall be drawn approximately equally from the private or seed industry sector and from the sector of

government or the public. The Secretary or the designee of the Secretary shall act as chairperson of the Board without voting rights except in the case of ties.

**(b) Functions of Board**

The functions of the Plant Variety Protection Board shall include:

(1) Advising the Secretary concerning the adoption of Rules and Regulations to facilitate the proper administration of this chapter;

(2) Making advisory decisions on all appeals from the examiner. The Board shall determine whether to act as a full Board or by panels it selects; and whether to review advisory decisions made by a panel. For service on such appeals, the Board may select, as temporary members, experts in the area to which the particular appeal relates; and

(3) Advising the Secretary on all questions under section 2404 of this title.

**(c) Compensation of Board**

The members of the Plant Variety Protection Board shall serve without compensation except for standard government reimbursable expenses.

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SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND  
CERTIFICATES OF PROTECTION

PART D—PROTECTABILITY OF PLANT VARIETIES

....

**§ 2402. Right to plant variety protection; plant varieties protectable**

**(a) In general**

The breeder of any sexually reproduced or tuber propagated plant variety (other than fungi or bacteria) who has so reproduced the variety, or the successor in interest of the breeder, shall be entitled to plant variety protection for the variety, subject to the conditions and requirements of this chapter, if the variety is—

(1) new, in the sense that, on the date of filing of the application for plant variety protection, propagating or harvested material of the

variety has not been sold or otherwise disposed of to other persons, by or with the consent of the breeder, or the successor in interest of the breeder, for purposes of exploitation of the variety—

(A) in the United States, more than 1 year prior to the date of filing; or

(B) in any area outside of the United States—

(i) more than 4 years prior to the date of filing, except that in the case of a tuber propagated plant variety the Secretary may waive the 4-year limitation for a period ending 1 year after April 4, 1996; or

(ii) in the case of a tree or vine, more than 6 years prior to the date of filing;

(2) distinct, in the sense that the variety is clearly distinguishable from any other variety the existence of which is publicly known or a matter of common knowledge at the time of the filing of the application;

(3) uniform, in the sense that any variations are describable, predictable, and commercially acceptable; and

(4) stable, in the sense that the variety, when reproduced, will remain unchanged with regard to the essential and distinctive characteristics of the variety with a reasonable degree of reliability commensurate with that of varieties of the same category in which the same breeding method is employed.

.....  
PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

**§ 2441. Examination of application**

The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as hereinafter provided.

**§ 2442. Notice of refusal; reconsideration**

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of

continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

#### **§ 2443. Initial appeal**

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

### PART G—APPEALS TO COURTS AND OTHER REVIEW

#### **§ 2461. Appeals**

From the decisions made under sections 2404, 2443, 2501, and 2568 of this title appeal may, within sixty days or such further times as the Secretary allows, be taken under the Federal Rules of Appellate Procedure. The United States Court of Appeals for the Federal Circuit shall have jurisdiction of any such appeal.

#### **§ 2462. Civil action against Secretary**

An applicant dissatisfied with a decision under section 2443 or 2501 of this title, may, as an alternative to appeal, have remedy by civil action against the Secretary in the United States District Court for the District of Columbia. Such action shall be commenced within sixty days after such decision or within such further time as the Secretary allows. The court may, in the case of review of a decision by the Secretary refusing plant variety protection, adjudge that such applicant is entitled to receive a certificate of plant variety protection for the variety as specified in the application as the facts of the case may appear, on compliance with the requirements of this chapter.

PART H—CERTIFICATES OF PLANT VARIETY PROTECTION

.....

**§ 2483. Contents and term of plant variety protection**

**(a) Certificate**

(1) Every certificate of plant variety protection shall certify that the breeder (or the successor in interest of the breeder), has the right, during the term of the plant variety protection, to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

(2) If the owner so elects, the certificate shall—

(A) specify that seed of the variety shall be sold in the United States only as a class of certified seed; and

(B) if so specified, conform to the number of generations designated by the owner.

(3) An owner may waive a right provided under this subsection, other than a right that is elected by the owner under paragraph (2)(A).

(4) The Secretary may at the discretion of the Secretary permit such election or waiver to be made after certifying and amend the certificate accordingly, without retroactive effect.

**(b) Term**

**(1) In general**

Except as provided in paragraph (2), the term of plant variety protection shall expire 20 years from the date of issue of the certificate in the United States, except that—

(A) in the case of a tuber propagated plant variety subject to a waiver granted under section 2402(a)(1)(B)(i) of this title, the term of the plant variety protection shall expire 20 years after the date of the original grant of the plant breeder's rights to the variety outside the United States; and

(B) in the case of a tree or vine, the term of the plant variety protection shall expire 25 years from the date of issue of the certificate.

**(2) Exceptions**

If the certificate is not issued within three years from the effective filing date, the Secretary may shorten the term by the amount of delay in the prosecution of the application attributed by the Secretary to the applicant.

**(c) Expiration upon failure to comply with regulations; notice**

The term of plant variety protection shall also expire if the owner fails to comply with regulations, in force at the time of certifying, relating to replenishing seed in a public repository, or requiring the submission of a different name for the variety, except that this expiration shall not occur unless notice is mailed to the last owner recorded as provided in section 2531(d) of this title and the last owner fails, within the time allowed thereafter, not less than three months, to comply with said regulations, paying an additional fee to be prescribed by the Secretary.

7 U.S.C. §§ 2321, 2326-2327, 2402(a), 2441-2443, 2461-2462, 2483 (footnote omitted).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

.....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT  
OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE  
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),  
DEPARTMENT OF AGRICULTURE**

.....

**SUBCHAPTER E—COMMODITY LABORATORY  
TESTING PROGRAMS**

.....

**PART 97—PLANT VARIETY AND PROTECTION**

SCOPE

**§ 97.1 General.**

Certificates of protection are issued by the Plant Variety Protection office for new, distinct, uniform, and stable varieties of sexually reproduced or tuber propagated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

DEFINITIONS

**§ 97.2 Meaning of words.**

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

*Abandoned application.* An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

*Act.* The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

....

*Applicant.* The person who applied for a certificate of plant variety protection.

*Application.* An application for plant variety protection under the Act.

*Assignee.* A person to whom an owner assigns his/her rights in whole or in part.

....

*Certificate.* A certificate of plant variety protection issued under the Act by the Office.

....

*Commissioner.* The Examiner in Chief of the Office.

....

*Examiner.* An employee of the Plant Variety Protection Office who determines whether a certificate is entitled to be issued. The term shall,

in all cases, include the Commissioner.

.....  
*Office or Plant Variety Protection Office.* The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

.....  
*Owner.* A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

#### ADMINISTRATION

### § 97.3 Plant Variety Protection Board.

(a) The Plant Variety Protection Board shall consist of 14 members appointed for a 2-year term. The Board shall be appointed every 2 years and shall consist of individuals who are experts in various areas of varietal development. The membership of the Board, which shall include farmer representation, shall be drawn approximately equally from the private or seed industry sector and from the government or public sector. No member shall be eligible to act on any matter involving any appeal or questions under section 44 of the Act, in which the member or his or her employer has a direct financial interest.

(b) The functions of the Board are to:

- (1) Advise the Secretary concerning adoption of rules and regulations to facilitate the proper administration of the Act;
- (2) Make advisory decisions on all appeals from the examiner or Commissioner;
- (3) Advise the Secretary on the declaration of a protected variety open to use in the public interest; and
- (4) Advise the Secretary on any other matters under the regulations in this part.

(c) The proceedings of the Board shall be conducted in accordance with the Federal Advisory Committee Act, Administrative Regulations of the U.S. Department of Agriculture (7 CFR part 25), and such additional operating procedures as are adopted by members of the Board.

#### THE APPLICATION

### § 97.20 Abandonment for failure to respond within the time limit.

(a) Except as otherwise provided in § 97.104, if an applicant fails to advance actively his or her application within 30 days after the date when the last request for action was mailed to the applicant by the Office, or within such longer time as may be fixed by the Commissioner, the application shall be deemed abandoned. The application fee in such cases will not be refunded.

(b) The submission of an amendment to the application, not responsive to the last request by the Office for action, and any proceedings relative thereto, shall not operate to save the application from abandonment.

(c) When the applicant makes a bona fide attempt to advance the application, and is in substantial compliance with the request for action, but has inadvertently failed to comply with some procedural requirement, opportunity to comply with the procedural requirement shall be given to the applicant before the application shall be deemed abandoned. The Commissioner may set a period, not less than 30 days, to correct any deficiency in the application.

**§ 97.21 Extension of time for reply.**

The time for reply by an applicant to a request by the Office for certain action, shall be extended by the Commissioner only for good and sufficient cause, and for a specified reasonable time. A request for extension and appropriate fee shall be filed on or before the specified time for reply. In no case shall the mere filing of a request for extension require the granting of an extension or state the time for reply.

**§ 97.22 Revival of an application abandoned for failure to reply.**

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

**§ 97.23 Voluntary withdrawal and abandonment of an application.**

(a) An application may be voluntarily withdrawn or abandoned by submitting to the Office a written request for withdrawal or abandonment, signed by the applicant or his or her attorney of record, if any, or the assignee of record, if any.

(b) An application which has been voluntarily abandoned may be revived within 3 months of such abandonment by the payment of the prescribed fee and a showing that the abandonment occurred without fraudulent intent.

(c) An original application which has been voluntarily withdrawn shall be returned to the applicant and may be reconsidered only by refiling and payment of a new application fee.

....

#### APPEAL TO THE SECRETARY

#### **§ 97.300 Petition to the Secretary.**

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

....

(d) Upon request, an opportunity to present data, views, and arguments orally, in an informal manner or in a formal hearing, shall be given to interested persons. If a formal hearing is requested, the proceeding shall be conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under various Statutes set forth in §§ 1.130 through 1.151 of this title.

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#### **§ 97.302 Decision by the Secretary.**

(a) The Secretary, after receiving the advice of the Board, may affirm or reverse the decision of the Commissioner, in whole or in part.

(b) Should the decision of the Secretary include an explicit statement that a certificate be allowed, based on an amended application, the applicant shall have the right to amend his or her application in conformity with such statement and such decision shall be binding on the Commissioner.

....

#### REVIEW OF DECISIONS BY COURT

**§ 97.500 Appeal to U.S. Courts.**

Any applicant dissatisfied with the decision of the Secretary on appeal may appeal to the U.S. Court of Customs and Patent Appeals or the U.S. Courts of Appeals, or institute a civil action in the U.S. District Court as set forth in the Act. In such cases, the appellant or plaintiff shall give notice to the Secretary, state the reasons for appeal or civil action, and obtain a certified copy of the record. The certified copy of the record shall be forwarded to the Court by the Plant Variety Protection Office on order of, and at the expense of the appellant or plaintiff

7 C.F.R. §§ 97.1-3, .20-23(a)-(c), .300(a), (d), .302, .500.

**PETITIONER'S RIGHT TO APPEAL  
UNDER 7 U.S.C. § 2443 AND 7 C.F.R. § 97.300(a)**

Prior to addressing the merits, Petitioner's right to appeal the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a) and my authority to consider Petitioner's appeal, should be briefly addressed.

Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides, when the Plant Variety Protection Office refuses an application for plant variety protection, the applicant may appeal to the Secretary of Agriculture. Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture where an appeal from a refusal of an application for plant variety protection is filed under 7 U.S.C. § 2443.<sup>3</sup> The Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 is not literally a refusal of an application for plant variety protection. Nonetheless, the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256 as a pending application has the same effect as a refusal of an application for plant variety protection. Therefore, while not free from doubt, I conclude: (1) Petitioner properly instituted its appeal of the Commissioner's denial of Petitioner's request for revival under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a); and (2) Petitioner's appeal of the Commissioner's denial of Petitioner's request for revival falls within the authority delegated to the Judicial Officer by the Secretary of

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<sup>3</sup>68 Fed. Reg. 27,431-50 (May 20, 2003) (to be codified at 7 C.F.R. § 2.35(a)(8)). *See also* 42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

Agriculture to hear appeals filed under 7 U.S.C. § 2443.

### INTRODUCTION

Section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)) provides parties to a proceeding instituted under 7 C.F.R. § 97.300(a) the right to present their positions in an informal manner or in a formal hearing conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). Petitioner chose the opportunity to present its position in an informal manner rather than in a formal hearing. Consequently, the record contains no exhibits that have been received into evidence and no testimony given under oath or affirmation and subject to cross-examination. Instead, the record consists of, and my findings of fact are based upon, the filings by Petitioner and the Commissioner and the presentations given by Petitioner and the Commissioner at the January 2, 2003, informal conference and the March 5, 2003, Plant Variety Protection Board hearing. A review of the filings and transcripts of the presentations by Petitioner and the Commissioner reveals that the salient facts are not in dispute. Instead, Petitioner and the Commissioner dispute the conclusions that should be drawn from those facts.

### FINDINGS OF FACT

1. Petitioner is an agribusiness headquartered in Boise, Idaho. One of Petitioner's business lines is turf and horticulture. Petitioner's Jacklin Seed Division is a producer and marketer of grass seed for golf course and other uses. (Pet. at 3.)

2. One variety of golf course grass is a creeping bentgrass known as "Lofts L-93." Lofts Seed, Inc. originally developed the Lofts L-93 variety. Dr. Virginia Lehman, a member of the Plant Variety Protection Board, is one of the scientists who developed Lofts L-93 on behalf of Lofts Seed, Inc. On May 8, 1996, Lofts Seed, Inc. filed an application for a certificate of plant variety protection for Lofts L-93 with the Plant Variety Protection Office. The Plant Variety Protection Office designated the application "PVP Application No. 9600256." (Pet. at 3-4.)

3. In a letter dated January 21, 1999, to Dr. Virginia Lehman, the Plant Variety Protection Office requested that Lofts Seed, Inc. provide additional information regarding PVP Application No. 9600256 on or before April 21, 1999, as follows:

All requested information must be in the Plant Variety Protection Office on or before **April 21, 1999**, or this application will be deemed abandoned. A proposal for an extension of time to supply the requested information may be made on or before the deadline specified above. Such a request must be accompanied by a \$50 fee and an explanation of why additional time is necessary, the amount of time required, as well as a detailed plan explaining how the information will be obtained if the extension is granted. See sections 97.20 through 97.23, 97.104, and 97.175 of the Regulations and Rules of Practice under the Plant Variety Protection Act for information on extensions and abandoned applications.

Ex. A, Tab 9 at 2, attached to Pet. (emphasis in original).

4. Dr. Virginia Lehman requested that the Plant Variety Protection Office extend the time for providing the requested additional information to November 15, 2000. The Plant Variety Protection Office extended the time for receipt of the requested additional information to November 1, 2000. Subsequently, the Plant Variety Protection Office extended the time for receipt of the requested additional information to November 15, 2000. (Ex. A, Tabs 10 and 12, attached to Pet.)

5. In 1999, AgriBioTech, Inc. acquired Lofts Seed, Inc. and thereby obtained an ownership interest in Lofts L-93. In December 1999, AgriBioTech, Inc. notified the Plant Variety Protection Office of its interest in Lofts L-93 and PVP Application No. 9600256 and stated Dr. Virginia Lehman was authorized to deal with all of AgriBioTech, Inc.'s Plant Variety Protection Act "grass applications." (Pet. at 4-5; Ex. A, Tabs 2-3, attached to Pet.)

6. On January 25, 2000, AgriBioTech, Inc. filed for bankruptcy protection in the United States Bankruptcy Court for the District of Nevada. Petitioner, Budd Seed, and ProSeeds Marketing, Inc. purchased the majority of AgriBioTech, Inc.'s turf-seed assets, including the rights to Lofts L-93 and the rights to PVP Application No. 9600256. Petitioner, Budd Seed, and ProSeeds Marketing, Inc. split the assets which they purchased out of the AgriBioTech, Inc. bankruptcy, and on July 31, 2000, Petitioner became the sole owner of Lofts L-93. (Pet. at 5; Ex. A at 2, attached to Pet.; Ex. A, Tab 4, attached to Pet.; Transcript of the Informal Conference at 10-12.)

7. In a letter dated December 8, 2000, the Plant Variety Protection Office informed Dr. Virginia Lehman that, as the November 15, 2000, deadline for providing the Plant Variety Protection Office with additional information had passed, PVP Application No. 9600256 was considered abandoned, as follows:

We have not received the information requested by the extended deadline of November 15, 2000. Since the information requested was not received within the extended time period, the subject application is considered permanently abandoned as of November 16, 2000.

Ex. A, Tab 12, attached to Pet.

8. Until approximately late March 2001, Petitioner was unaware of the November 15, 2000, deadline for providing the Plant Variety Protection Office with additional information and the abandoned status of PVP Application No. 9600256 that took effect beginning November 16, 2000. The Plant Variety Protection Office website listed the PVP Application No. 9600256 applicant as “AgriBioTech, Inc.” and the status of PVP Application No. 9600256 as “Application Pending” at least until March 22, 2001. During the period following Petitioner’s acquisition of Lofts L-93, Petitioner used the Plant Variety Protection Office website to track the status of PVP Application No. 9600256. (Pet. at 6; Ex. A at 5, attached to Pet.; Ex. A, Tab 17, attached to Pet.)

9. Petitioner first contacted the Plant Variety Protection Office regarding Lofts L-93 by letter dated March 22, 2001. In that letter, Petitioner requested that the Plant Variety Protection Office record the assignment from AgriBioTech, Inc. to Petitioner of various plant varieties, including Lofts L-93. Dr. A. Douglas Brede, Research Director at Petitioner’s Jacklin Seed Division, learned that the Plant Variety Protection Office considered PVP Application No. 9600256 abandoned, and in a letter dated March 29, 2001, requested that the Plant Variety Protection Office “lift the abandonment of the ‘L-93’ PVP application.” (Pet. at 6; Ex. A at 7, attached to Pet.; Ex. A, Tabs 4, 19, and 32, attached to Pet.)

10. In a letter dated April 20, 2001, the Plant Variety Protection Office responded to Petitioner’s March 29, 2001, letter stating the Plant Variety Protection Office had declared PVP Application No. 9600256 permanently abandoned, as follows:

On November 16, 2000, in accordance with section 97.20(a) of the Regulations and Rules of Practice under the Plant Variety Protection Act (PVPA), application for [Lofts L-93] was declared abandoned. In accordance with section 97.22, the applicant was given 3 months to revive the abandoned application. This Office, having received no request from the applicant’s representative, declared the application permanently abandoned.

Ex. A, Tab 33, attached to Pet.

11. In a letter dated May 13, 2002, the Commissioner denied Petitioner's request to record the assignment of Lofts L-93 from AgriBioTech, Inc. to Petitioner. In that letter, the Commissioner states the denial of Petitioner's request to record the assignment is not a determination of Petitioner's right to revive PVP Application No. 9600256 as a pending application, as follows:

This is not a determination that Simplot does not possess some residual interest in the abandoned application, including the right to pursue its revival as a pending application. The procedure for the revival of an application abandoned for failure to advance the application is to submit a request to the Commissioner showing the cause of the failure to respond, a response to the last request for action, and the required fee (7 CFR 97.22). Such a request must be timely.

Ex. A, Tab 1, attached to Pet.

12. In June 2002, Petitioner requested revival of PVP Application No. 9600256 (Ex. A, attached to Pet.). The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 as a pending application in a letter dated July 25, 2002, which states as follows:

Upon reconsideration, the request of J.R. Simplot Company ("Simplot") to revive the abandoned application for 'Lofts L-93' is denied.

The revival of an abandoned application is governed by Section 97.22 of the regulations (7 C.F.R. 97.22), which provides as follows:

97.22 Revival of an application abandoned for failure to reply.

An application abandoned for failure on the part of the applicant to advance actively his or her application to its completion, in accordance with the regulations in this part, may be revived as a pending application within 3 months of such abandonment, upon a finding by the Commissioner that the failure was inadvertent or unavoidable and without fraudulent intent. A request to revive an abandoned application shall be accompanied by a written statement showing the cause of the failure to respond, a response to the last request for action, and by the specified fee.

The Plant Variety Protection Office (“PVPO”) recognizes Simplot as the successor in interest to AgriBioTech, Inc. (the successor to the original applicant) and entitled to pursue the revival of the abandoned application.

On March 22, 2001, Simplot wrote to the PVPO, requesting that the assignment of various certificates of protection and applications, including the application at issue, be recorded. This was the first communication from Simplot regarding the application. Within a few days, Simplot was informed that the application had been abandoned and on March 29, 2001, Simplot wrote asking for a waiver of the time limits. It is undisputed that the application was abandoned by Simplot’s predecessor on November 15, 2000, by failing to respond to a request for information from the PVPO by that deadline.

Simplot contends that the abandoned application should be revived because the failure to actively advance the certificate is not attributable to Simplot and because the delay in responding to the communication was inadvertent and without fraudulent intent attributable to Simplot. In particular, Simplot contends that it faced “numerous roadblocks” in its attempt to actively advance the application. These included the negligence of its predecessor (and its predecessor’s agents) in allowing the abandonment, the general disarray of its predecessor’s records and property, and “the unwillingness of the PVPO to allow Simplot access to the property purchased subject to the Bankruptcy Court’s order.” (Petition, p. 3)

In retrospect, PVPO should have provided Simplot access to a copy of the abandoned application and related correspondence. Simplot was the successor in interest to the applicant of record and the matter of the recognition of the assignment should have been distinguished from the question of the recordability of an abandoned application. However, this delay played no part in the permanent abandonment of the application. The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot’s first communication with the PVPO.

As stated in the letter of May 13, 2002, denying the request that the abandoned application be recorded, any request to revive an abandoned

application must be timely. It is unfortunate that the application was not actively advanced by Simplot's predecessors and was abandoned. Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it.

Accordingly, the request to return application no. 9600256 for the variety 'Lofts L-93' to pending status must be denied.

Ex. B, attached to Pet.

13. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to advise the Judicial Officer on the Petition. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise the Judicial Officer that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, "were fair and consistent" with its handling of plant variety protection applications and to recommend that PVP Application No. 9600256 "should not be revived." (Transcript of the Plant Variety Protection Board Hearing at 78-80.)

#### CONCLUSIONS OF LAW

Based on the Findings of Fact in this Decision and Order, I conclude:

1. Petitioner properly instituted its appeal of the Commissioner's denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);
2. The Secretary of Agriculture has jurisdiction to hear Petitioner's appeal from the Commissioner's denial of its request for revival of PVP Application No. 9600256 under 7 U.S.C. § 2443 and 7 C.F.R. § 97.300(a);
3. Petitioner's appeal of the Commissioner's denial of its request for revival of PVP Application No. 9600256 falls within the authority delegated to the Judicial Officer by the Secretary of Agriculture to hear appeals filed under 7 U.S.C. § 2443;
4. The failure to advance PVP Application No. 9600256 was not "unavoidable" as that term is used in 7 C.F.R. § 97.22;
5. The failure to advance PVP Application No. 9600256 was "inadvertent" and "without fraudulent intent" as those terms are used in 7 C.F.R. § 97.22;
6. PVP Application No. 9600256 was abandoned effective November 16, 2000;
7. PVP Application No. 9600256 was not revived as a pending application

within 3 months following abandonment as required by 7 C.F.R. § 97.22; and

8. The Commissioner's denial of Petitioner's request to revive PVP Application No. 9600256 as a pending application, which Petitioner submitted after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired, was not error.

## **DISCUSSION**

### **Petitioner's Petition**

Section 97.22 of the Regulations (7 C.F.R. § 97.22) provides that an application abandoned for failure on the part of an applicant to advance the application may be revived as a pending application within 3 months of the abandonment, upon a finding by the Commissioner that the failure to advance the application was inadvertent or unavoidable and without fraudulent intent. The filings and presentations by the parties establish that PVP Application No. 9600256 was not advanced and was abandoned effective November 16, 2000; thus, the 3-month period for revival of PVP Application No. 9600256 as a pending application expired February 16, 2001. Neither the applicant of record, AgriBioTech, Inc. nor Petitioner requested revival of PVP Application No. 9600256 as a pending application during the 3-month period for revival provided in 7 C.F.R. § 97.22. Petitioner first communicated with the Plant Variety Protection Office regarding PVP Application No. 9600256 in a letter dated March 22, 2001, 1 month 6 days after the 3-month period for revival provided in 7 C.F.R. § 97.22 had expired. Petitioner requested revival of PVP Application No. 9600256 in a letter dated June 28, 2002. The Commissioner denied Petitioner's request for revival of PVP Application No. 9600256 because the time for possible revival expired before Petitioner attempted to revive PVP Application No. 9600256. Petitioner appeals the Commissioner's denial of its request to revive PVP Application No. 9600256 as a pending application.

Petitioner raises seven issues in its Petition. First, Petitioner contends the 3-month period for revival of abandoned applications in 7 C.F.R. § 97.22 is a procedural rule that the United States Department of Agriculture may waive when justice requires. Petitioner argues that justice requires a waiver of the deadline for revival of PVP Application No. 9600256. (Pet. at 13-17.) The Commissioner apparently agrees that 7 C.F.R. § 97.22 is a procedural rule but states: "No case has held that an agency cannot issue procedural rules and then follow them. Procedural rules are rules, not suggestions." (Answer at 8.)

I agree with Petitioner's contention that the 3-month revival period in 7 C.F.R. § 97.22 is a procedural rule. However, once an applicant abandons an

application for plant variety protection and the period for reviving the application has expired, the abandoned application is permanently abandoned and the Commissioner then has no application before him. With no application before him, the Commissioner cannot change the status of the application from “permanently abandoned” to “pending.”

Moreover, even if I found the Commissioner could have waived the deadline for revival of PVP Application No. 9600256 after February 16, 2001, I would not find that the Commissioner erred by failing to waive the deadline. Petitioner, relying on *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), contends a long-established principle of administrative law permits agencies to waive procedural regulations when justice requires (Pet. at 13). However, equally well-established is the principle that ordinarily agencies must follow their own regulations.<sup>4</sup>

Petitioner cites three cases in which agencies waived procedural regulations and on judicial review each agency waiver was upheld (Pet. at 13-15).<sup>5</sup> While these cases support Petitioner’s general point that an agency may, under limited circumstances, waive procedural rules, the cases are not applicable to the instant proceeding in which the Commissioner did not waive 7 C.F.R. § 97.22 but, instead, followed the regulation.

Petitioner cites one case, *Spitzer Great Lakes Ltd. v. EPA*, 173 F.3d 412 (6th Cir. 1999), in which the Court held the Environmental Protection Agency abused its discretion by refusing to waive a procedural regulation where an appellant in an agency proceeding relied upon and complied with materially misleading information provided by the agency. However, the facts in the instant proceeding are not similar to those in *Spitzer Great Lakes Ltd.* In the instant proceeding, Petitioner first contacted the Commissioner regarding Lofts L-93 in a letter dated March 22, 2001, 1 month 6 days after the period for reviving PVP Application No. 9600256 had expired. Therefore, unlike *Spitzer Great Lakes Ltd.*, there was no agency communication to Petitioner that could

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<sup>4</sup>*St. Anthony Hospital v. HHS*, 309 F.3d 680, 709 (10th Cir. 2002); *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir.), *cert. denied*, 530 U.S. 1270 (2000); *Bergamo v. CFTC*, 192 F.3d 78, 79 (2d Cir. 1999); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997); *Oy v. United States*, 61 F.3d 866, 871 (2d Cir. 1995); *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 582 (D.C. Cir. 1994); *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

<sup>5</sup>Specifically, Petitioner cites *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *Fried v. Hinson*, 78 F.3d 688 (D.C. Cir. 1996); and *Oy v. United States*, 61 F.3d 899 (Fed. Cir. 1995).

have caused or contributed to Petitioner's failure to revive PVP Application No. 9600256 prior to the expiration of the revival period. The record establishes the Commissioner did not know and did not have reason to know that Petitioner had any interest in Lofts L-93 or PVP Application No. 9600256 until after the period for revival of the abandoned application had expired. The record also establishes the Commissioner provided accurate information regarding the status of PVP Application No. 9600256 to AgriBioTech, Inc. the applicant of record.

Petitioner asserts a number of facts illustrate the injustice that follows from the Commissioner's refusal to waive the deadline for revival of PVP Application No. 9600256. Petitioner contends AgriBioTech, Inc. only provided Petitioner with limited access to its chaotic and uninformative business records regarding Lofts L-93 and other purchases; AgriBioTech, Inc. and Dr. Virginia Lehman failed to cooperate with Petitioner regarding Lofts L-93 and PVP Application No. 9600256; AgriBioTech, Inc. and Dr. Virginia Lehman allowed PVP Application No. 9600256 to become abandoned; and neither AgriBioTech, Inc. nor Dr. Virginia Lehman informed Petitioner of the status of PVP Application No. 9600256 (Pet. at 15-17). I find the purported lack of communication and cooperation between Petitioner and AgriBioTech, Inc. unfortunate. However, the Commissioner did not cause the lack of communication and cooperation between Petitioner and AgriBioTech, Inc. and prior to the expiration of the revival period, the Commissioner did not know or have reason to know about the lack of communication and cooperation between Petitioner and AgriBioTech, Inc. I do not find Petitioner's business relationships with AgriBioTech, Inc. and with Dr. Virginia Lehman compel the Commissioner to waive the deadline for revival of PVP Application No. 9600256.

Petitioner also contends the Commissioner's refusal is unjust because of purportedly confusing Plant Variety Protection Office communications provided Petitioner. Petitioner references two letters, one dated April 20, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the other dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf (Pet. at 17; Ex. A, Tabs 1 and 33, attached to Pet.), which Petitioner found confusing. The Plant Variety Protection Office and the Commissioner sent Petitioner these letters after the period for revival of PVP Application No. 9600256 had expired; thus, the letters could not have caused or contributed to Petitioner's failure to request revival of PVP Application No. 9600256 within the 3-month period provided in 7 C.F.R. § 97.22. Therefore, I do not find the letters dated April 20, 2001, and May 13, 2002, support Petitioner's contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Finally, Petitioner asserts the Plant Variety Protection Office website listed PVP Application No. 9600256 as “‘pending’ well into March of 2001.” (Pet. at 16.) I find the Commissioner’s inaccurate website troubling. However, the website contains information for the public and the Commissioner also communicates directly with the applicant of record (Transcript of the Informal Conference at 59). The Commissioner communicated with the applicant of record, AgriBioTech, Inc. regarding the status of PVP Application No. 9600256. The record establishes that the Commissioner accurately informed AgriBioTech, Inc. of the status of PVP Application No. 9600256, the date on which PVP Application No. 9600256 became abandoned, and the date on which the period for revival of PVP Application No. 9600256 as a pending application would expire. Petitioner became sole owner of Lofts L-93 on July 31, 2000, and could have become the applicant of record at any time after July 31, 2000, merely by submitting a request to the Commissioner (Transcript of the Informal Conference at 59). Petitioner did not request to become the applicant of record prior to the expiration of the period for revival of PVP Application No. 9600256, and the Commissioner, as he was required to do, continued to communicate with AgriBioTech, Inc. I do not find, under these circumstances, that the inaccurate Plant Variety Protection Office website supports Petitioner’s contention that justice requires that the Commissioner waive the deadline for revival of PVP Application No. 9600256.

Second, Petitioner contends the Plant Variety Protection Act explicitly addresses delay caused by an applicant in a manner directly contrary to the 3-month revival period in 7 C.F.R. § 97.22. Petitioner correctly points out that 7 U.S.C. § 2483(b) limits the term of a certificate of plant variety protection to 20 years from the date of issuance of the certificate in the United States<sup>6</sup> and provides, if the certificate is not issued within 3 years from the effective filing date of the application for the certificate, the Secretary of Agriculture may shorten the term of the certificate by the amount of delay in prosecution of the application attributable to the applicant. Petitioner states, rather than authorizing the Secretary of Agriculture to declare an application abandoned, Congress authorized the Secretary of Agriculture to reduce the period of plant variety protection afforded by a certificate for delay the Secretary of Agriculture determines is attributable to the applicant. (Pet. at 19-20.) The Commissioner

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<sup>6</sup>In the case of a tuber propagated plant variety subject to a waiver granted under 7 U.S.C. § 2402(a)(1)(B)(i), the term of a certificate of plant variety protection is 20 years after the date of the original grant of the plant breeder’s rights to the variety outside the United States. In the case of a tree or vine, the term of a certificate of plant variety protection is 25 years from the date of issuance of the certificate. 7 U.S.C. § 2483(b)(1)(A), (B).

did not respond to this issue in his Answer.

I find nothing in the Plant Variety Protection Act to indicate that Congress intended 7 U.S.C. § 2483(b) as a limitation on the Secretary of Agriculture's authority in 7 U.S.C. § 2326 to establish regulations for the conduct of proceedings in the Plant Variety Protection Office or that Congress intended 7 U.S.C. § 2483(b)(2) to be the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection.<sup>7</sup> Therefore, I reject Petitioner's contention that the Secretary of Agriculture is not authorized to promulgate regulations to provide for abandonment of an application when an applicant fails to advance the application and to limit the period during which an abandoned application may be revived as a pending application.

Third, Petitioner contends the 3-month revival deadline is inconsistent with the Plant Variety Protection Act. Citing 7 U.S.C. § 2402(a), Petitioner states Congress established only four criteria for obtaining plant variety protection. The applicant must show the variety that is the subject of the application is: (1) new, (2) distinct, (3) uniform, and (4) stable. Petitioner contends a regulation that cuts off an applicant's right to demonstrate a plant variety meets these four criteria solely because an administrative deadline is missed violates this statutory provision. (Pet. at 18-22, 29-30.) The Commissioner responds that 7 C.F.R. § 97.22 is authorized by the Plant Variety Protection Act and, in particular, by 7 U.S.C. § 2442(b) (Answer at 2-5).

Entitlement to plant variety protection is subject to the conditions and requirements of the Plant Variety Protection Act.<sup>8</sup> The Plant Variety Protection Act does not provide that the only condition for obtaining plant variety protection is the applicant's showing that the variety that is the subject of the application is new, distinct, uniform, and stable. Congress explicitly provided other conditions and requirements necessary to obtain a certificate of plant variety protection. For example, 7 U.S.C. § 2421(a) requires an applicant to file a signed written application accompanied by a fee and 7 U.S.C. § 2481(b) requires the payment of a fee and deposit in a public repository of a viable sample of basic seed necessary for the propagation of the variety, prior to the

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<sup>7</sup>If 7 U.S.C. § 2483(b)(2) were the exclusive mechanism to discourage applicant delay in the prosecution of an application for a certificate of plant variety protection, an applicant could delay the disposition of an application for years without jeopardizing the applicant's opportunity to obtain plant variety protection albeit for a shorter period than the maximum period provided in 7 U.S.C. § 2483(b)(1).

<sup>8</sup>7 U.S.C. § 2402(a).

issuance of a certificate of plant variety protection. As for limitations on the time for applicant action, Congress explicitly authorized the Secretary of Agriculture to establish a time for applicant action after the Secretary of Agriculture mails the applicant notice of an action other than an allowance of plant variety protection.<sup>9</sup> An applicant that fails to take action within the time set by the Secretary of Agriculture has failed to comply with the conditions and requirements of the Plant Variety Protection Act. Moreover, Congress explicitly authorized the Secretary of Agriculture to establish regulations for the conduct of proceedings in the Plant Variety Protection Office.<sup>10</sup> The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office, and 7 C.F.R. § 97.22 is a regulation for the conduct of that proceeding. Therefore, I reject Petitioner's contention that the 3-month period for revival of an abandoned application in 7 C.F.R. § 97.22, is inconsistent with the Plant Variety Protection Act.

Fourth, Petitioner asserts the Secretary of Agriculture is only authorized by the Plant Variety Protection Act to issue procedural rules for the conduct of proceedings within the Plant Variety Protection Office. Petitioner contends, as construed by the Commissioner, 7 C.F.R. § 97.22 is an absolute unwaivable bar to revival of an abandoned application and does not operate as a procedural rule; therefore, as construed by the Commissioner, the Secretary of Agriculture has no authority to issue 7 C.F.R. § 97.22. (Pet. at 22-23.)

Section 6 of the Plant Variety Protection Act (7 U.S.C. § 2326) authorizes the Secretary of Agriculture to promulgate regulations for the conduct of proceedings in the Plant Variety Protection Office. The process for the examination of an application for plant variety protection is a proceeding conducted in the Plant Variety Protection Office. Section 97.22 of the Regulations (7 C.F.R. § 97.22), which limits the time for revival of abandoned applications for plant variety protection, is a regulation for the conduct of those proceedings; thus, the Secretary of Agriculture is authorized by 7 U.S.C. § 2326 to promulgate 7 C.F.R. § 97.22.

As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, even if I found the Secretary of Agriculture is only authorized to promulgate procedural rules under 7 U.S.C. § 2326, as Petitioner contends, I would not find that 7 C.F.R. § 97.22 is beyond the authority granted to the Secretary of Agriculture.

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<sup>9</sup>7 U.S.C. § 2442(b).

<sup>10</sup>7 U.S.C. § 2326.

Petitioner appears to take the position that since 7 C.F.R. § 97.22, as construed by the Commissioner, prohibits Petitioner from obtaining a certificate of plant variety protection for Lofts L-93, 7 C.F.R. § 97.22 is a substantive rule. I disagree. A procedural rule is a rule that itself does not alter the rights or interests of the parties although it may alter the manner in which the parties present themselves to the agency.<sup>11</sup> A substantive rule, in contrast, puts a stamp of agency approval or disapproval on a given type of behavior.<sup>12</sup> Section 97.22 of the Regulations (7 C.F.R. § 97.22) does not itself alter rights or place a stamp of approval or disapproval on a given type of behavior. Instead, 7 C.F.R. § 97.22 limits the time during which an applicant may request revival of an abandoned application for plant variety protection and requires that the request for revival be accompanied by a fee and a written statement addressing issues pertinent to the abandonment of the application. I find 7 C.F.R. § 97.22 is at the procedural end of the spectrum running from “procedural” to “substantive.” Even unambiguously procedural rules can affect the outcome of an agency proceeding.<sup>13</sup> Section 97.22 of the Regulations (7 C.F.R. § 97.22) is not changed from a procedural rule to a substantive rule merely because the time limit in 7 C.F.R. § 97.22 affects Petitioner’s right to obtain a certificate of plant variety protection for Lofts L-93.

Fifth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United

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<sup>11</sup>*Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

<sup>12</sup>*Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999); *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

<sup>13</sup>*See generally Freund v. Nycomed Amersham*, 326 F.3d 1070, 1079 n.9 (9th Cir. 2003) (stating the fact that a procedural rule may affect the outcome of an appeal does not make the rule substantive); *Chamber of Commerce of the United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (stating even a purely procedural rule can affect the substantive outcome of an agency proceeding); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citing with approval *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961), in which the court held a rule was procedural even though failure to observe the rule might cause the loss of substantive rights); *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (stating our circuit, in applying the 5 U.S.C. § 553 exemption for procedural rules, has gradually shifted focus from asking whether a given procedure has a substantial impact on the parties to inquiring whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior; the gradual move away from looking solely into the substantiality of the impact reflects a recognition that even unambiguously procedural measures affect parties to some degree); *Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961) (stating all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one).

States Department of Agriculture did not explain the rationale for the 3-month deadline for revival of an abandoned application (Pet. at 24-28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include either the terms or substance of the proposed rule or a description of the subjects and issues involved and that the final rulemaking document contain a concise general statement of the basis and purpose of the final rule.<sup>14</sup> However, these rulemaking requirements do not apply to rules of agency organization, procedure, or practice.<sup>15</sup> As discussed in this Decision and Order, *supra*, I agree with Petitioner's and the Commissioner's position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to include in the pertinent rulemaking documents an explanation of the basis and purpose for the 3-month period for revival in 7 C.F.R. § 97.22.

Moreover, the United States Department of Agriculture did explain the basis for the 3-month period during which an applicant may revive an application abandoned for failure to advance the application. In April 1972, the United States Department of Agriculture issued a notice of proposed rulemaking in which it proposed regulations to implement the Plant Variety Protection Act.<sup>16</sup> On October 28, 1972, the United States Department of Agriculture published a final rulemaking document adopting the proposed regulations.<sup>17</sup> The October 1972 final rule has separate provisions for revival of applications abandoned for failure to advance the applications to completion and for revival of applications voluntarily abandoned. The final regulation includes a 3-month period for the revival of voluntarily abandoned applications but provides no limitation on the time for the revival of applications abandoned for failure to advance the applications to completion.<sup>18</sup>

The United States Department of Agriculture published a notice of proposed rulemaking in 1976, in which, *inter alia*, it proposed to provide the same

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<sup>14</sup>5 U.S.C. § 553(b)(3), (c).

<sup>15</sup>5 U.S.C. § 553(b)(A).

<sup>16</sup>37 Fed. Reg. 7672 (Apr. 18, 1972).

<sup>17</sup>37 Fed. Reg. 23,140 (Oct. 28, 1972). These final regulations were codified in 7 C.F.R. pt. 180. In 1993, the Plant Variety Protection Regulations were codified in 7 C.F.R. pt. 97, where they can currently be found (58 Fed. Reg. 42,435 (Aug. 9, 1993)).

<sup>18</sup>37 Fed. Reg. 23,144 (Oct. 28, 1972); 7 C.F.R. §§ 180.22, .23 (1973).

3-month period for revival of applications abandoned for failure to advance the applications to completion as it provided for revival of voluntarily abandoned applications. The preamble in the notice of proposed rulemaking states: in order to make the provisions for revival of an application “consistent, it is proposed that an application abandoned for either reason, if revived, must be revived within 3 months.”<sup>19</sup> The United States Department of Agriculture adopted the proposed regulation and the preamble of the final rulemaking document provides the same reason for the amendment as was previously provided in the notice of proposed rulemaking.<sup>20</sup>

Petitioner contends there is no rational basis for making the two revival provisions consistent. However, the adoption of consistent time limits is important when viewed in light of the Plant Variety Protection Act. Section 62(b) of the Plant Variety Protection Act (7 U.S.C. § 2442(b)) provides time limits for an applicant’s taking “appropriate action” after the Secretary of Agriculture mails a notice of an action other than an allowance. The Plant Variety Protection Act does not provide different time limits for “appropriate action” depending on the applicant’s reasons for failure to take appropriate action.

Sixth, Petitioner contends 7 C.F.R. § 97.22 is invalid because the United States Department of Agriculture failed to reference the legal authority under which it proposed the regulation (Pet. at 28).

The Administrative Procedure Act requires that general notice of proposed rulemaking include reference to the legal authority under which the rule is proposed;<sup>21</sup> however, the requirement that notice of proposed rulemaking reference legal authority under which the rule is proposed does not apply to rules of agency organization, procedure, or practice.<sup>22</sup> As discussed in this Decision and Order, *supra*, I agree with Petitioner’s and the Commissioner’s position that 7 C.F.R. § 97.22 is a procedural rule. Therefore, the United States Department of Agriculture was not required to reference the legal authority under which 7 C.F.R. § 97.22 was proposed.

Moreover, when the United States Department of Agriculture first proposed the Regulations, including the proposed procedure for reviving an application

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<sup>19</sup>41 Fed. Reg. 54,492 (Dec. 14, 1976).

<sup>20</sup>42 Fed. Reg. 9157 (Feb. 15, 1977).

<sup>21</sup>5 U.S.C. § 553(b)(2).

<sup>22</sup>5 U.S.C. § 553(b)(A).

abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the “Plant Variety Protection Act (84 Stat. 1542)” is the legal authority under which the rule is proposed.<sup>23</sup> Again, when the United States Department of Agriculture proposed to amend a number of provisions in the Regulations, including the procedure for reviving an application abandoned for failure to advance the application, the United States Department of Agriculture stated in the notice of proposed rulemaking the “Plant Variety Protection Act (7 U.S.C. 2321, et seq.)” is the legal authority under which the rule is proposed.<sup>24</sup>

Petitioner contends the references to the Plant Variety Protection Act in these notices of proposed rulemaking are not sufficiently specific. Petitioner suggests the United States Department of Agriculture should have specifically identified 7 U.S.C. § 2326 as the legal authority for the procedure for reviving abandoned applications. (Pet. at 28.)

Even if I were to conclude that 7 C.F.R. § 97.22 is a substantive rule required to be promulgated in accordance with 5 U.S.C. § 553(b)(2), I would reject Petitioner’s contention that the references to the Plant Variety Protection Act in the relevant notices of proposed rulemaking were not sufficiently specific. The legislative history applicable to the Administrative Procedure Act and the *Attorney General’s Manual on the Administrative Procedure Act* (1947) indicate that the purpose of the requirement that each notice of proposed rulemaking contain reference to the legal authority under which the rule is proposed is to provide interested persons with a fair opportunity to comment on the agency’s authority to promulgate the proposed rule.<sup>25</sup> The final rulemaking documents related to the two notices of proposed rulemaking in question discuss the comments received but make no mention of any person who submitted a comment indicating that he or she was denied an opportunity to comment on the notices of proposed rulemaking.<sup>26</sup> I find the references to the legal authority in the two notices of proposed rulemaking in question were sufficiently specific to provide interested parties with a fair opportunity to comment on the Secretary

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<sup>23</sup>37 Fed. Reg. 7672 (Apr. 18, 1972).

<sup>24</sup>41 Fed. Reg. 54,492 (Dec. 14, 1976).

<sup>25</sup>See *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5th Cir. 1983) (quoting S. Rep. No. 79-752 (1945), H.R. Rep. No. 79-1980 (1945), and the *Attorney General’s Manual on the Administrative Procedure Act* at 29 (1947)).

<sup>26</sup>37 Fed. Reg. 23,140 (Oct. 28, 1972); 42 Fed. Reg. 9157 (Feb. 15, 1977).

of Agriculture's authority to promulgate procedures an applicant must follow in order to revive a plant variety protection application abandoned for failure to advance the application.

Petitioner cites *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290 (5th Cir. 1983), and *Georgetown University Hospital v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987), in support of its position that the references to the Plant Variety Protection Act in the two notices of proposed rulemaking in question are not sufficiently specific. Neither *Global Van Lines* nor *Georgetown University Hospital* concern a failure to sufficiently specify the legal authority under which a rule was proposed. In each case, the Court set aside the rulemaking proceeding because the agency involved failed to reference the proper legal authority for the rule. In *Global Van Lines*, the Interstate Commerce Commission promulgated a rule which allowed freight forwarders to petition to remove restrictions from their existing certificates without having to complete new licensing procedures. In both the notice of proposed rulemaking and the final rule, the Interstate Commerce Commission referenced provisions of the Interstate Commerce Act which the Court concluded did not provide authority for the rule. Similarly, in *Georgetown University Hospital*, the Secretary of Health and Human Services promulgated a medicare reimbursable cost-limit rule and gave it retroactive effect. The Secretary of Health and Human Services referenced section 223 of the Social Security Amendments of 1972 as the legal authority for the retroactive application of the rule. The Court concluded that section 223 of the Social Security Amendments of 1972 did not authorize retroactive cost-limit rules but, instead, authorized prospective cost-limit rules. I find *Georgetown University Hospital* and *Global Van Lines* inapposite.

Seventh, Petitioner contends 7 C.F.R. § 97.22 is not clearly written. Petitioner states:

It is totally unclear what is supposed to happen within three months of abandonment: is the applicant under an obligation to file a request for revival within three months, or does the finding of the Commissioner have to occur within three months? The most natural English reading is that the finding of the Commissioner must occur within three months. However, this would be a ludicrous outcome as it would mean than [sic] an applicant who files a revival request within a few days of an initial abandonment is at the mercy of the Commissioner's schedule no matter how meritorious the applicant's position regarding inadvertence and non-fraudulent intent.

Pet. at 27.

The Commissioner did not respond to this issue in his Answer. However, based upon correspondence from the Plant Variety Protection Office to Petitioner, it appears the Commissioner's position is that an applicant must make a request for revival within the 3-month period provided in 7 C.F.R. § 97.22.<sup>27</sup>

Petitioner suggests there are two possible ways to construe 7 C.F.R. § 97.22: (1) the applicant is required to request revival within the 3-month period following abandonment or (2) the Commissioner is required to make the required findings within the 3-month period following abandonment (Pet. at 27). But, Petitioner's two suggested constructions do not assist Petitioner. PVP Application No. 9600256 was abandoned effective November 16, 2000, and the 3-month period for revival expired February 16, 2001. Petitioner did not request revival within the 3-month period following the November 16, 2000, abandonment, and the Commissioner did not make the required findings within the 3-month period following the November 16, 2000, abandonment. Therefore, I reject Petitioner's suggestion that the lack of clarity in 7 C.F.R. § 97.22 constitutes a basis for waiving the 3-month time limit for revival.

#### **Petitioner's March 2003 Letters**

Petitioner also raises two issues in letters dated March 14, 2003, and March 27, 2003, which Petitioner sent to me. On April 17, 2003, the

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<sup>27</sup>In a letter dated April 21, 2001, from the Plant Variety Protection Office to Dr. A. Douglas Brede, the Plant Variety Protection Office states "[t]his office, *having received no request from the applicant's representative*, declared the application permanently abandoned." (Ex. A, Tab 33 at 1, attached to Pet. (emphasis added).) In a letter dated July 25, 2002, from the Commissioner to Richard C. Peet, the Commissioner states:

The application was abandoned on November 15, 2000. The time for the possible revival of the application expired three months later, on February 16, 2001, before Simplot's first communication with the PVPO.

As stated in the letter of May 13, 2002, denying the request that the abandoned application be recorded, *any request to revive an abandoned application must be timely*. It is unfortunate that the application was not actively advanced by Simplot's predecessors and was abandoned. *Nonetheless, the time for the possible revival of the abandoned certificate expired before Simplot attempted to revive it*.

Ex. B at 2, attached to Pet. (emphasis added).

I agree with the Commissioner's apparent position that an applicant must request revival within the 3-month period provided in 7 C.F.R. § 97.22.

Commissioner filed a response to Petitioner's March 14 and 27, 2003, letters (Response to Petitioner's Letters).

First, Petitioner encourages me to consider the advice provided by the Plant Variety Protection Board regarding the disposition of this proceeding for what it is: purely advisory (Petitioner's letter dated Mar. 14, 2003, at 1-2). Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) requires that I seek the advice of the Plant Variety Protection Board before deciding Petitioner's appeal from the Commissioner's denial of Petitioner's request for revival of PVP Application No. 9600256. Section 97.302 of the Regulations (7 C.F.R. § 97.302) provides that I may issue a decision after receiving advice from the Plant Variety Protection Board. I agree with Petitioner that the Plant Variety Protection Board's role in this proceeding is merely advisory. While I must consider any advice offered by the Plant Variety Protection Board, I am not required to follow the Plant Variety Protection Board's advice. In this proceeding, I sought and received advice from the Plant Variety Protection Board. I have considered the advice given by the Plant Variety Protection Board. My decision to follow the Plant Variety Protection Board's advice is based upon my agreement with the Plant Variety Protection Board, not upon a belief that I am required to follow the Plant Variety Protection Board's advice.

Second, Petitioner asserts Dr. Virginia Lehman did not recuse herself from the Plant Variety Protection Board's March 5, 2003, hearing, as I suggested she do in a memorandum I sent to Plant Variety Protection Board members on February 18, 2003 (Petitioner's letter dated Mar. 14, 2003, at 2-4; Petitioner's letter dated Mar. 27, 2003).

The transcript of the March 5, 2003, Plant Variety Protection Board hearing establishes that Dr. Virginia Lehman was present during the Plant Variety Protection Board's hearing and answered questions from other members of the Plant Variety Protection Board (Transcript of the Plant Variety Protection Board Hearing at 1, 65-68).<sup>28</sup> However, Dr. Virginia Lehman abstained from voting on the motion regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVP Docket No. 02-0001 (Transcript of the Plant Variety Protection Board Hearing at 80). Recusal is "[r]emoval of oneself as a judge or policy-maker in a particular matter."<sup>29</sup> I find Dr. Virginia Lehman's abstention from voting on the motion

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<sup>28</sup>Dr. Virginia Lehman is identified as "Inventor" on pages 65 through 68 of the transcript of the Plant Variety Protection Board hearing.

<sup>29</sup>Black's Law Dictionary 1281 (7th ed. 1999).

regarding the Petition filed in the instant proceeding and Petitioner's petition filed in *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, is a recusal.

#### **Petitioner's Right to Judicial Review**

Petitioner has the right to judicial review of this Decision and Order in accordance with 7 U.S.C. § 2461 or, in the alternative, 7 U.S.C. § 2462. Appeal under 7 U.S.C. § 2461 must be taken "within sixty days or such further time as the Secretary [of Agriculture] allows," and civil action under 7 U.S.C. § 2462 must be "commenced within sixty days after [the Secretary of Agriculture's] decision or within such further time as the Secretary [of Agriculture] allows." On May 30, 2003, I held a conference call with Richard G. Stoll and Robert A. Ertman. During the conference call, Richard G. Stoll requested that I allow Petitioner 120 days for any appeal that it may take under 7 U.S.C. § 2461 or any civil action that it may commence under 7 U.S.C. § 2462. Robert A. Ertman stated the Commissioner had no objection to Petitioner's request. Therefore, any appeal under 7 U.S.C. § 2461 must be taken within 120 days after the date of this Decision and Order and any civil action under 7 U.S.C. § 2462 must be commenced within 120 days after the date of this Decision and Order. The date of this Decision and Order is June 2, 2003.

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

#### **ORDER**

I affirm the Commissioner's July 25, 2002, determination that PVP Application No. 9600256 cannot be revived as a pending application. This Order shall become effective on the day after service on Petitioner.

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**MISCELLANEOUS DECISIONS**

**In re: CARUTHERS RAISIN PACKING CO.  
2002 AMA Docket No. F&V 989-3.  
Order Dismissing Petition.  
Filed April 15, 2003.**

Colleen Carroll, for Respondent.  
Petitioner, Pro se.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

Petitioner withdrew its Petition, by FAX dated April 15, 2003.  
Accordingly, this case is hereby ordered CLOSED.

Copies of this Order, and Petitioner's FAX dated April 15, 2003, shall be served by the Hearing Clerk upon each of the parties.

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**In re: CARUTHERS RAISIN PACKING CO.  
2002 AMA Docket No. F&V 989-4.  
Order Closing Case.  
Filed April 17, 2003.**

Colleen Carroll, for Respondent.  
Petitioner, Pro se.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

Petitioner withdrew its Petition, by FAX dated April 14, 2003.  
Previously, Chief Judge Hunt indicated:

"The docket number for both the Petition filed on August 13, 2002, and the Amended Petition filed on November 12, 2002, shall be 2002 AMA Docket No. F&V 989-3."

Order dated December 20, 2002.

Chief Judge Hunt has referred Petitioner's FAX dated April 14, 2003 to me for action, as I am the assigned judge in 2002 AMA Docket No. F&V 989-3.

Just as I ordered 2002 AMA Docket No. F&V 989-3 CLOSED on April 15, 2003, I hereby order 2002 AMA Docket No. F&V 989-4 CLOSED.

Closed of this Order, and Petitioner's FAX dated April 14, 2003, shall be served by the Hearing Clerk upon each of the parties.

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**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.  
2002 AMA Docket No. F&V 989-1.  
Remand Order.  
Filed May 12, 2003.**

**AMA – Raisins – Petition contents – “Petition” defined – “Shall” defined – Judicial Officer bound by rules of practice – Administrative law judges bound by the rules of practice.**

The Judicial Officer (JO) remanded the proceeding to Administrative Law (ALJ) Judge Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation did not conform to the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal, as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.  
Brian C. Leighton, for Petitioner.  
Initial decision issued by Jill S. Clifton, Administrative Law Judge.  
*Remand Order issued by William G. Jenson, Judicial Officer.*

**PROCEDURAL HISTORY**

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition<sup>1</sup> on August 5, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On October 22, 2002, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Petition.” Respondent contends the Petition does not contain Petitioner's date of incorporation as required by section 900.52(b)(1) of

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

the Rules of Practice (7 C.F.R. § 900.52(b)(1)), does not contain an affidavit by an officer of Petitioner as required by section 900.52(b)(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(6)), and should be dismissed (Mot. to Dismiss Pet.). On November 4, 2002, Petitioner filed “Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition,” which, *inter alia*, contains Petitioner’s date of incorporation.

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

On March 13, 2003, in accordance with the ALJ’s Order Denying Respondent’s Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner’s Date of Incorporation, Petitioner filed a verification of the date of Petitioner’s incorporation. Respondent did not file a response to Petitioner’s Petition in accordance with the ALJ’s Order Denying Respondent’s Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner’s Date of Incorporation. Instead, on March 28, 2003, Respondent appealed to the Judicial Officer. On April 24, 2003, Petitioner filed “Petitioner’s Response to Respondent’s Appeal Petition.” On April 25, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

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

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

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

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

....

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

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

7 C.F.R. § 900.52(b)(1).

Petitioner admits, and the ALJ found, the Petition did not contain Petitioner's date of incorporation as required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)). The ALJ denied Respondent's Motion to Dismiss Petition because Petitioner provided the date of its incorporation in Petitioner's Opposition to Respondent's Motion to Dismiss Petition filed November 4, 2002, as follows:

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

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

The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. Section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) states the *petition*<sup>2</sup> (not some other filing) *shall* contain the information, references, statements, prayers for relief, and affidavit described in section 900.52(b)(1)-(6) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)-(6)). The word *shall* is ordinarily the language of command and

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

leaves no room for discretion.<sup>3</sup> Thus, Petitioner is required by section 900.52(b)(1) of the Rules of Practice (7 C.F.R. § 900.52(b)(1)) to include in its Petition the date of Petitioner's incorporation. The Rules of Practice are binding on administrative law judges and the Judicial Officer,<sup>4</sup> and administrative law judges and the Judicial Officer have very limited authority to modify the Rules

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<sup>3</sup>See generally *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573-74 (9th Cir. 2000) (stating the term "shall" is usually regarded as making a provision mandatory, and the rules of statutory construction presume that the term is used in its ordinary sense unless there is clear evidence to the contrary); *United States v. Hughes*, 414 F.2d 1330, 1334 (9th Cir. 1969) (referring to the word "shall" as "imperative"); *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364, 369-70 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order) (stating the word "shall" is ordinarily the language of command and leaves no room for administrative law judge discretion); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

<sup>4</sup>*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

of Practice in a proceeding.<sup>5</sup>

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

The ALJ issued an "Order Scheduling Oral Hearing" on March 18, 2003. Respondent filed a "Motion to Cancel Oral Hearing" on April 4, 2003. On April 25, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Cancel the Oral Hearing."

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

**§ 900.59 Motions and requests.**

(a) *General.* . . .

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

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

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

Respondent filed the Motion to Cancel Oral Hearing 3 weeks prior to the date the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer. Therefore, the ALJ is authorized to rule on Respondent's Motion to Cancel Oral Hearing and the Judicial Officer is not required to rule on Respondent's Motion to Cancel Oral Hearing. Therefore, I remand the Motion to Cancel Oral Hearing to the ALJ for a ruling.

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

#### **ORDER**

1. The ALJ's Order Denying Respondent's Motion to Dismiss But Requiring Petitioner to File Verification of Petitioner's Date of Incorporation, issued March 10, 2003, is vacated.
2. The proceeding is remanded to the ALJ to:
  - (a) issue an order in accordance with the Rules of Practice; and
  - (b) rule on Respondent's Motion to Cancel Oral Hearing.

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**In re: BOGHOSIAN RAISIN PACKING CO., INC.**  
**2002 AMA Docket No. F&V 989-6.**  
**Remand Order.**  
**Filed May 13, 2003.**

**AMAA – Raisins – Order dismissing petition – Judicial Officer bound by rules of practice – Administrative law judges bound by the rules of practice.**

The Judicial Officer (JO) remanded the proceeding to Administrative Law Judge (ALJ) Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition did not conform to

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

the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.

Brian C. Leighton, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

*Remand Order issued by William G. Jenson, Judicial Officer.*

### PROCEDURAL HISTORY

Boghosian Raisin Packing Co., Inc. [hereinafter Petitioner], instituted this proceeding by filing a Petition<sup>1</sup> on December 2, 2002. Petitioner instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On March 3, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition." Respondent contends the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) and should be dismissed (Mot. to Dismiss Pet.). On April 2, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Dismiss Petition."

On April 7, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition" in which she agreed with Respondent's contention that the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

On April 15, 2003, Respondent appealed to the Judicial Officer. On May 9, 2003, Petitioner filed "Response of Boghosian Raisin Packing Co., Inc. to Respondent's Appeal Petition." On May 9, 2003, the Hearing Clerk transmitted

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<sup>1</sup>Petitioner entitles its Petition "Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of All Varieties Of Raisins Established For The 2002-2003 Crop Year, Pursuant To 7 C.F.R. § 989.1 *Et Seq.* And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith With Respect To The Reserve Requirements, That Are Not In Accordance With Law" [hereinafter Petition].

the record to the Judicial Officer for consideration and decision.

### CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's one issue in "Respondent's Appeal Petition" is that the ALJ, having granted in part Respondent's Motion to Dismiss Petition, should have: (1) dismissed all or a portion of the Petition; (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal; and (3) permitted Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)) (Respondent's Appeal Pet. at 3).

Section 900.52(c)(2) of the Rules of Practice provides if an administrative law judge dismisses a petition or a portion of the petition, the petitioner shall be permitted to file an amended petition and section 900.52a(a) of the Rules of Practice provides the time for the respondent's filing an answer to the amended petition, as follows:

#### § 900.52 Institution of proceeding.

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

(2) *Decision by the 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.

#### § 900.52a Answer to petition.

(a) *Time of filing*. Within 30 days after the filing of the petition,<sup>2</sup> the Administrator shall file an answer thereto: *Provided*, That, if a motion to dismiss the petition, in whole or in part, is made pursuant to §

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<sup>2</sup>"The term *petition* includes an amended petition." (7 C.F.R. § 900.51(p).)

900.52(c), the answer shall be filed within 15 days after the service of an order of the Judge denying the motion or granting the motion with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

7 C.F.R. §§ 900.52(c)(2), .52a(a) (footnote added).

The ALJ agreed with Respondent's contention that the Petition did not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) (Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet.). However, instead of dismissing the Petition or a portion of the Petition, permitting Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal, and permitting Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)), the ALJ directed Petitioner and Respondent, as follows:

... I direct the parties as follows: (1) By Tuesday, April 22, 2003, Petitioner shall supplement its Petition with the particulars as to why the procedure and percentage calculations and other RAC actions were not in accordance with the Raisin Marketing Order or the Act. (2) Within 20 days after service of those particulars, Respondent shall answer or otherwise respond to the Petition as supplemented. (3) Both parties shall construe the Petition as a request for relief for Petitioner. (4) If, by the date on which Respondent's response is to be prepared, the RAC recommendation of which Petitioner complains is not yet effective and cannot impact handlers, the Respondent may file an affidavit or declaration to that effect, **rather than an Answer**.

Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet. at 1-2 (emphasis in original).

The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. The Rules of Practice are binding on administrative law judges and the Judicial

Officer,<sup>3</sup> and administrative law judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.<sup>4</sup> A conclusion by the ALJ that the Petition does not conform to section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) requires that the ALJ dismiss the Petition or a portion of the Petition and permit Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal. Respondent must be permitted to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

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<sup>3</sup>*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

<sup>4</sup>*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

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

### ORDER

1. The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition, issued April 7, 2003, is vacated.
2. The proceeding is remanded to the ALJ to issue an order in accordance with the Rules of Practice.

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**In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.  
2002 AMA Docket No. F&V 989-5.  
Remand Order and Ruling Denying Request for Extension of Time.  
Filed May 13, 2003.**

**AMAA – Raisins – Order dismissing petition – Judicial Officer bound by rules of practice –  
Administrative law judges bound by the rules of practice – “Vacate” defined.**

The Judicial Officer (JO) remanded the proceeding to Administrative Law Judge (ALJ) Jill S. Clifton to issue an order in accordance with the Rules of Practice. The JO found the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition did not conform to the Rules of Practice (7 C.F.R. §§ 900.52(c)(2), .52a(a)). The JO stated the Rules of Practice are binding on administrative law judges. A conclusion by the ALJ that a petition does not conform to 7 C.F.R. § 900.52(b) requires that the ALJ dismiss the petition or a portion of the petition and permit the Petitioner to file an amended petition within 20 days following service on the Petitioner of the ALJ's dismissal as provided in 7 C.F.R. § 900.52(c)(2). The Respondent must be permitted to file an answer to any amended petition in accordance with 7 C.F.R. § 900.52a(a).

Colleen A. Carroll, for Respondent.

Brian C. Leighton, for Petitioner.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

*Remand Order and Ruling Denying Request for Extension of Time issued by William G. Jenson,  
Judicial Officer.*

### PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition<sup>1</sup> on December 4, 2002. Petitioner

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<sup>1</sup>Petitioner entitles its Petition “Petition To Modify Raisin Marketing Order Provisions/Regulations And/Or Petition To The Secretary Of Agriculture To Set Aside Reserve Percentages Of All Varieties Of Raisins Established For The 2002-2003 Crop Year, Pursuant To  
(continued...)”

instituted the proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); the federal marketing order regulating the handling of “Raisins Produced From Grapes Grown In California” (7 C.F.R. pt. 989); and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On March 3, 2003, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a “Motion to Dismiss Petition.” Respondent contends the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) and should be dismissed (Mot. to Dismiss Pet.). On March 25, 2003, Petitioner filed “Petitioner’s Opposition to Respondent’s Motion to Dismiss Petition.”

On April 1, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an “Order Granting in Part and Denying in Part Respondent’s Motion to Dismiss Petition” in which she agreed with Respondent’s contention that the Petition does not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

On April 7, 2003, Respondent appealed to the Judicial Officer. On April 25, 2003, Petitioner filed “Petitioner’s Response to Respondent’s Appeal Petition.” On April 28, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On May 6, 2003, Respondent filed a “Request for Extension of Time to File Response to Petition.”

### CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent’s one issue in “Respondent’s Appeal Petition” is that the ALJ, having granted in part Respondent’s Motion to Dismiss Petition, should have: (1) dismissed all or a portion of the Petition; (2) permitted Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ’s dismissal; and (3) permitted Respondent to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)) (Respondent’s Appeal Pet. at 3).

Section 900.52(c)(2) of the Rules of Practice provides if an administrative law judge dismisses a petition or a portion of the petition, the petitioner shall be permitted to file an amended petition and section 900.52a(a) of the Rules of

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<sup>1</sup>(...continued)

7 C.F.R. § 989.1 *Et Seq.* And To Exempt Petitioner From Various Provisions Of The Raisin Marketing Order And/Or Any Obligations Imposed In Connection Therewith With Respect To The Reserve Requirements, That Are Not In Accordance With Law” [hereinafter Petition].

Practice provides the time for the respondent's filing an answer to the amended petition, as follows:

**§ 900.52 Institution of proceeding.**

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

(2) *Decision by the 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.

**§ 900.52a Answer to petition.**

(a) *Time of filing*. Within 30 days after the filing of the petition,<sup>2</sup> the Administrator shall file an answer thereto: *Provided*, That, if a motion to dismiss the petition, in whole or in part, is made pursuant to § 900.52(c), the answer shall be filed within 15 days after the service of an order of the Judge denying the motion or granting the motion with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

7 C.F.R. §§ 900.52(c)(2), .52a(a) (footnote added).

The ALJ agreed with Respondent's contention that the Petition did not comply with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) (Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet.). However, instead of dismissing the Petition or a portion of the Petition, permitting Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal, and permitting Respondent to file

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<sup>2</sup>"The term *petition* includes an amended petition." (7 C.F.R. § 900.51(p).)

an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)), the ALJ directed Petitioner and Respondent, as follows:

. . . I direct the parties as follows: (1) By Tuesday, April 15, 2003, Petitioner shall supplement its Petition with the particulars as to why the procedure and percentage calculations and other RAC actions were not in accordance with the Raisin Marketing Order or the Act. (2) Within 20 days after service of those particulars, Respondent shall answer or otherwise respond to the Petition as supplemented. (3) Both parties shall construe the Petition as a request for relief for Petitioner. (4) If, by the date on which Respondent's response is to be prepared, the RAC recommendation of which Petitioner complains is not yet effective and cannot impact handlers, the Respondent may file an affidavit or declaration to that effect, **rather than an Answer**.

Order Granting in Part and Denying in Part Respondent's Mot. to Dismiss Pet. at 2 (emphasis in original).

The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is a rational disposition of Respondent's Motion to Dismiss Petition; however, the ALJ's order is not in accord with the Rules of Practice. The Rules of Practice are binding on administrative law judges and the Judicial Officer,<sup>3</sup> and administrative law judges and the Judicial Officer have very

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<sup>3</sup>*In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice). *Cf. In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd per curiam*, 39 Fed. Appx. 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 123 S. Ct. 1802 (2003); *In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judges are bound by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes).

limited authority to modify the Rules of Practice in a proceeding.<sup>4</sup> A conclusion by the ALJ that the Petition does not conform to section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)) requires that the ALJ dismiss the Petition or a portion of the Petition and permit Petitioner to file an amended petition within 20 days following service on Petitioner of the ALJ's dismissal. Respondent must be permitted to file an answer to any amended petition in accordance with section 900.52a(a) of the Rules of Practice (7 C.F.R. § 900.52a(a)). Therefore, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition and remand the proceeding to the ALJ to issue an order in accordance with the Rules of Practice.

#### **RULING DENYING MOTION FOR EXTENSION OF TIME**

On May 6, 2003, after the Hearing Clerk transmitted the record to me, Respondent requested an extension of time to comply with the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition. Section 900.69(c) of the Rules of Practice authorizes the Judicial Officer to rule on requests for extensions of time after transmittal of the record to the Judicial Officer, as follows:

#### **§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.**

...  
(c) *Extensions of time.* The time for the filing of any documents or papers required or authorized in this subpart to be filed may be extended

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<sup>4</sup>See *In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

upon (1) a written stipulation between the parties, or (2) upon the request of a party, by the judge before the transmittal of the record to the Secretary, or by the Secretary at any other time if, in the judgment of the Secretary or the judge, as the case may be, there is good reason for the extension.

7 C.F.R. § 900.69(c).

As stated in this Remand Order and Ruling Denying Request for Extension of Time, *supra*, I vacate the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition. Therefore, the ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition is void and neither Respondent nor Petitioner is required to comply with the order.<sup>5</sup> I find no good reason to grant Respondent's request for an extension of time to comply with an order that is vacated. Therefore, Respondent's Request for Extension of Time to File Response to Petition is denied.

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

#### ORDER

1. The ALJ's Order Granting in Part and Denying in Part Respondent's Motion to Dismiss Petition, issued April 1, 2003, is vacated.
2. The proceeding is remanded to the ALJ to issue an order in accordance with the Rules of Practice.
3. Respondent's Request for Extension of Time to File Response to Petition is denied.

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<sup>5</sup>See *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 662 (1st Cir. 1997) (citing with approval the definition of *vacate* in Black's Law Dictionary 1548 (6th ed. 1990): "vacate" means "to annul" or "to render . . . void"), *cert. denied*, 524 U.S. 951 (1998); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside); *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to set aside); *Action on Smoking and Health v. CAB*, 713 F.2d 795, 797 (D.C. Cir. 1983) (per curiam) (stating to *vacate* means to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside); *Stewart v. Oneal*, 237 F. 897, 906 (6th Cir. 1916) (stating *vacate* means to annul, set aside, or render void), *cert. denied*, 243 U.S. 645 (1917).

**In re: BOGHOSIAN RAISIN PACKING CO., INC.**  
**2002 AMA Docket No. F&V 989-6.**  
**Order Dismissing Petition.**  
**Filed May 14, 2003.**

Colleen Carroll, for Respondent.  
Howard A. Sagaser for Petitioner.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

The Petition filed on December 2, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 13, 2003.

Respondent's Request for Extension filed May 12, 2003, is MOOT, as no response is necessary.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-7. – Editor]

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**In re: LION RAISINS, INC.**  
**2002 AMA Docket No. F&V 989-1.**  
**Order Canceling Oral Hearing and Dismissing Petition.**  
**Filed May 14, 2003.**

Colleen Carroll, for Respondent.  
Brian C. Leighton, for Petitioner.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

The oral hearing scheduled to begin on Monday, June 23, 2003 in Fresno, California, is hereby CANCELED,<sup>1</sup> and the Petition filed on August 5, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 12, 2003.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

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<sup>1</sup>The hearing remains scheduled at that time and place in 2002 AMA F&V 989-2, regarding In re: Boghosian Raisin Packing Co., Inc.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-7. –  
Editor]

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**In re: LION RAISINS, INC.**  
**2002 AMA Docket No. F&V 989-5.**  
**Order Dismissing Petition.**  
**Filed May 14, 2003.**

Colleen Carroll, for Respondent  
Brian C. Leighton, for Petitioner.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

The Petition filed on December 4, 2002 is hereby DISMISSED, for the reasons stated in the Judicial Officer's Remand Order issued May 13, 2003.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[Petitioner re-filed this Complaint under AMA Docket No. F & V 989-5. –  
Editor]

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**In re: E&A PRODUCE, INC., EDUARDO and ANITA ANTONIO.**  
**AMAA Docket No. 02-0004.**  
**Dismissal Without Prejudice.**  
**Filed May 5, 2003.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

Complainant withdrew the Complaint, by notice filed May 1, 2003.

Accordingly, this case is hereby dismissed without prejudice.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

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**In re: MICHAEL R. THOMAS.**  
**DNS-RD Docket No. 03-0001.**  
**Order of Dismissal.**  
**Filed March 18, 2003.**

Donald McAmis, for Complainant.  
Daniel I. Prywes, for Respondent.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

In consideration of the parties' Consent Motion, and the entire record of these proceedings,

**IT IS HEREBY ORDERED:**

1. The November 14, 2002 notice of final debarment of Respondent Michael R. Thomas is vacated *nunc pro tunc*, as if said debarment had never been issued.
2. USDA shall immediately remove Respondent Michael R. Thomas from the federal government's list of debarred persons.
3. This appeal is dismissed.

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**In re: SAM'S BAKERY.**  
**FMIA Docket No. 03-0001.**  
**Order Dismissing Complaint.**  
**Filed June 20, 2003.**

Margaret A. Burns, for Complainant.  
Daniel A. Swensen, for Respondent.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant moves to withdraw the complaint filed November 21, 2002. Complainant's motion is granted. The complaint is dismissed.

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**In re: NICHOLAS W. EIGSTI.**  
**FSA Docket No. 03-0001.**  
**Dismissal Without Prejudice.**  
**Filed June 27, 2003.**

Complainant. Pro se.  
Robert Ertman, for Respondent.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

For the reasons stated in the Response to Order of Administrative Law Judge, received June 11, 2003, I find that the Complaint should be and hereby is **DISMISSED**, without prejudice.

Copies of this Dismissal shall be served by the Hearing Clerk upon Complainant and upon the Administrator of the Agricultural Marketing Service.

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**In re: STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND  
FAMILY SERVICES.  
FSP Docket No. 02-0003.  
Order Canceling Hearing and Dismissing Case.  
Filed June 6, 2003.**

Angela M. Kline, for Appellant.  
Shelley F. Malofsky, for Appellee.  
*Order issued by Jill S. Clifton, Administrative Law Judge.*

By Settlement Agreement received June 6, 2003, the Wisconsin State agency, Appellant, withdrew its Petition.

Accordingly, the hearing scheduled for December 15, 2003, in Washington, D.C., is hereby canceled, and this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

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**In re: SAM'S BAKERY.  
PPIA Docket No. 03-0001.  
Order Dismissing Complaint.  
Filed June 20, 2003.**

Margaret A. Burns, for Complainant.  
Daniel A. Swensen, for Respondent.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant moves to withdraw the complaint filed November 21, 2002. Complainant's motion is granted. The complaint is dismissed.

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**DEFAULT DECISIONS**

**ANIMAL QUARANTINE ACT**

**In re: WILLIAM HARGROVE.**

**A.Q. Docket No. 01-0012.**

**Decision and Order.**

**Filed October 21, 2002.**

**AQ – Default – Quarantine – Importation of meat products.**

James D. Holt, for Complainant.

Respondent, Pro se.

*Decision and Order issued by Jill S. Clifton, Administrative Law Judge.*

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Act of February 2, 1903, as amended (21 U.S.C. § 111) [herein the Act], the regulations promulgated thereunder (9 C.F.R. § 94.11), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on September 24, 2001.

The complaint alleges that on November 21, 2000, respondent shipped by mail from Germany to the United States salami, soup mixes containing beef fat, and gravy mixes containing beef in violation of 9 C.F.R. § 94.11 because the importation of fresh, chilled, or frozen beef from a Germany without a certificate is prohibited

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on September 24, 2001. On March 7, 2002, a copy of the complaint was mailed to respondent by regular mail. On April 25, 2002, the hearing clerk notified the respondent that his answer to the complaint had not been received within the allotted time. The failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. §1.139.

On August 26, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to by the absence of a timely

answer, 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.

#### **Finding of Fact**

1. The mailing address of William Hargrove is CMR 4 Box 204, APO AE 09173-0204. 2. On November 21, 2000, respondent shipped by mail from Germany to the United States salami, soup mixes containing beef fat, and gravy mixes containing beef.

#### **Conclusion**

It is a 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 for 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 animal diseases and plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of animal diseases, the risk of the undetected introduction and spread of animal diseases is greatly increased. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address a violation of the Act. A single violation of the Act could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the two hundred and fifty dollar (\$250.00) civil penalty requested. Complainant's recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re: S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons

similarly situated to the respondent. *In re: Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id.* at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Act and the regulation promulgated pursuant to those regulations (9 C.F.R. § 94.11).

Therefore, the following Order is issued.

### **Order**

William Hargrove is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00). 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  
Accounts Receivable  
P.O. Box 3334  
Minneapolis, Minnesota 55403

within thirty (30) 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 the 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 6, 2003. - Editor]

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**In re: CHRISTINE L. SHAH.**

**A.Q. Docket No. 01-0011.**

**Decision and Order.**

**Filed October 23, 2002.**

**AQ – Default – Importation of meat products.**

Tracey Manoff, 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 meat and meat products into the United States (9 C.F.R. Part 94 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. sections 1.130 *et seq.* and 9 C.F.R. sections 70.1 *et seq.*.

This proceeding was instituted by a complaint filed on August 31, 2001, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about August 8, 2000, the respondent shipped by mail one (1) salami from Germany into the United States in violation of 9 C.F.R. section 94.11, because the salami was not accompanied by a health certificate as required.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. section 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. section 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. section 1.136(a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. section 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. section 1.139.

#### **Findings of Fact**

1. Christine L. Shah, respondent herein, is an individual whose mailing address is 317th MC, Unit 27502, APO AE 09139.

2. On or about August 8, 2000, respondent shipped salami by mail from Germany to the United States, in violation of section 94.11 of the regulations (9 C.F.R. section 94.11) because the salami was not accompanied by a certificate, as required.

### **Conclusion**

By reason of the facts contained in the Finding of Fact above, the respondent has violated 9 C.F.R. section 94.11. 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 A.Q. Docket No. 01-0011.

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. section 1.145.

[This Decision and Order became final January 17, 2003. - Editor]

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**DEFAULT DECISIONS****ANIMAL WELFARE ACT**

**In re: BOB ZUBIC d/b/a PORTAGE PET CENTER.  
AWA Docket No. 02-0018.  
Decision and Order upon Admission of Facts by Reason of Default.  
Filed October 16, 2002.**

**AWA – Default – Exhibitor, unlicensed.**

Donald A. Tracy, for Complainant.  
Respondent, Pro se.

*Decision and Order 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.

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Bob Zubic on May 28, 2002. The letter of service informed respondent that he must file an answer pursuant to the Rules of Practice and that a failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Bob Zubic 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****I**

A. Bob Zubic, hereinafter referred to as respondent, is an individual doing business as Portage Pet Center, whose address is 5003 US Highway 6, Portage, Indiana 46368.

B. The respondent, at all times material herein, was operating as an exhibitor as defined in the Act and the regulations.

## II

On or about December 15, 2000, the respondent operated as an exhibitor 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 subsection 2.1 of the regulations (9 C.F.R. § 2.1).

### 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, 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, respondent 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. Respondent is assessed a civil penalty of \$550.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

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 December 27, 2002. – Editor]

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**In re: DEVA EXOTICS, INC., DEVA EXOTICS'INC., LLC., MICHAEL V. DEMMER, JOANNE VASSALLO.**

**AWA Docket. No. 02-0027.**

**Decision and Order as to Respondent Exotics, Inc. by Reason of Admission of Facts.**

**Filed January 14, 2003.**

**AWA – Default – Veterinary care, inadequate.**

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.

*Decision and Order issue by James W. Hunt, Administrative Law Judge.*

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et. seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On August 30, 2002, the Hearing Clerk sent to respondent Deva Exotics, Inc., by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which respondent had provided to complainant. Respondent Deva Exotics, Inc., 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. Respondent Deva Exotics, Inc., actually received the complaint on September 3, 2002. Said respondent has failed to file an answer to the complaint.

The material facts alleged in the complaint, which are all admitted by said respondent's failure to file an answer or to deny, 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 Deva Exotics, Inc., is a Wisconsin corporation whose principal business address is 3983 County Highway O, Potosi, Wisconsin 53820, and whose agent for service of process is respondent Michael V. Demmer, located at the same address. Respondent Deva Exotics, Inc., is the successor-in-interest to Deva Exotics, LLC, a Wisconsin limited liability company, whose principal business address was 3983 County Highway O,

Potosi, Wisconsin 53820, whose registered agent was respondent Michael V. Demmer. At all times mentioned herein respondent Deva Exotics, Inc., and/or Deva Exotics, LLC, operated as an exhibitor, as that term is defined in the Act and the Regulations. Deva Exotics, LLC was dissolved on July 11, 2001. Deva Exotics, Inc. was incorporated on July 11, 2001.

2. Respondent Deva Exotics, Inc., owns and exhibits to the public for compensation approximately 22 animals, including big cats, wolves and wolf-hybrids. As part of the exhibition, said respondent allows members of the public to handle the animals, specifically the two felines, an adult Siberian Tiger named "Pounce" and a lion named "Pandora."

3. On or about February 3, 2000, respondent Deva Exotics, Inc., exhibited "Pounce" to the public, and allowed the animal to be handled directly by members of the public, without distance or barriers. During that exhibition, "Pounce" scratched Dan J. Lehnerr on the neck.

On May 3, 2000, respondent Deva Exotics, Inc., exhibited approximately eight animals ("Pounce," "Pandora," and several wolves and/or wolf-dog hybrids), to several members of the public and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. Specifically, respondent allowed members of the public to wrestle with both "Pounce" and "Pandora."

On May 7, 2000, respondent Deva Exotics, Inc., exhibited approximately eight animals ("Pounce," "Pandora," and several wolves) to five members of the public, and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. During that exhibition, "Pounce" bit Rebecca Barrette, an individual who was handling the animal. As Ms. Barrette was leaving the enclosure, "Pandora" jumped on her back.

4. On May 7, 2000, respondent Deva Exotics, Inc., failed to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves.

5. On or about February 3, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger.

6. On May 3, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids.

7. On May 7, 2000, respondent Deva Exotics, Inc., failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves.

8. On May 7, 2000, respondent Deva Exotics, Inc., failed to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal.

9. On or about February 3, 2000, respondent Deva Exotics, Inc., failed to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal.

10. On May 3, 2000, respondent Deva Exotics, Inc., failed to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

11. On May 7, 2000, respondent Deva Exotics, Inc., failed to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

12. On or about February 3, 2000, respondent Deva Exotics, Inc., exhibited a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being.

13. On May 3, 2000, respondent Deva Exotics, Inc., exhibited a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being.

14. On May 7, 2000, respondent Deva Exotics, Inc., exhibited a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being.

#### CONCLUSIONS OF LAW

1. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(1).

2. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an

unsupervised and untrained member of the public to handle an adult Siberian tiger. 9 C.F.R. § 2.40(b)(2).

3. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids. 9 C.F.R. § 2.40(b)(2).

4. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(2).

5. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

6. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

7. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

8. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

9. On or about February 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

10. On May 3, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and

approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

11. On May 7, 2000, respondent Deva Exotics, Inc., willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

### ORDER

1. Respondent Deva Exotics, Inc., its 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.

2. Respondent Deva Exotics, Inc., is assessed a civil penalty of \$11,000.

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 6, 2003.- Editor]

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**In re: DEVA EXOTICS, INC., DEVA EXOTICS'INC., LLC., MICHAEL V. DEMMER, JOANNE VASSALLO.**

**AWA Docket No. 02-0027.**

**Decision and Order as to Respondent Joanne Vassallo by Reason of Admission of Facts.**

**Filed January 14, 2003.**

**AWA – Default – Veterinary care, inadequate.**

Colleen A. Carroll, for Complainant.

Respondent, Pro se.

*Decision and Order issue by James W. Hunt, Administrative Law Judge.*

### ADMISSION OF FACTS

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et al)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

On August 30, 2002, the Hearing Clerk sent to respondent Joanne Vassallo,

by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The package was mailed to the respondent's current mailing address, which respondent had provided to complainant. Respondent Joanne Vassallo 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. Respondent Joanne Vassallo actually received the complaint on September 3, 2002. Said respondent has failed to file an answer to the complaint.

The material facts alleged in the complaint, which are all admitted by said respondent's failure to file an answer or to deny, 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 Joanne Vassallo is an individual whose business address is 3983 County Highway O, Potosi, Wisconsin 53820. At all times mentioned herein, said respondent was licensed and operating as an exhibitor, as that term is defined in the Act and the Regulations, under Animal Welfare Act license number 35-C-0199, issued under the name "MIKE DEMMER AND JOANNE VASSALLO, doing business as Deva Exotics," and was a principal in respondent Deva Exotics, Inc. Said respondent previously held licenses 21-A-005 and 21-C-021.

2. Respondent Joanne Vassallo owns and exhibits to the public for compensation approximately 22 animals, including big cats, wolves and wolf-hybrids. As part of the exhibition, said respondent allows members of the public to handle the animals, specifically the two felines, an adult Siberian Tiger named "Pounce" and a lion named "Pandora."

3. On or about February 3, 2000, respondent Joanne Vassallo exhibited "Pounce" to the public, and allowed the animal to be handled directly by members of the public, without distance or barriers. During that exhibition, "Pounce" scratched Dan J. Lehnerr on the neck.

On May 3, 2000, respondent Joanne Vassallo exhibited approximately eight animals ("Pounce," "Pandora," and several wolves and/or wolf-dog hybrids), to several members of the public and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. Specifically, respondent allowed members of the public to wrestle with both "Pounce" and "Pandora."

On May 7, 2000, respondent Joanne Vassallo exhibited approximately eight

animals (“Pounce,” “Pandora,” and several wolves) to five members of the public, and allowed the members of the public to directly handle the animals without any distance or barriers between the animals and the people. During that exhibition, “Pounce” bit Rebecca Barrette, an individual who was handling the animal. As Ms. Barrette was leaving the enclosure, “Pandora” jumped on her back.

4. On May 7, 2000, respondent Joanne Vassallo failed to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves.

5. On or about February 3, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger.

6. On May 3, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids.

7. On May 7, 2000, respondent Joanne Vassallo failed to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves.

8. On May 7, 2000, respondent Joanne Vassallo failed to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal.

9. On or about February 3, 2000, respondent Joanne Vassallo failed to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to the animal.

10. On May 3, 2000, respondent Joanne Vassallo failed to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

11. On May 7, 2000, respondent Joanne Vassallo failed to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public.

12. On or about February 3, 2000, respondent Joanne Vassallo exhibited

a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being.

13. On May 3, 2000, respondent Joanne Vassallo exhibited a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 4

On May 7, 2000, respondent Joanne Vassallo exhibited a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being.

### CONCLUSIONS OF LAW

1. On May 7, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to have appropriate equipment available, and specifically, used inadequate equipment to restrain lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(1).

2. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed an unsupervised and untrained member of the public to handle an adult Siberian tiger. 9 C.F.R. § 2.40(b)(2).

3. On May 3, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves and/or wolf-dog hybrids. 9 C.F.R. § 2.40(b)(2).

4. On May 7, 2000, respondent Joanne Vassallo willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included the use of appropriate methods to prevent injuries, and, specifically, allowed unsupervised and untrained members of the public to handle lions, tigers, and wolves. 9 C.F.R. § 2.40(b)(2).

5. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause trauma and unnecessary discomfort to the animal. 9 C.F.R. § 2.131(a)(1).

6. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a Siberian tiger as carefully as possible in a manner that did not cause unnecessary discomfort to

the animal. 9 C.F.R. § 2.131(a)(1).

7. On May 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

8. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations by failing to handle a female lion, a male Siberian tiger, and approximately six wolves during public exhibition so there was minimal risk of harm to the public and to the animals, with sufficient distance or barriers between the animal and the public so as to ensure the safety of the animal and the public. 9 C.F.R. § 2.131(b)(1).

9. On or about February 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion and a male Siberian tiger under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

10. On May 3, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves or wolf-dog hybrids under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

11. On May 7, 2000, respondent Joanne Vassallo willfully violated the handling regulations, by exhibiting a female lion, a male Siberian tiger, and approximately six wolves under conditions that were inconsistent with their good health and well-being. 9 C.F.R. § 2.131(c)(1).

### **ORDER**

1. Respondent Joanne Vassallo, 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.

2. Respondent Joanne Vassallo is assessed a civil penalty of \$2,750.

3. Respondent Joanne Vassallo's animal welfare license (number 35-C-0199) is hereby revoked.

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 6, 2003.- Editor]

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**In re: JAMES R. ANDERSON, d/b/a WIZARD OF CL' OZ**  
**AWA Docket No. 02-0017.**  
**Decision and Order.**  
**Filed March 11, 2003.**

**AWA – Default – Records, inadequate – Veterinary care, inadequate.**

Sharlene A. Deskins, Attorney 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 certified mail on May 29, 2002. 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.

The 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, are admitted as set forth herein by Respondent's failure to file an answer pursuant to the Rules of Practice, and are adopted 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. James R. Anderson, hereinafter referred to as the respondent, is an individual whose address is 3441 S W 27th Street, Fort Lauderdale, FL 33312.

B. The respondent, at all times material herein, was licensed and operating

as a dealer as defined in the Act and the regulations. The respondent operates under the business name of Wizard of Cl'Oz.

C. When the respondent became licensed and annually thereafter, he received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

## II

On July 9, 1998, 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)).

## III

A. On November 28, 2000, 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)).

B. On November 28, 2000, APHIS inspected respondent's premises and records and found that the respondent had failed to individually identify at least 13 bengal kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

C. On November 28, 2000, 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 because the Respondent had no written program for veterinarian care. The Respondent further failed to provide adequate veterinary care by not having a veterinarian examine animals that appeared to be ill. The above stated actions of the Respondent were willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

D. On November 28, 2000, 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. Outdoor housing facilities for tamarins were not enclosed by a perimeter fence of sufficient height to keep animals and unauthorized persons out as required in the standards (9 C.F.R. 3.127(d)); and

2. The premises including buildings and surrounding grounds, were not

kept in good repair, and clean and free of trash, junk, waste, and discarded matter, in order to protect the animals from injury, and facilitate the required husbandry practices (9 C.F.R § 3.11(c)). The enclosure for a female doberman and her ten puppies contained lawn equipment and other materials.

#### IV

A. On October 6, 2000, the respondent failed to maintain complete records showing the acquisition, disposition, and identification of at least 9 kittens, 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)).

B. On October 6, 2000, the respondent's failed to individually identify at least 9 kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

#### V

A. On or about October 12, 2000, the respondent failed to maintain complete records showing the acquisition, disposition, and identification of kittens, 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)).

B. On or about October 12, 2000, the respondent's failed to individually identify at least 4 bengal kittens in willful violation of section 11 of the Act (7 U.S.C. § 2141) and section 2.50 of the regulations (9 C.F.R. § 2.50).

#### 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 provide proper veterinary care;

- (b) Failing to maintain complete records as required by the regulations;
- (c) Failing to identify animals as required by the regulations;
- (d) Failing to provide animals with a perimeter fence which is of a sufficient height to keep animals and unauthorized persons out of the respondent's facility;
- (e) Failing to maintain the facilities and enclosures for animals free of equipment, junk or other materials; and
- (f) Transporting, selling or offering for sale animals that are less than eight weeks of age.

2. The Respondent is assessed a civil penalty of \$4,600 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. The Respondent, his agents, partners, employees, successors and assigns, directly or through any corporate or other device are disqualified from applying for a license under the Animal Welfare Act until the civil penalty assessed in this case and any costs associated with collecting the civil penalty are paid in full.

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 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 21, 2003.- Editor]

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## PLANT QUARANTINE ACT

**In re: MARIA MAURICIO LOPEZ.**  
**P.Q. Docket No. 02-0004.**  
**Decision and Order by Reason of Default.**  
**Filed December 20, 2002.**

**PQ – Default – Importation, prohibited, of mangos.**

James D. Holt, for Complainant.  
Respondent, Pro se.  
*Decision and Order by Jill S. Clifton, Administrative Law Judge.*

### Preliminary Statement

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein the complainant], instituted this administrative proceeding under the Plant Protection Act (7 C.F.R. §§ 7701-7772) [herein the Act], the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a complaint on December 27, 2001.

The complaint alleges that on June 24, 2000, the respondent imported approximately ten (10) mangoes from Mexico into the United States at Los Angeles, California, in violation of 7 C.F.R. § 319.56-2(e), because the mangoes were not imported under permit, as required.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the complaint to the respondent by certified mail on December 28, 2001. On February 26, 2002, a copy of the complaint was mailed to respondent by regular mail. On April 24, 2002, the hearing clerk notified the respondent that his answer to the complaint had not been received within the allotted time. The failure to file a timely answer constitutes a waiver of hearing. 7 C.F.R. §1.139.

On September 23, 2002, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), complainant filed a proposed decision, along with a motion for the adoption thereof, both which were served upon the respondent by the Hearing Clerk. There having been no meritorious objections filed, the material allegations alleged in the complaint, and admitted to by the absence of a timely

answer, 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.

#### **Finding of Fact**

1. The mailing address of Maria Mauricio Lopez is 8862 Van Nuys, Apartment 22, Panorama City, California 91402.

2. On June 24, 2000, the respondent imported approximately ten (10) mangoes from Mexico into the United States without the required permit.

#### **Conclusion**

It is a 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 for 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 animal diseases and plant pests is dependent upon the compliance of individuals such as the respondent. Without the adherence of these individuals to Federal regulations concerned with the prevention of the spread of animal diseases, the risk of the undetected introduction and spread of animal diseases is greatly increased. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address a violation of the Act. A single violation of the Act could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the two hundred and fifty dollar (\$250.00) civil penalty requested. Complainant's recommendation “as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry.” *In re S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons

similarly situated to the respondent. *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). “The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators.” *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, “if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time.” *Id.* at 633.

Under USDA's sanction policy “great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program.” *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). “In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws.” *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the respondent has violated the Act and the regulation promulgated pursuant to those regulations (7 C.F.R. § 319.56-2(e)).

Therefore, the following Order is issued.

### **Order**

Maria Mauricio Lopez is hereby assessed a civil penalty of two hundred and fifty dollars (\$250.00). 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  
Accounts Receivable  
P.O. Box 3334  
Minneapolis, Minnesota 55403

within thirty (30) 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 the respondent, unless there is an appeal to the

Judicial Officer within thirty (30) days 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 effective on February 3, 2003. – Editor]

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**CONSENT DECISIONS**

(Not published herein-Editor)

**AGRICULTURAL MARKETING AGREEMENT ACT**

Golden Sun Gem, Inc., a California corporation formerly known as Sun Fruit Inc.; and Jasbir Purewal, an individual. AMAA Docket No. 01-0002. 3/3/03.

Golden Sun Gem, Inc., a California corporation formerly known as Sun Fruit Inc.; Jasbir Purewal, an individual; Baljinder Purewal, an individual; and JBM Farms, a general partnership. AMAA Docket No. 01-0003. 3/3/03.

Gerrald's Vidalia Sweet Onion, Inc. AMAA Docket No. 03-0001. 3/25/03.

**ANIMAL QUARANTINE ACT**

FRS Farms, Incorporated. A.Q. Docket No. 01-0007. 3/17/03.

Valley Pride Pack, Incorporated. A.Q. Docket No. 01-0007. 3/17/03.

**ANIMAL WELFARE ACT**

Tom Harvey d/b/a Safari Zoological Park. AWA Docket No. 00-0024. 1/14/03.

Gerald Wensmann and Angeline Wensmann d/b/a Highdarling Cattery aka Highland Hills Kennel. AWA Docket No. 01-0052. 1/16/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0036. 2/3/03.

Michael G. Powell, d/b/a Miami Reptile. AWA Docket No. 00-0041. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 00-0041. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0015. 2/3/03.

Delta Air Lines, Inc., a Georgia corporation. AWA Docket No. 01-0037. 2/3/03.

Brandon Tuckett and Larry L. Tuckett d/b/a Tuckett's Family Farm. AWA Docket No. 02-0029. 2/12/03.

Matt Bennett. AWA Docket No. 99-0034. 2/26/03.

David J. Harris. AWA Docket No. 02-0025. 2/27/03.

Billy R. Holman. AWA Docket No. 02-0009. 3/27/03.

Tigers-R-Us, Bobby Hranicky, and Kelly Hranicky. AWA Docket No. 00-0026. 3/14/03.

University of Massachusetts at Amherst. AWA Docket No. 01-0038. 3/14/03.

Bax Global, Inc. AWA Docket No. 01-0038. 4/21/03.

Norisa Harris, Donald Harris, Dog-Gone Kennel. AWA Docket No. 01-0014. 4/22/03.

Michael S. Sandlin and Tiger Truck Stop, Inc. AWA Docket No. 02-0021. 4/25/03.

Breck Wakefield, Derek Werner, d/b/a Branson West Reptile Garden. AWA Docket No. 03-0004. 5/8/03.

Thomas M. Thompson. AWA Docket No. 03-0023. 5/15/03.

Daniel Shonka. AWA Docket No. 01-0019. 5/20/03.

Joe Estes d/b/a Safari Joe's Wildlife Rescue, aka Safari Joe's Exotic Wildlife Rescue and Safari Joe's Zoological Park. AWA Docket No. 02-0026. 6/11/03.

Wendell Sandlin and Truckers Village, Inc., d/b/a Tiger Travel Plaza. AWA Docket No. 02-0024. 6/27/03.

**FEDERAL MEAT INSPECTION ACT**

Nebraska Beef, Ltd. FMIA Docket No. 03-0002. 1/27/03.

Robert Winner Sons, Inc., d/b/a Winner's Quality Meats, a/k/a Winner's Meats.  
FMIA Docket No. 03-0003. 2/7/03.

Salem Packing Company, Inc., Anthony S. Bonaccurso, and Samuel  
Bonaccurso. FMIA Docket No. 02-0001. 4/22/03.

**HORSE PROTECTION ACT**

Bill C. Cantrell. HPA Docket No. 01-0003. 1/31/03.

Steve Dunn. HPA Docket No. 00-0014. 3/7/03.

**POULTRY PRODUCTS INSPECTION ACT**

Robert Winner Sons, Inc., d/b/a Winner's Quality Meats, a/k/a Winner's  
Meats. PPIA Docket No. 03-0002. 2/7/03.