

AGRICULTURE DECISIONS

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In re: GARY R. EDWARDS, LARRY E. EDWARDS, CARL EDWARDS & SONS STABLES, WILLIAM V. BARKLEY, JR., AND KAY BARKLEY.

HPA Docket No. 91-113

Errata.

The Second Remand Order issued by Judicial Officer, Donald A. Campbell is published at both 54 Agric. Dec. 348, and 55 Agric. Dec. 309. The correct citation is 54 Agric. Dec. 309.

In re: JACKIE McCONNELL and FLOYD SHERMAN.

HPA Docket No. 91-162.

Errata.

The Order Lifting Stay Order issued by Judicial Officer, Donald A. Campbell is published at both 54 Agric. Dec. 448 and 55 Agric. Dec. 307. The correct citation is 54 Agric. Dec. 448.

In re: MARVIN PASTOR.

HPA Docket No. 94-2.

Errata.

The Dismissal of Complaint issued by Administrative Law Judge, Dorothea A. Baker is published at both 54 Agric. Dec. 450 and 55 Agric. Dec. 332. The correct citation is 54 Agric. Dec. 450.

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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

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

DAN GLICKMAN, SECRETARY OF AGRICULTURE v. WILEMAN BROTHERS & ELLIOTT, INC., ET AL.

No. 95-1184.

Filed September 20, 1996.

(Cite as: 117 S. Ct. 34)

SUPREME COURT OF THE UNITED STATES

Former decision, 116 S.Ct. 1875.

Case below, *Wileman Brothers & Elliott, Inc. v. Espy*, 9th Cir., 58 F.3d 1367.

Motion of National Association of State Departments of Agriculture, et al. for leave to file a brief as amici curiae granted. Motion of Washington Apple Commission, et al. for leave to file a brief as amici curiae granted. Motion to American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae granted.

CAL-ALMOND, INC., ET AL. v. DEPARTMENT OF AGRICULTURE.
No. 95-1978.

Filed October 7, 1996.

(Cite as: 117 S. Ct. 72)

SUPREME COURT OF THE UNITED STATES

Cite Case below, 14 F.3d 429; 67 F.3d 874.

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

**GORE, INC., d/b/a PURE MILK CO., V. ESPY, AS SECRETARY OF
UNITED STATES DEPARTMENT OF AGRICULTURE.****No. 94-50631.****Filed July 16, 1996.****(Cite as: 87 F.3d 767)****Milk marketing order - Standing - Separate facility - Arbitrary and Capricious.**

The United States Court of Appeals for the Fifth Circuit reversed the Secretary's finding that Gore's delivery of packaged milk products to a customer's distribution center constituted a shipment to a milk plant under 7 C.F.R. § 1126.4, where the distribution center and processing plant were separate operations but were housed under the same roof. The Court held that the Secretary's interpretation of the meaning of "separate facilities" was arbitrary and capricious, and plainly inconsistent with the text of the regulation. Gore paid \$366,772.38 into the producer-settlement fund on behalf of its customer HEB. The Court held that Gore had standing to challenge the assessments, finding 1) that it suffered injury by losing HEB as a market for its milk, and 2) that it is in the zone of interests protected because it is in the class of persons regulated.

Before: POLITZ, Chief Judge, JONES and PARKER, Circuit Judges.

**UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT****POLITZ, Chief Judge:**

Gore, Inc. doing business as Pure Milk Co., appeals an adverse summary judgment sustaining a ruling by the Secretary of Agriculture that Gore's delivery of packaged milk products to a customer's distribution center constituted a shipment to a milk plant under 7 C.F.R. § 1126.4. Concluding that the Secretary's interpretation is arbitrary, capricious, and plainly inconsistent with the text of the regulation, we reverse.

BACKGROUND

The Agriculture Marketing Agreement Act of 1937¹ governs the distribution, sale, and marketing of all milk products.² The AMAA is implemented regionally by the Secretary who has adopted milk marketing regulations.³ These regulations, often referred to as "order," establish a labyrinthine price support scheme.⁴ Under the Texas Order,⁵ producers⁶ receive a "blend price" from the handlers⁷ who purchase and distribute their milk.⁸ The blend price is the uniform price paid to producers for all milk sold to handlers regardless of the milk's eventual use.⁹ The AMAA recognizes the unlikelihood that each handler will use milk purchases in a

¹7 U.S.C. § 601 *et seq.* (1992 & Supp. 1995).

²In *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

³*Suntex Dairy v. Block*, 666 F.2d 158 (5th Cir.), *cert. denied*, 459 U.S. 826, (1982). *See, e.g.*, 7 C.F.R. pt. 1126 (1995) (Texas marketing order).

⁴*Suntex Dairy*; *see also* 7 U.S.C. § 608c (1992 & Supp. 1995); 7 C.F.R. pt. 1126 (1995).

⁵7 C.F.R. § 1126.2(1995) (establishing the boundaries for the Texas milk marketing area).

⁶7 C.F.R. § 1126.12(1995). Dairy farms are producers under this definition.

⁷7 C.F.R. § 1126.9(1995).

⁸7 C.F.R. § 1126.61(1995).

⁹7 C.F.R. § 1126.61(1995). The AMAA's price support system is premised on the fact that the price handlers are willing to pay for milk depends upon its use. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339 (6th Cir. 1994), *cert. denied*, U.S. 6, 116 S.Ct. 50, 133 L.Ed.2d 15 (1995). Under the Texas order, milk distributed in fluid form is classified as Class I. 7 C.F.R., § 1126.50(a) (1995). Class I commands the highest minimum price. 7 C.F.R. § 1126.50(a) (1995). Class II uses, which include yogurt and cream, command an intermediary minimum price. 7 C.F.R. § 1126.50(b) (1995). Class III and IIIA uses command the lowest minimum prices. 7 C.F.R. § 1126.50(c),(d) (1995).

manner exactly reflecting the average utilization in the market as a whole.¹⁰ The Texas Order establishes a producer-settlement fund into which handlers directing a greater than average proportion of their milk into the more valuable fluid uses must make payments.¹¹ Handlers directing a lesser than average proportion of their total milk into such fluid uses receive payments from that fund.¹²

An operator of both a dairy farm and a processing plant is designated as a producer-handler.¹³ Producers-handlers are entitled to certain benefits, including the ability to sell their products without regard to the pricing scheme.¹⁴ Milk received from a producer-handler at the plant of a regulated handler is designated as a lower Class III receipt, regardless of the price actually paid to the producer-handler or the actual use of the milk by the handler.¹⁵ Thereafter, if the handler applies the milk to a higher value use it must pay the difference into the producer-settlement fund.

Gore is a vertically integrated milk producer, owning a dairy, a processing plant, and a packaging facility. As such, it is designated as a producer-handler under the Texas Order. H.E. Butt Company (HEB), a grocery company operating in Texas, purchases packaged fluid milk from Gore for sale in its retail stores. In addition to purchasing packaged fluid milk from Gore, HEB also owns and operates a milk plant.

HEB operates a large complex in San Antonio, Texas, housing its milk production plant, an ice cream plant, a bakery and a Perishable Distribution Center (PDC). The PDC is housed under the same roof and shares a common wall with the milk production plant but is entirely separate

¹⁰See *Lehigh Valley Farmers v. Block*, 829 F.2d 409 (3d Cir. 1987).

¹¹7 C.F.R. § 1126.71(1995).

¹²7 C.F.R. § 1126.71(1995).

¹³7 C.F.R. § 1126.10(1995).

¹⁴See 7 C.F.R. § 1126.7(f)(1)(1995).

¹⁵7 C.F.R. § 1126.14 and 1126.44(1995). Although Gore could sell its milk at any price due to its status as a producer-handler, the record reflects that Gore sold its milk at a premium over the Class I minimum price.

therefrom.¹⁶ The record reflects that the PDC is exclusively a distribution center.¹⁷

Perishable goods sold by HEB, including the milk purchased from Gore,¹⁸ milk produced in the HEB milk processing plant, and various other items such as cut flowers, eggs, and meat are delivered to the PDC.¹⁹ Once delivered to the PDC, the goods are loaded onto trucks for distribution to the HEB retail stores. There is no connection between the milk processing plant and the PDC that does not also exist between the origin of the non-milk perishable goods and the PDC.²⁰

The market administrator²¹ for the Texas Order determined that HEB's receipt of Gore's milk constituted a receipt of milk from a producer-handler at the processing plant of a regulated handler. As such, the receipt was classified as Class III.²² From this premise HEB's subsequent sale of the milk purchased from Gore as Class I fluid milk called for a deposit into the producer-settlement fund. Gore paid \$366,772.38²³ into the producer-settlement fund on behalf of HEB to avoid loss of HEB as a customer.²³

¹⁶The PDC has its own receiving and loading docks and is managed separately.

¹⁷The record establishes that the PDC turns over its entire inventory 200 to 250 times each year.

¹⁸Gore previously delivered all of the milk directly to the individual HEB retail stores but began delivering a portion to the PDC to increase efficiency.

¹⁹The milk processed in the HEB plant passes through the wall between the plant and the PDC on a conveyor belt.

²⁰No raw milk to be processed by the HEB processing plant is delivered to the PDC and no processed milk ever passes from the PDC into the processing plant.

²¹The Secretary acts through the market administrator. 7 C.F.R. § 1000.3(1995).

²²7 C.F.R. § 1126.14 and 1126.44(1995).

²³Gore concedes that if the Secretary's interpretation is correct \$366,772.38 is the amount HEB properly owed to the producer-settlement fund.

Gore sought administrative review,²⁴ maintaining that the PDC is a separate distribution facility which is specifically excepted from the definition of a plant.²⁵ The Administrative Law Judge deferred to the Secretary's interpretation²⁶ and the Secretary's chief judicial officer affirmed.

The instant action followed. The parties submitted cross-motions for summary judgment. The district court referred this matter to a magistrate judge who recommended granting Gore's motion for summary judgment. After a *de novo* review, the district court determined to grant the Secretary's motion for summary judgment. Gore timely appeals.

Analysis

A. Standing

At the threshold we must determine whether Gore possesses standing. The Supreme Court teaches that "term standing subsumes a blend of constitutional requirements and prudential considerations."²⁷ To satisfy the requirements of Article III a plaintiff must have suffered an injury in fact, caused by the challenged government conduct, which is likely to be redressed by the relief sought.²⁸ In addition to the constitutional requirement, the Supreme Court has also taught that we should consider certain prudential principles in determining whether the plaintiff has standing. Specifically, we must resolve whether the plaintiff's conduct falls within the zone of interest protected or regulated by the statute.²⁹ Only those belonging to the class

²⁴See 7 U.S.C. § 608c(15)(A)(1992).

²⁵7 C.F.R. § 1126.4(1995) ("[S]eperate facilities used only as a distribution point for storing packaged milk in transit for route distribution shall not be a plant under this definition.").

²⁶The ALJ deferred but noted the persuasive force of Gore's position.

²⁷*Apache Bend Apartments, Ltd. v. United States through the Internal Revenue Service*, 987 F.2d 1174, 1176 (5th Cir. 1993) (en banc) (internal quotations omitted).

²⁸*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

²⁹*Apache Bend* (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)). See also *Lujan*, 497 U.S. at 883 (emphasis in

that the law was designed to protect may sue.³⁰ We must also inquire whether the plaintiff is asserting personal legal rights and interests.

Gore possesses constitutional standing; it was injured in fact by the Secretary's interpretation of 7 C.F.R. § 1126.4 which essentially foreclosed at least one very valuable market to Gore, *i.e.*, the HEB account, and we may relieve that injury by rejecting that interpretation.³¹ Further, Gore belongs to the class of persons regulated by the AMAA³² and, as such, is within the zone of interests protected or regulated by the statute.³³ Finally, other prudential considerations do not weigh against a finding of standing.

B. The Secretary's Interpretation of 7 C.F.R. § 1126.4.

Gore contends that the Secretary grossly erred in interpreting the definition of "plant" found in 7 C.F.R. § 1126.4. Gore maintains that the PDC is specifically excluded under the definition of "plant."

Our review is governed by the Administrative Procedure Act which requires that we determine whether the Secretary's interpretation of the regulation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.³⁴ In such a review we routinely defer to an agency's

original)("[T]he plaintiff must establish that the injury he complains of (*his* aggrivement, or the adverse effect *upon him*) falls within the 'zone of interest' sought to be protected by the statutory provisions whose violation forms the legal basis for his complaint.").

³⁰*Sabine River Authority v. United States Dep't of Interior*, 951 F.2d 669 (5th Cir.), *cert. denied*, 506 U.S. 823 (1992).

³¹*See Craig v. Boren*, 479 U.S. 190 (1976) (foreclosure of a market constitutes an injury in fact).

³²*See* 7 U.S.C. § 601 *et seq.* (1992); 7 C.F.R. pt. 1126 (1995).

³³*See Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *cf. Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

³⁴5 U.S.C. § 706(2)(A) (1989); *Pacific Gas Transmission Co. v. F.E.R.C.*, 998 F.2d 1303 (5th Cir. 1993); *Acadian Gas Pipeline System v. F.E.R.C.* 878 F.2d 865 (5th Cir. 1989).

construction of its own regulations,³⁵ but our examination should not be categorized as a summary endorsement of the agency's actions. A reviewing court does not serve the function of a mere rubber stamp of agency decisions."³⁶ Rather, we must undertake a careful and searching examination, ensuring that the agency's interpretation is rational and not plainly inconsistent with the text of the regulation.³⁷

The text of the regulation defines a "plant" as

the land, buildings, facilities, and equipment constituting a single operating unit or establishment at which milk or milk products (including filled milk) are received, processed, or packaged....[S]eperate facilities used only as a distribution point for storing packaged milk in transit for route disposition shall not be a plant under this definition.³⁸

Gore contends the PDC is a "separate facility used only as a distribution point" even though the complex, as a whole, includes a plant within the meaning of section 1126.4. The Secretary maintains that to constitute a separate facility, the PDC must be physically removed from the milk plant. Based on this interpretation, the Secretary concluded that the PDC is not a separate facility because it is housed under the same roof with the milk plant. We find the Secretary's interpretation of section 1126.4 strained, plainly inconsistent with the text of the regulation, arbitrary, capricious, and otherwise not in accordance with law.

³⁵See, e.g., *Acadian Gas*; *Pacific Gas*.

³⁶*Acadian Gas*, 878 F.2d at 868. The review of an agency's interpretation of its regulations is different than the review of an agency's interpretation of the statute it is charged to interpret under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See *Pacific Gas*; *Marlowe v. Bottarelli*, 938 F.2d 807 (7th Cir. 1991).

³⁷*Acadian Gas*; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (An agency's interpretation of its own regulations must comport with "the plain words of the regulation.").

³⁸7 C.F.R. § 1126.4(1995).

The regulations do not define "separate facility"; we must first determine whether the Secretary applied the ordinary meaning of that term.³⁹ A facility typically is defined in terms of its function;⁴⁰ hence, the ordinary import of the phrase "separate facility" is that the subject unit functions distinctly from something else and that it possesses a different purpose.⁴¹ The Secretary's contention that the modifier "separate" requires that the facility be physically removed modifies the regulation, for adopting that interpretation effectively inserts the phrase "and removed" before the term "facility." Section 1126.4 on its face recognizes a distinction between facilities and buildings. This suggests that if a physically separate building were required, the ordinary term for such would have been used. We therefore conclude that the Secretary's myopic interpretation is arbitrary, capricious, and otherwise not in accordance with law.

Alternatively, the Secretary contends that even if the facilities need not be physically separate, the PDC was not functionally separate. Under section 706(2)(E) of the APA, the factual findings of the hearing officer must be upheld if supported by substantial evidence.⁴² "The 'substantial evidence' standard requires a determination that agency findings are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support

³⁹*Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995); *see also*, *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning.").

⁴⁰*See* Webster's Third International Dictionary 812-13 (3d ed. 1976) (defining facility as "something that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"); Black's Law Dictionary 531 (5th ed. 1979) (defining facility as "[s]omething that is built or installed to perform some particular function.").

⁴¹Webster's Third International Dictionary 2069 (3d ed. 1976) (defining separate as distinct, different, dissimilar in nature, or set apart); Black's Law Dictionary 1124 (5th ed. 1979) (defining separate as something that is distinct individual, particular, or disconnected). The ordinary usage of the term "separate" does not require physical separation.

⁴²5 U.S.C. § 706(2)(E) (1989); *Parchman v. United States Department of Agriculture*, 852 F.2d 858 (6th Cir. 1988). The substantial evidence test only applies when a formal trial-type hearing is required under 5 U.S.C. §§ 556 and 557. *Consumers Union of the United States, Inc. v. Federal Trade Commission*, 801 F.2d 417 (D.C. Cir. 1986).

a conclusion.’’⁴³ A finding that the PDC is not functionally separate is not supported by substantial evidence; rather, the evidence overwhelmingly supports the contrary conclusion.

The Secretary maintains that because milk passed from the HEB milk plant into the PDC, the PDC was part of the production process. We are not persuaded. As the marketing administrator recognized, the PDC is strictly an assembly point for distribution.⁴⁴ First, no raw milk ever entered the PDC; the milk processed in the HEB plant was completely processed, packaged, and cooled before passing through the PDC.⁴⁵ Second, various other perishable goods passed through the PDC en route to HEB retail stores and as these perishables arrived at the PDC they quickly were loaded onto trucks for distribution.⁴⁶ Finally, the PDC was completely separate from the HEB milk plant; each had its own management and loading docks. No product ever entered the PDC and was then taken into any other area of the facility. The only physical connection between the milk plant and the PDC is the conveyor belt operating through the common wall. This sole tenuous connection is insufficient to transform a large distribution center into a component part of a milk plant. It is manifest that the Secretary’s determination that the PDC constituted a plant under section 1126.4 is not supported by substantial evidence.

Gore seeks not only invalidation of the Secretary’s interpretation that the delivery of its processed milk to the PDC constituted a delivery to a plant, but it also seeks reimbursement for the \$366,772.38 paid into the producer-settlement fund on behalf of HEB. Gore paid this money because of the Secretary’s now-rejected interpretation of section 1126.4 (or, alternatively, the Secretary’s unsupported conclusion that the PDC was not functionally

⁴³*Suntex Dairy*, 666 F.2d at 162 (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

⁴⁴Not only was the PDC a distribution point for the milk products, but it was also the distribution point for numerous other perishables.

⁴⁵No milk processed by HEB ever passed from the PDC into the milk plant.

⁴⁶The inventory of the PDC was turned over every second day.

separate) and, therefore, is entitled to a refund of the amount from the producer-settlement fund.⁴⁷

The judgment appealed is REVERSED, judgment consistent herewith in favor of Gore is RENDERED, and the matter is REMANDED for appropriate disposition.

**SANI-DAIRY, A DIVISION OF PENN TRAFFIC CO., INC. v.
YEUTTER SECRETARY OF AGRICULTURE, UNITED STATES
DEPARTMENT OF AGRICULTURE AND UNITED STATES OF
AMERICA.***

No. 95-3304.

Decided July 31, 1996 as amended August 29, 1996.

(Cite as: 91 F.3d 15)

Milk marketing order - Prohibited economic trade barrier.

The United States Court of Appeals for the Third Circuit affirmed and adopted the District Court's decision which held that the Secretary's regulations, as applied to the plaintiffs, constitute a prohibited economic trade barrier.

Before: NYGAARD, SAROKIN and ALDISERT, Circuit Judges.

**UNITED STATES COURT OF APPEALS
THIRD CIRCUIT**

OPINION OF THE COURT

Per Curiam.

⁴⁷See *Abbotts Dairies Division of Fairmont Foods v. Butz*, 584 F.2d 12 (3d Cir. 1978); see also 7 U.S.C. § 608c(15)(B) (1992) (granting jurisdiction in equity).

*Pursuant to Rule 12(a), F.R.A.P.

Several Pennsylvania dairy farmers and a dairy cooperative¹ challenge the validity of the Secretary of Agriculture's regulations governing the marketing of fluid milk in the New York-New Jersey milk marketing area.²

Plaintiffs allege that the Secretary's regulations, promulgated under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, violate 7 U.S.C. § 608c(5)(G), which states:

No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

The district court found that the Secretary's regulations governing the marketing of fluid milk in the New York-New Jersey milk marketing area, as applied to plaintiffs, constituted a prohibited economic trade barrier to milk producers and sellers outside the New York-New Jersey milk marketing area. *See Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 91-98 (1962). The district court awarded plaintiffs restitution and interest. We will now affirm, and in so doing adopt the reasoning of the district court expressed in *Sani-Dairy v. Yeutter*, 935 F.Supp. 608 (W.D. Pa. 1995) and *Sani-Dairy v. Espy*, F. Supp. NO. CIV. A. 90-222J, CIV. A. 90-236J, 1993 WL 832147 (W.D. Pa. Dec. 30, 1993).

KENNEY v. GLICKMAN, SECRETARY OF AGRICULTURE.

No. 95-2371.

Decided September 30, 1996.

(Cite as: 96 F.3d 1118)

Not the type of enforcement decision that is presumptively unreviewable under APA - Sufficient law for judicial review - Reversed and remanded.

Poultry and meat producers brought an action challenging USDA regulations governing meat and poultry processing. The United States District Court for the Southern District of Iowa

¹The dairy cooperative is no longer part of this suit because it failed to exhaust its administrative remedies before seeking judicial review.

²The marketing area is defined in 7 C.F.R. § 1002.3.

dismissed the action for failure to state a claim. The United States Court of Appeals for the Eighth Circuit reversed and remanded the case finding that the regulations were not presumptively unreviewable enforcement decisions under the Administrative Procedure Act, and that there was sufficient law available for judicial review of the agency's decisions. The Secretary's decisions regarding zero tolerance water washing are general policies and standards, not decisions on whether a violation has occurred or should be acted against, and are therefore not enforcement actions. There is a strong presumption that Congress intends the judicial review of administrative action, and law to apply can be found in underlying statutes or regulations. The PPIA and the FMIA regulations provide sufficient law to apply in reviewing the Secretary's decisions regarding zero tolerance, water washing, and permissible water retention. The case was remanded for a determination of whether the Secretary abused his discretion.

Before MCMILLIAN and BEAM, Circuit Judges, and PERRY,* *District Judge.*

**UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

PERRY, District Judge.

Delores Kenney and fellow poultry consumers appeal from the district court's order dismissing this action for failure to state a claim. Because we find that the challenged actions and inactions of the Secretary of Agriculture are reviewable, we reserve and remand to the district court for a determination of whether the Secretary abused his discretion.

I.

The original plaintiffs, poultry consumers and red meat producers, brought an action against appellee Daniel Glickman, Secretary of Agriculture,¹ challenging certain aspects of the Department of Agriculture's regulatory scheme governing meat and poultry processing. The district court held that the poultry consumers had standing to challenge the Secretary's actions, but

*The HONORABLE CATHERINE D. PERRY, United States District Judge for the Eastern District of Missouri, sitting by designation.

¹Defendant below was Mike Espy, who was Secretary of Agriculture at the time appellants brought this action. Daniel Glickman, current Secretary of Agriculture, has replaced Espy as party to this action.

the red meat producers did not have standing. The red meat producers did not appeal that part of the district court's order. With respect to the poultry consumers, the district court granted the Secretary's motion to dismiss for failure to state a claim, holding that the actions and decisions of the Secretary of Agriculture challenged by appellants are not subject to judicial review. The poultry consumers have appealed that determination.

Appellants challenge certain actions and inactions by the Secretary of Agriculture regarding the processing of poultry. The Secretary is responsible for implementing both the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. 451 *et seq.*, and the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. 601 *et seq.* The stated objectives and bases of the two Acts are identical: protect the health and welfare of consumers and to eliminate the burdens on interstate commerce that result from the distribution of unwholesome, adulterated or mislabeled products. With respect to the health of consumers, both parties provided statistics regarding the large number of contaminated meat and poultry carcasses processed each year and the negative consequences resulting from human consumption of the contaminated carcasses. In light of the identical goals of the two Acts, appellants allege that the Secretary has issued contradictory requirements for the inspection and cleaning of meat and poultry, and that the Secretary has improperly allowed water absorbed during processing to remain in poultry.

The processing of meat and poultry begins with the removal of certain parts of the carcasses. The carcasses and parts are then either sold or processed further. Because both meat and poultry are sold by weight, any moisture added during processing increases the value of the carcass. Similarly, any trimming of the carcass during processing to remove contaminants reduces the value of the carcass. To further the goals of the PPIA and FMIA, the regulations require ante- and post-mortem inspections of the livestock and poultry processed for human food. In technical terms, the purpose of the inspections is to ensure that the carcasses are not "adulterated" or "misbranded." The definitions of those two terms are nearly identical under the two Acts.

Individual meat and poultry carcasses are inspected during processing, and carriers of *E. coli* and other pathogens are removed. The well-known contaminants that carry pathogens are feces, ingesta and milk. If contaminants are found on an individual meat or poultry carcass, the regulations require processors to remove the contaminants. The regulations refer to this as "zero tolerance" with respect to individual carcasses. After the individual carcasses have been inspected and reprocessed as necessary, the

inspector reinspects sample carcasses selected from the entire lot to determine whether there was a "process defect" that may have caused contaminants to exist on carcasses in that particular lot. Before March 1993, the regulations established a tolerance slightly above zero with respect to process defects in both poultry and meat. In other words, if the number of defects discovered on the sample carcasses was less than the tolerance level, the entire lot could proceed. If the defects exceeded the tolerance level, the entire lot failed and corrective action was required.

In March 1993, the Secretary issued directives to operators and inspectors of beef slaughter plants.² The directives--which affected meat but not poultry--lowered the tolerance level for process defects to zero. The directives did not affect the tolerance level for individual carcasses, *i.e.*, the tolerance for contaminants on individual carcasses remains zero for both meat and poultry. The tolerance level for process defects in poultry remains slightly above zero. In other words, a certain level of contaminants discovered in poultry during the process inspection is acceptable and the lot will not be returned for reprocessing.

In addition to the different standards of tolerance for process defects, the methods of contaminant removal approved by the Secretary also differ between meat and poultry. The regulations governing inspections require meat processors to trim or otherwise actually remove the contaminated tissue, while the regulations allow poultry processors to "water wash" the contaminated portion of the carcass.

Appellants challenge the Secretary's decisions with respect to (1) the "zero tolerance" for process defects in meat but not poultry and (2) the regulations allowing poultry processors to water wash rather than trim contaminants. Appellants contend that the Secretary should either issue the same regulations for poultry and meat or provide a legally sufficient reason for treating meat and poultry differently.

Finally, appellants challenge certain water-retention regulations governing poultry. The regulations governing water absorbed during processing differ between meat and poultry. The meat regulations prohibit processors from adding water and other substances to a meat carcass during processing. Poultry carcasses, on the other hand, may absorb and retain an average of eight percent increase over the weight of the carcass before final washing.

²In December 1993, interim guidelines replaced the March 1993 directives with no relevant substantive changes.

Appellants challenge this regulation on two grounds. First, irrespective of the meat regulations, appellants allege that the Secretary has violated the Poultry Act's prohibitions against "adulterated" and "misbranded" carcasses by allowing water retention in poultry. Second, appellants allege that the Secretary has acted arbitrarily and capriciously by allowing retention of water in poultry but not in meat.

II.

The district court held that none of the Secretary's challenged actions or inactions are reviewable. With respect to the zero tolerance and contaminant removal standards, the court looked to the introductory language of the PPIA and held that "that statute has been drawn so broadly that there is no standard available for judging how and when the agency should exercise its discretion." Likewise, the court held that decisions regarding retention of water during poultry processing are "left completely to the discretion of the Secretary." We review the district court's decision *de novo*. *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied*, 444 U.S. 899, 100 S. Ct. 208, 62 L. Ed. 2d 135 (1979).

The Administrative Procedure Act (APA) is the starting point for discussion of reviewability of an agency action. The APA provides that any person "adversely affected or aggrieved" by a "final agency action for which there is no other adequate remedy" is generally entitled to judicial review. 5 U.S.C. § 702, 704.³ There are two exceptions to the general rule of reviewability:

(1) where the statute explicitly precludes judicial review, and (2) where "agency action is committed to agency discretion by law." *Id.* 701(a). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), the Supreme Court noted that the second exception was "very narrow" and that "it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at 410, 91 S. Ct., at 821 (footnote omitted) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). The Court again discussed the second exception to reviewability in *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). In *Chaney*, the Court created a rebuttable presumption that "an

³The APA judicial review provisions apply equally to agency action and agency inaction. 5 U.S.C. §§ 551(13), 706(1); *see also Iowa ex rel. Miller v. Block*, 771 F.2d 347, 352 (8th Cir. 1985), *cert. denied*, 478 U.S. 1012, 106 S. Ct. 3312, 92 L. Ed. 2d 725 (1986).

agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" under § 701(a) (2) of the APA. *Chaney*, 470 U.S. at 831, 105 S. Ct. at 1655.

In this case, neither party contends that any of the three challenged actions are explicitly precluded from judicial review by statute, and therefore the first exception to reviewability does not apply. Appellee contends that its regulations regarding zero tolerance and contaminant removal are enforcement decisions that are presumptively unreviewable under *Chaney*. Appellants contest the characterization of these regulations (or lack thereof) as enforcement decisions, and claim that they are reviewable. With respect to the Secretary's decision to allow water absorption into poultry, appellee apparently does not dispute that the action is reviewable, and instead argues that the Secretary's actions were not arbitrary and capricious.

III.

Appellee contends that the Secretary's decisions to reject a zero tolerance standard for poultry process defects and to allow water washing of poultry contaminants are the type of enforcement decisions that the Supreme Court declared presumptively unreviewable in *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985). In support of his argument, appellee states that the meat and poultry inspection processes are the same, and that the Secretary has merely made a decision to use agency resources to enforce the meat inspection processing regulations more vigorously as part of a "high priority" to prevent pathogens in the nations's meat supply.

We reject appellee's characterization of the zero tolerance and water washing policies as enforcement decisions; we find that *Chaney* does not establish a presumption of unreviewability in this case. In *Heckler v. Chaney*, the Court held that the Food and Drug Administration's decision not to take enforcement actions to prevent the use of lethal injections was not subject to review. *Id.* According to the Court, a decision not to enforce "often involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831, 105 S. Ct. at 1655. The Court stated the following reasons for the general unsuitability of judicial review of enforcement actions:

[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another,

whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32, 105 S. Ct. at 1656.

The Secretary's decisions regarding zero tolerance and water washing are not *Chaney*-type enforcement actions. The Secretary has not decided "whether a violation has occurred," has not decided whether he will "succeed" if he acts, and has not determined which "technical violations" to act against. Rather, the Secretary has adopted general policies stating that the tolerance level of process defects in poultry is slightly above zero while the tolerance level of process defects in meat is zero, and that poultry contaminants can be water washed rather than trimmed while meat contaminants must be trimmed. Those policies are the standards that the Secretary deems acceptable to implement the goals of the PPIA and FMIA.

Likewise, this is not a case where the Secretary has refused to institute proceedings. In support of the presumption of unreviewability, the Court in *Chaney* stated:

Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict--a decision which has long been regarded as the special province of the Executive Branch

Id. at 832, 105 S. Ct. at 1656. This language suggests that *Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards. An example highlights the distinction: A prosecutor refuses to institute proceedings when he or she decides not to prosecute an individual possessing one ounce of marijuana; Congress would not be characterized as "refusing to institute proceedings" under *Chaney* if it amended the drug laws to exclude simple possession of one ounce or less of marijuana as a crime.

In sum, we do not believe the Court in *Chaney* intended its definition of "enforcement action" to include an interpretation by an agency that the

statute's goals could be met by adopting a certain permanent standard.⁴ See, e.g., *Arent v. Shalala*, 70 F.3d 610, 614 (D.C. Cir. 1995) ("*Chaney* is of no assistance to the [agency] in this case because the [agency's] promulgation of a standard for 'substantial compliance' under the [Act] does not represent an enforcement action."); *Edison Elec. Institute v. U.S. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993) ("Petitioners are not challenging the manner in which the [agency] has chosen to exercise its enforcement discretion Instead, petitioners are challenging the [agency's] interpretation of [the Act] and its implementing regulations Clearly, this interpretation has to do with the substantive requirements of the law; it is not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review."); *National Treasury Employees Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988) ("[The agency's] decision to develop some but not other competitive examinations . . . is a major policy decision, quite different from day-to-day agency nonenforcement decisions . . ."). The poultry policies allowing greater than zero tolerance of process defects and water washing of contaminants are policy decisions based on the Secretary's interpretation of the PPIA in light of the goal to protect consumers from health risks.

IV.

Having determined that the Secretary's zero tolerance and water washing policies for poultry do not qualify as enforcement actions, we continue to review the Secretary's challenged inactions under the relevant provisions of the APA. The Secretary's decisions with respect to poultry are presumed reviewable unless there is no law to apply. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402; 91 S. Ct. 814; 28 L. Ed. 2d 136 (1971). In general, there is a strong presumption that Congress intends judicial review of

⁴The Court in *Chaney* recognized that it was not addressing the situation "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," and therefore expressed no opinion as to whether such decisions would be unreviewable under § 701(a). *Chaney*, 470 U.S., at 833, n. 4; 105 S. Ct. at 1656 n. 4. In this case, the Secretary's zero tolerance and contaminant removal standards are conscious and express general policies. Although appellants have not argued that this case involves an extreme policy that is an "abdication" of the Secretary's responsibilities, we find that the Court's distinction in footnote four of *Chaney* between general policies and enforcement actions supports our conclusion.

administrative action. *Abbott Lab v. Gardner*, 387 U.S. 136, 140; 87 S. Ct. 1507, 1511; 18 L. Ed.2d 681 (1967). "Judicial review of a final agency action will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.*

Courts have found that "law to apply" may exist in the underlying statute or in regulations by the agency interpreting the underlying statute. *See, e.g., Safe Energy Coalition of Michigan v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1478 (D.C. Cir. 1989); *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988) (per curiam). Both the PPIA and the Secretary's regulations under the FMIA provide law to apply in reviewing the Secretary's inaction with respect to zero tolerance and water washing. The district court relied on the introductory language to the PPIA and found that it was so broad that there was no law to apply. However, appellants rely on more than the introductory language to the PPIA regarding protection of consumers' health; appellants also rely on the language in the PPIA mandating that the Secretary prevent adulterated poultry products from entering commerce. *See* 21 U.S.C. §§ 453 (g), 455. We find that the prohibition of "adulterated" products found in the PPIA provides a sufficient standard by which the district court can examine the Secretary's zero tolerance and water wash policies that govern poultry processing. The district court must examine the Secretary's reasons for adopting the policies in light of the goals of the PPIA and the definition of "adulterated" to determine whether the Secretary's action or inaction was arbitrary and capricious or an abuse of discretion.

In addition, the Secretary's regulations and policies regarding meat that were implemented pursuant to the FMIA provide law to apply. The PPIA and FMIA are identical in several respects, and parallel in most other respects. The legislative history of the two Acts and subsequent amendments indicate a congressional intent to construe the PPIA and the FMIA consistently. *American Public Health Ass'n v. Butz*, 511 F.2d 331, 335 (D.C. Cir. 1974); *see also* H.R. Rep. No. 1333, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N.3426. Courts have also held that, in general, similar or parallel statutes should be interpreted consistently whenever possible. *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F. 2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052, 13 S. Ct. 974, 122 L. Ed.2d 129 (1993); *FAIC Securities, Inc. v. United States*, 768 F.2d 352, 363 (D.C. Cir. 1985). Although there is no requirement that the regulations interpreting the PPIA and FMIA be identical, we believe that the Secretary's interpretation of the FMIA--which resulted in a zero tolerance of process defects in meat and a requirement that meat processors trim contaminants--provides law to apply in evaluating the

regulations interpreting the nearly identical PPIA. The Secretary may have legitimate, rational reasons for differing between meat and poultry. However, in light of the strikingly similar goals and language of the two statutes, we hold that there is law to apply to determine whether the Secretary acted arbitrarily and capriciously in distinguishing between poultry and meat in implementing regulations governing contaminants during processing. Because the district court found the actions unreviewable, it did not proceed to review them. Accordingly, Count I will be remanded to the district court for review of the Secretary's actions.

V.

Appellants have also challenged the Secretary's regulations allowing up to 8% water to be absorbed during poultry processing. It is undisputed that these regulations are not "enforcement actions" under *Heckler v. Chaney*, but rather are agency interpretations of the PPIA and FMIA. In addition, appellee does not appear to argue that there is no law to apply or that the decision to allow poultry to absorb some water is "committed to agency discretion." Rather, appellee appears to have conceded that the actions are reviewable, and essentially argued to this Court that the regulations are a reasonable interpretation by the Secretary of the PPIA.

Appellants are correct that this action is reviewable because there is law to apply--both the PPIA itself and the Secretary's interpretation of the nearly identical FMIA. Appellants challenged the poultry water retention regulation under the PPIA provision prohibiting adulterated and misbranded poultry products. The relevant definitions of "adulterated" and "misbranded" are identical under the PPIA and FMIA. Compare 21 U.S.C. § 453(g), (h) with 21 U.S.C. § 601(m), (n). However, the regulations permit up to 8% water to be retained during the processing of poultry, see 9 C.F.R. § 381.66 (1995), whereas the meat regulations do not allow the retention of water or any other substance during processing, see 9 C.F.R. § 301.2(c)(8) (1995).

Under the PPIA, a poultry product is "adulterated" if "any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appeal better or of greater value than it is." 21 U.S.C. § 453(g)(8). This definition provides law to apply. The district court can review whether the Secretary has properly excluded water absorbed during processing from the class of substances prohibited by the PPIA from being added to poultry. In addition, the court can compare the Secretary's poultry and meat regulations to determine whether the

Secretary has acted arbitrarily and capriciously or abused his discretion by treating meat and poultry differently.

Likewise, the definition of "misbranded" provides law to apply, as evidenced by the numerous court decisions reviewing agency action and inaction challenged as violations of the prohibition against misbranded poultry products. *See, e.g., American Meat Institute v. USDA*, 646 F.2d 125 (4th Cir. 1981); *National Pork Producers Council v. Bergland*, 631 F.2d 1353 (8th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S. Ct. 1350, 67 L. Ed.2d 335 (1981); *American Public Health Ass'n v. Butz*, 511 F.2d 331 (D.C. Cir. 1974). Appellants contend that the current poultry regulations regarding water retention violate two of the provisions in the definition of "misbranded" poultry under the PPIA. First, a poultry product is misbranded "if its labeling is false or misleading in any particular." 21 U.S.C. § 453 (h)(1). Second, a poultry product is misbranded

[U]nless it bears a label showing . . . (B) an accurate statement of the quantity of the product in terms of weight, measure, or numerical count: Provided, That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages or articles not in packages or other containers may be established by regulations prescribed by the Secretary.

21 U.S.C. § 453(h)(8). The district court relied on the "reasonable variation" and "exemptions . . . may be established" language contained in 453 (h)(5) to conclude that all interpretations of the term "misbranded" were committed by Congress to agency discretion. This conclusion affords too much weight to provisions that are merely a part of the definition of "misbranded" and that appear to apply only in very narrow situations. *See generally Rath Packing Co. v. Becker*, 530 F.2d 1295, 1298-1301, 1308-12 (9th Cir. 1975), *aff'd*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed.2d 604 (1977); *see also* 9 C.F.R. §§ 317.2, 317.19 (1995) (defining scope of "reasonable variations"). There is nothing in the definition of "misbranded" that indicates Congress intended to afford complete discretion to the agency regarding decisions such as the water absorption provisions challenged in this case. Because appellee has not overcome the presumption of reviewability with respect to the poultry regulations that allow some water to be absorbed, Count II will be remanded to the district court for review of the Secretary's actions.

VI.

In conclusion, we reverse and remand this action to the district court on both Counts I and II for a review of the Secretary's actions.

MCMILLIAN, Circuit Judge, dissenting in part.

I respectfully dissent in part. I would affirm the district court's dismissal of appellants' claim in Count I of the complaint. In my opinion, the Secretary's decisions not to enforce a zero tolerance standard for poultry process defects and to allow water washing of poultry contaminants are nonreviewable enforcement decisions under *Heckler v. Chaney*, 470 U.S. 821, 831-32, 105 S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985). However, for the reasons stated in Part V of the majority opinion, I agree that the district court's dismissal of appellants' claim in Count II of the complaint (concerning the water absorption regulations) should be reversed, and that claim remanded for review.

**KREIDER DAIRY FARMS, INC. v. GLICKMAN, SECRETARY OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE.**

No. CIV. A. 95-6648.

Filed August 15, 1996.

Milk marketing order - Definition of producer-handler - Promulgation history-Remand.

The United States District Court for the Eastern District of Pennsylvania remanded the case for further factfinding, in order to determine whether granting Kreider producer-handler status would give it an unfair economic advantage. The market administrator (MA) of Order 2 denied Kreider producer-handler status because its sales to Ahava are considered to be distributions to a "subdealer." Because Ahava plays a role in distributing the milk to its ultimate end users, the MA determined that Kreider is not completely self-contained, and is therefore, not entitled to be exempt from contributions to the producer-settlement fund. The Court found that the MA's interpretation of Order 2 is not clearly supported by the plain language of the order, the promulgation history, or agency precedent. It also determined that further fact finding is necessary to decide whether the economic justification for the market administrator's interpretation is valid. It further held that if the petitioner prevails, it is entitled to a full refund of assessments with interest.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

MEMORANDUM

CAHN, District Judge:

Plaintiff, Kreider Dairy Farms, Inc. ("Kreider"), seeks review of a Decision and Order issued by the Judicial Officer of the United States Department of Agriculture ("USDA").¹ Kreider initiated this case by filing a complaint pursuant to section 608c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. (the "AMAA"). The case arises from the administration of a federal milk marketing order, enacted under the authority of the AMAA, which regulates the sale of milk and fluid milk products in the New York-New Jersey milk marketing area. See 7 C.F.R. § 1002 et seq. (1995).

Kreider challenges the ruling of the Judicial Officer ("JO") who affirmed the decision of the Market Administrator ("MA") for the New York-New Jersey Milk Marketing Order ("Order 2")² to regulate Kreider as a handler

¹The Judicial Officer acts on behalf of the Secretary of Agriculture in all adjudicative matters which are appealed to the USDA. See 7 C.F.R. § 2.35(1995).

²The following provides a helpful background on the purpose of a milk marketing order:

Milk marketing orders issued under the [AMAA] provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and for the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. The procedure is generally as follows: The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means

(continued...)

under Order 2 rather than designating Kreider as a producer-handler exempt from paying certain fees for sales of fluid milk. Pursuant to 7 U.S.C. § 608c(15)(B) of the AMAA, Kreider sought review of the JO's decision by filing a complaint in this court against Defendant Dan Glickman, the Secretary of the USDA ("Defendant" or "the Secretary"). Currently before this court are Kreider's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. After consideration of the memoranda and the on-record hearing on this matter, this court finds that Defendant's action is not warranted by the record before this court. Therefore, this case is remanded to the Secretary for further factual findings.

PROCEDURAL HISTORY

Kreider initiated these proceedings on December 23, 1993, by filing a Petition with the USDA pursuant to section 608c(15)(A) of the AMAA. An Answer to the Petition was filed by the Administrator of the Agricultural Marketing Service, USDA, on February 25, 1994. On December 14, 1994, a hearing was held before an administrative law judge ("ALJ").

In a Decision and Order dated March 20, 1995, the ALJ held that Kreider qualified as a producer-handler under Order 2 and stated that Kreider was therefore entitled to a full refund of all sums which had it been required to pay into producer-settlement and administrative funds established under the Order. As of November, 1994, these sums totalled \$543,864.68. The ALJ denied Kreider's request for interest on the amount paid.

The Agricultural Marketing Service filed its Appeal to the ALJ's Decision on May 5, 1995. Also on May 5, 1995, Kreider filed a Cross-Appeal concerning its right to interest on the refund. On September 28, 1995, the JO issued a Decision and Order reversing the ALJ and upholding the MA's decision to regulate Kreider as a handler under Order 2. *See In re: Kreider Dairy Farms, Inc.*, 94 AMA Docket No. M-1-2 (USDA Sept. 28, 1995).

On October 18, 1995, following the issuance of the JO's Decision and Order, Kreider filed its Complaint with the United States District Court for

²(...continued)
of the equalization or producer-settlement fund.

In re Yasgur Farms, Inc. 33 Agric. Dec. 389, 391-92 (1974) (quoting *Grant v. Benson*, 229 F.2d 765, 767 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)).

the Eastern District of Pennsylvania. On December 29, 1995, Defendant filed its Answer to the Complaint.

FACTUAL BACKGROUND

Kreider is a dairy farm corporation with its principal office in Manheim, Pennsylvania. Manheim is located within what the USDA considers to be the Middle Atlantic area, a region in which sales of milk are regulated by Federal Milk Marketing Order 4. *See* 7 C.F.R. § 1004 *et seq.* (1995). Although Kreider is physically located within the boundaries of Order 4, it sells fluid milk in the marketing area covered by Order 2.

Since 1990, Kreider has been selling packaged kosher fluid milk to two subdealer/handlers, the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. (the "FPPTLC") and Ahava Dairy Products, Inc. ("Ahava"). The FPPTLC is a distributor of fluid milk and milk products and is located in Baltimore, Maryland. It sells fluid milk to customers in Lakewood, New Jersey. Ahava, which is also a distributor of fluid milk and milk products, is located in Brooklyn, New York. Ahava distributes its dairy products in Brooklyn, Manhattan, and Queens, New York. Its customer base encompasses between 800 and 1,100 customers consisting of grocery stores, restaurants, and schools.

In December, 1990, the MA responsible for administering Order 2 learned that Kreider was selling fluid milk to Ahava for distribution into the milk marketing area covered by the New York-New Jersey Milk Marketing Order. Subsequently, the MA determined that Kreider also sold fluid milk to the FPPTLC, which distributed it into the Order 2 marketing area.

By letter dated December 19, 1990, the MA informed Kreider that it might be subject to regulation under Order 2 and instructed it to file reports with the MA's office. In January 1991, Kreider filed an application for a producer-handler designation with the MA for Order 2. The MA denied the application based on its determination that Kreider did not meet the requirements of a producer-handler as defined in § 1002.12 of Order 2. *See* 7 C.F.R. § 1002.12 (1995). Instead, in July 1992, following audits of Kreider, the MA concluded that Kreider should be billed as a regulated handler operating a partial pool plant under Order 2. On August 7, 1992, the MA sent a billing statement to Kreider, billing it as a regulated handler under Order 2 for the period November 1991 to June 1992. Subsequently, the MA continued to bill Kreider on a monthly basis as a handler operating a partial

pool plant. As of December 14, 1994, the time of the hearing before the ALJ, the total amount which Krieder has paid to the MA was \$543,864.68.

STANDARD OF REVIEW

A district court's review of an MA's decision is limited to whether the decision was warranted by the record and has a rational basis in the law. *Marigold Foods, Inc. v. Butz*, 493 F.2d 60, 62 (8th Cir. 1974). The court cannot engage in a de novo fact finding process. *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Assn v. State Farm Mutual*, 463 U.S. 29, 43 (1983). However, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Because the MA's decision appears arbitrary on the basis of the record before this court, this case is remanded for further factual findings.

DISCUSSION

In the instant motion Kreider raises four claims: first, that Defendant's application of the Order 2 producer-handler regulations to Kreider is not in accordance with the law; second, that the MA should be estopped from changing Kreider's status as a producer-handler because the MA initially approved this status for Kreider; third, that Defendant's application of Order 2 to Kreider's distribution of kosher milk products impermissibly interferes with the First Amendment rights of Ahava and its customers; and fourth, that Kreider is entitled to declaratory and injunctive relief and a refund of all payments made pursuant to the unlawful application of the order, with appropriate interest upon the refund. Because Kreider failed to raise the First Amendment and estoppel claims before the Judicial Officer, this court will not consider these claims. *United States v. Daylight Dairy Products, Inc.*, 822 F.2d 1, 2 (1st Cir. 1987) (stating that "a district court, when enforcing a marketing order, cannot consider legal challenges to the order until after the handler has

pursued his administrative remedy") (citations omitted).³ Therefore, this court confines its discussion to Kreider's first and fourth claims.

I. Whether Kreider Qualifies for Producer-Handler Status

Kreider offers two arguments supporting its designation as a producer-handler. Kreider asserts first that the promulgation history of the Order 2 producer-handler regulations establishes that distribution to subdealers is not prohibited. Second, Kreider contends that the plain language of the Order 2 producer-handler regulation establishes that Kreider meets all of the requirements. Because Kreider's second assertion is more logically the starting point for a determination of Kreider's status under Order 2, this court will examine these claims in reverse order. Additionally, the court will examine the JO's findings that departmental precedent does not support the ALJ's decision that producer-handlers are not prohibited from distributing to subdealers and that Kreider's interpretation of the exemption is antithetical to the federal milk marketing scheme and would defeat the purpose of Order 2.

A. The Plain Language of the Order 2 Producer-Handler Regulation

³Even if this court were to consider the First Amendment and estoppel claims, it would concur with the ALJ's decision. The ALJ found that Plaintiff had no standing to assert the claim under the First Amendment. This finding is supported by *Valley Forge College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (finding that respondents, who objected to the government's donation of property to a religious organization on First Amendment grounds, had no standing because "[t]hey fail[ed] to identify any personal injury suffered . . . as a consequence of the alleged constitutional error"). The ALJ found no undue delay on the part of the MA in reaching his decision with respect to Plaintiff's producer-handler status. This court also finds that the record does not support Kreider's assertion that the Market Administrator misled Kreider as to whether Kreider would qualify for producer-handler status. The record shows nothing more than a misunderstanding between Kreider and the MA, and is therefore insufficient to support an estoppel claim. "When estoppel is alleged against the United States, the [party asserting this] must also prove 'affirmative misconduct' on the part of the government." *United States v. St. John's General Hospital*, 875 F.2d 1064, 1069 (3d Cir. 1989). Further, even if the MA had given Kreider erroneous information about its potential for attaining producer-handler status, this does not mean that the Secretary should be bound by that act. See *In re Yagur Farms, Inc.*, 33 Agric. Dec. at 412 ("[I]t is settled that a handler relies on erroneous advice by the Market Administrator's office at his peril.") (citations omitted).

There are three subpoints to Kreider's plain-language argument. Kreider asserts that "the syntax of the Order 2 producer-handler regulations establishes that there is no requirement that producer-handlers have any specific role in the distribution of their fluid milk products after the products leave their plant." (Pls.' Br. Supp. Mot. Summ. J. at 19.) Kreider also contends that its interpretation is supported by the cancellation provisions of the order. *Id.* at 22-23. Finally, Kreider asserts that the order's treatment of the delivery of producer-handler milk products to regulated pool plants supports its interpretation. *Id.* at 23.

1. The Syntax of Order 2

The relevant language of the Order reads as follows:

(b) Requirements. (1) The handler has and exercises (in his capacity as a handler) complete and exclusive control over the operation and management of a plant at which he handles milk received from production facilities and resources (milking herd, buildings housing such herd, and the land on which such buildings are located) [,] the operation and management of which also are under the complete and exclusive control of the handler (in his capacity as a dairy farmer), all of which facilities and resources for the production, processing, and distribution of milk and milk products constitute an integrated operation over which the handler (in his capacity as a producer-handler) has and exercises complete and exclusive control.

7 C.F.R. § 1002.12(b)(1). Kreider asserts that it is significant that the exempt entity is called a "producer-handler" as opposed to a "producer-handler-distributor" or "producer-distributor." (Pls.' Br. Supp. Mot. Sum. J. at 20.) Kreider contends that when the language of this section of Order 2 is parsed, "it demonstrates a precise concern with the facilities and resources for the production and processing of milk, but no concern whatsoever with respect to facilities of, or means of, distribution." *Id.* Kreider further asserts that

[I]f the regulation . . . was intended to require that producer-handlers have distribution facilities to deliver the milk products directly to the consumer or to the store which sells to the consumer, the regulation, to be logical and consistent, would have specified the types or categories

of distribution facilities that were contemplated, just as it did with respect to the farm and plant facilities.

Id. at 22.

In assessing this argument, the JO found that Kreider is "attempting to meet the 'plain language' [of the producer-handler regulation] by putting a meaning on the word 'distribution' which the word cannot bear . . ." *In re: Kreider*, 1995 WL 598331, at *21. The JO stated "the Order declares that the 'production, processing, and distribution of milk and milk products' must constitute an 'integrated operation' over which the producer-handler has and exercises 'complete and exclusive control.'" *Id.*

This court finds that the order is ambiguous. The order clearly states that a producer-handler must have complete and exclusive control over distribution facilities and resources, not simply distribution in general. However, while production facilities and resources are defined as "milking herd, buildings housing such herd, and the land on which such buildings are located," there is no definition of distribution facilities. Thus, it does not appear to this court to be clear from the plain language of the order what the distribution facilities are that must be under the complete and exclusive control of the producer-handler.

2. Order 2's Cancellation Provisions

Kreider also contends that the cancellation provisions of the regulation supports its interpretation of "producer-handler." Kreider notes that the cancellation provision, 7 C.F.R. § 1002.12(c), mentions nothing about cancellation for delivery to subdealers but addresses all of the other substantive requirements for producer-handler status. (Pls.' Br. Supp. Mot. Summ. J. at 22.) Kreider points to the three specific instances of cancellation covered in this section of the regulations:

- (1) Transfer of cows or production resources to the name of another person who then sells the milk into the pool as producer milk;
- (2) purchase/transfer into the producer-handler operation of cows or facilities previously used to supply pool milk (except after notice and only during the 'flush' months of the year; and
- (3) handling fluid milk products from other handlers in amounts exceeding the exempt limits.

Id. at 23 (citing 7 C.F.R. § 1002.12(c)). In response, Defendant cites the JO's finding that "the catch-all provision contained in § 1002.12(c) which states that producer-handler status may be canceled if any of the requirements contained in § 1002.12(b) of the regulation are not met, served to effectively provide that sales to subdealer handlers would be grounds for cancellation." (Def.'s Resp. Pls'. Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 23 (citing *In re: Kreider*, 1995 WL 598331, at *22).)

Because this court finds the requirements set forth in section 1002.12(b) ambiguous for the reasons previously stated, Defendant's argument is not a satisfactory explanation of why the cancellation order does not include dealing to subdealers when it does speak to other activity clearly prohibited by the requirements section.

3. Order 2's Treatment of the Delivery of Producer-Handler Milk Products to Regulated Pool Plants

Kreider's final argument concerning the plain language of Order 2 is that the Order "specifically contemplates the delivery of producer-handler milk products to regulated pool plants and establishes the consequences of those transactions (in terms of allocating and pricing the milk)." (Pl.'s Br. Supp. Mot. Summ. J. at 23 (citing 7 C.F.R. § 1002.45(a)(8)(iii).) Kreider asserts that although such sales are discouraged by treating such deliveries as non-pool deliveries and thereby possibly subject to compensatory payments, such sales are allowed and do not affect a producer-handler's status. *Id.* In considering this argument of Kreider, the JO found:

[T]he Order must dictate how all milk and milk products are allocated and priced from every conceivable source. Otherwise, there would be a gap in the regulatory scheme. But it is neither logical nor necessary to include the consequences to a producer-handler of delivering milk to a subdealer in the "allocation" provisions of the Order. That section is concerned only with the consequences to the pool plant of receiving milk from particular sources.

In re: Kreider, 1995 WL 598331, at *22 (citation omitted).

This court agrees with the JO that there is no reason to assume that a section on allocation should deal with consequences to a producer-handler for delivering to a pool-handler. However, as noted above, this court finds the order to be ambiguous. If there is ambiguity, it is appropriate to turn to the

legislative history. See, e.g., *In re Wileman Bros. & Elliott, Inc.*, 49 Agric. Dec. 705, 798 (1990) (stating that "[i]t is appropriate to consider all of the legislative history in the rulemaking records before the Secretary," and that "where the Secretary's intent is revealed, the regulations should be construed, insofar as possible, in accordance with the Secretary's intent").

B. The Promulgation History of Order 2 Producer-Handler Regulations

Kreider contends that a "[r]eview of [the] record demonstrates that the [USDA] specifically refused to adopt a prohibition of producer-handler sales to subdealers." (Pl's Br. Supp. Mot. Summ. J. at 13-14.) The parties agree on the relevant facts of the promulgation history.

The producer-handler exemption currently contained in the New York-New Jersey Milk Marketing Order was first promulgated in 1958 through amendments to what was then Milk Marketing Order No. 27. Prior to 1958, milk from a handler's own dairy farm was exempt from the pooling requirements of the New York-New Jersey Order on the following basis:

- (2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.
- (3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such point.

7 C.F.R. § 927.65(h).

The 1958 hearings were called (insofar as the producer-handler issue was concerned) to consider proposed amendments to the producer-handler exemption cited above. The hearings resulted from concern in the milk industry that the terms of the exemption needed to be better defined and more stringently enforced.

Subsequent to the rulemaking hearings, several handler organizations submitted proposals as to how the Secretary should address the producer-handler issue. The largest handler group in the area, the Milk Dealers' Association of Metropolitan New York, Inc., advocated either elimination of the producer-handler status or limitation on the amount of a producer-handler's milk which could be exempt from regulation. If the producer-

handler exemption were to remain in effect, this group advocated a complete prohibition on milk sales to subdealers by producer-handlers.

On June 11, 1958, the Secretary issued his Recommended Decision concerning amendments to the New York-New Jersey Milk Marketing Order. The Secretary did not specifically prohibit sales to subdealer handlers. Instead, the Recommended Decision set forth the following requirements for producer-handler status:

(b) Requirements: (1) the handler owns the plant which he operates in his capacity as a handler and also owns, in his capacity as a dairy farmer, the milking herd, the buildings housing the milking herd, and the land on which such buildings are located, all of which constitute the milk production, processing, and distributing facilities and resources of the handler's operation as a producer-handler. . . .

7 C.F.R. § 927.15.

After the publication of the Recommended Decision in the Federal Register, various handler organizations filed exceptions with the Secretary, advocating inclusion of specific language to prohibit producer-handlers from selling milk to subdealers.

When the Final Decision was issued, it did not include specific language barring sales to subdealers. As can be determined from a comparison of the recommended and current orders, the altered language of what is now the current order adds, among other things, the requirement that the producer-handler have complete and exclusive control over the facilities and resources for the production, processing and distribution of milk and milk products and that such constitute an integrated operation.

Although both Kreider and Defendant agree on the events of the promulgation history, they of course interpret them in different ways. Kreider asserts that this history shows that the Secretary specifically chose not to include a prohibition on distribution to subdealers in the requirements for producer-handlers. Defendant's argument appears to fall back on its plain language argument: "the Judicial Officer . . . turned to the language of the Final Decision itself and noted that 'the new language in the Final Decision, as opposed to the [language of the] Recommended Decision ha[d] the effect of barring sales to subdealers.'" (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & 598331, at *25.) As previously stated, the plain language of the Order does not clearly have this effect. Further, the promulgation history lends

some support to Kreider's interpretation of Order 2's producer-handler requirements.

C. Departmental Precedent

The JO and Defendant rely primarily on *In re Smoot Jersey Farms*, 30 Agric. Dec. 713 (1971) as support for their contention that producer-handlers under Order 2 cannot engage in subdealing. In *Smoot* the relevant milk order, Order No. 136, contained the following requirement for producer-handlers: "The operation of the milk production, processing, and distributing facilities are under the complete and exclusive control of such person and at his sole risk." *Smoot*, 30 Agric. Dec. at 719 (citing 7 C.F.R. § 1136.8(c).) The petitioner in *Smoot* was an individual doing business as Smoot Jersey Farms for many years prior to the formation by his sons and his daughters-in-law of Smoot Dairy Sales, which was formed for the purpose of distributing milk products produced and processed by the petitioner. *Id.* at 715. The operations of Smoot Jersey Farms and Smoot Dairy Sales were conducted on the same premises as follows:

Among other things, the premises housed a milking barn and processing facilities under the control of petitioner, and a cooler or storage area with a loading dock which was leased by and controlled by Smoot Dairy Sales. Milk was produced, packaged, and bottled in the area controlled by petitioner. It was then placed in the cooler which was controlled by Smoot Dairy Sales, and distributed from the dock on retail and wholesale routes by [Smoot Dairy Sales].

Id. at 715-16. The JO in *Smoot* ruled that the petitioner did not qualify as a "producer-handler" because "the distribution of the milk produced and processed by petitioner is not under the exclusive control or at the risk of petitioner, but is, rather, at the risk and control of Smoot Dairy Sales." *Id.* at 721. In *Smoot*, the JO defined "distribution" as follows:

Petitioners would have us define as a distribution the transfers of processed milk into the cooler and depot. This we cannot do in the context of a milk order issued pursuant to the act. Order No. 136 and milk orders issued pursuant to the act generally are constructed on the basis of distribution from regulated plants and not mere intra-plant transfers of milk. The distribution of fluid milk products takes place

when such products are taken from the plant and a mere transfer from the processing section therein to storage facilities on the plant premises does not constitute a distribution.

Id. at 719-20 (citations omitted).

This case does not appear to squarely support the JO's and Defendant's interpretation of Order 2 as applied to Kreider. In *Smoot*, the Judicial Officer's assertion that "[t]he distribution of fluid milk products takes place when such products are taken from the plant" does not clearly prohibit a producer-handler from distributing to subdealers so long as the producer-handler itself takes the product from its plant. In the instant case, it is undisputed that Kreider uses its own trucks to distribute to Ahava and the FPPTLC. Therefore, under *Smoot's* definition the distribution of Kreider's fluid milk products is under Kreider's complete and exclusive control.

D. The JO's Finding that Kreider's Interpretation of the Exemption is Antithetical to the Federal Milk Marketing Scheme

The JO and Defendant assert that to allow producer-handlers to sell to subdealers would frustrate the economic purpose behind Order 2's producer-handler exemption. The JO explains the economic purpose as follows:

[M]ilk marketing orders were adopted to end the chaotic conditions previously existing, by enabling all producers to share in the [fluid milk] market, and, also, requiring all producers to share in the necessary burdens of surplus milk . . . through means of the producer-settlement fund. The only justification for exempting a producer-handler from the pooling requirements is because the producer-handler is a self-contained production, processing and distribution unit. Since a producer-handler does not share its [fluid milk] utilizations with the other producers supplying milk to the area, it is vital to the regulatory program that the producer-handler not be permitted to "ride the pool," i.e., to count on milk supplied by other producers to provide milk for the producer-handler during its peak needs. That principle has been frequently stated. . . .

In re: Kreider, 1995 WL 598331, at *32 (citations omitted). How this "pool-riding" problem arises when a producer-handler is allowed to sell to subdealers is explained as follows:

[Kreider] does not have to produce enough milk to satisfy its customers' needs in the period of short production, because, during the period of short production, [Kreider] can count on Ahava's other suppliers to supply pool milk to meet the needs of the firms ultimately buying [Kreider's] milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

Id. at *31. In other words, Kreider receives an unearned economic benefit unavailable to handlers who do not enjoy producer-handler status: Unlike other handlers, Kreider does not need to pay into the producer-settlement fund, and, unlike other handlers, Kreider has no surplus-milk concerns because it never has to produce an over-supply to satisfy its customers during times when cows produce less milk.

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider's milk to receive Ahava's certification that the milk is kosher, there must be "direct and daily supervision and control over the production and processing facilities by appropriate rabbinical authorities" and that such supervision is "extensive." (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 3 & 3 n. 2.) Because of Ahava's special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava's needs in the period of short production.⁴

If the record cannot support the economic justification behind the Defendant's action, then it appears arbitrary, especially since, as noted previously, the language of Order 2 is ambiguous and the MA's action is not clearly supported by the promulgation history of Order 2 or departmental interpretation. "If the court determines that [a] ruling [by the Secretary] is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in

⁴For example, Ahava has determined that "Farmland Dairies, a major fluid milk processor in the Northern New Jersey-New York area, although entirely owned by a family of the Jewish faith . . . was unacceptable as a source of kosher milk" to New York's ultra-orthodox Jewish community, which makes up Ahava's customer base. (Amicus Ahava's Mem. Supp. Pl.'s Mot. Summ. J. at 5.)

accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." 7 U.S.C. § 608c(15)(B), *see also Minnesota Milk Producers Ass'n v. Yeutter*, 851 F. Supp. 1389, 1398 (D. Minn. 1994) (finding that the Secretary's final decision did not provide sufficient explanation so that it could be determined that it meets the requirements of the AMAA and remanding to the Secretary for additional findings of fact and explanation); *Oak Tree Farm Dairy, Inc. v. Butz*, 390 F. Supp. 852, 857 (E.D.N.Y. 1975) (remanding the case for "further administrative exploration of the contentions raised here"); *In re: County Line Cheese Co., Inc.*, 44 Agric. Dec. 63, at *1 (1985) ("If the Secretary had failed to engage in reasoned agency decisionmaking, it would have been appropriate to remand the proceeding to the Secretary for the purpose of issuing revised findings."). Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

II. APPROPRIATE RELIEF

Kreider asserts that it is entitled to a judgment declaring that the application of the Order 2 producer-handler regulation to "its sales in Order 2 is not in accordance with law; that further enforcement of the regulations in this manner should be permanently enjoined; ... that the Market Administrator should refund to Kreider the payments made pursuant to the invalid application of the regulations; and that reasonable interest should be added to the refunds." (Pl.'s Br. Supp. Mot. Summ. J. at 28-29.) For the reasons stated below, this court finds that Kreider is entitled to a refund and interest should it be found that Kreider qualifies for the status of a producer-handler.

In his Decision and Order, the JO ruled that Kreider would not be entitled to a return of the principal amount paid into Order 2 even if it were to prevail in this case:

In fact, if I were to conclude that Petitioner meets the criteria in 7 C.F.R. sec. 1002.12(b)(1) of a producer-handler, I would hold that there would be no retroactive relief even as to the principal. That is because under the definition of producer-handler, a producer-handler is not a person who meets the requirements of paragraph (b), but, rather, is a person who "has been so designated by the market administrator upon

determination that the requirements of paragraph (b) of this section have been met.

In re: Kreider, 1995 WL 598331 at *35 (citations omitted). It is undisputed that Kreider never received producer-handler designation under Order 2. However, at issue in the instant case is whether the MA erroneously denied Kreider's application for such a designation. In *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389 (1974), the JO discussed the propriety of lump sum refund payments for money previously paid into the producer-settlement fund by those later claiming producer-handler status, and stated that "[s]uch a lump sum payment must be made, at times, where it is determined that the Market Administrator erroneously imposed an obligation upon a handler during a prior period." *Id.* at 407 n. 5. Therefore, if it is determined that the MA's failure to designate Kreider as a producer-handler is erroneous, a refund is in order.

This court also finds that interest should accompany this refund. See *Sani-Dairy v. Yeutter*, Civ. A. No. 90-222J, 1995 WL 848950, at *2 (W.D. Pa. Mar. 27, 1995) (finding it appropriate that interest be allowed on a refund from the producer-settlement fund), *aff'd*, No. 95-3304, 1996 WL 427870 (3d Cir. July 31, 1996); see also *Kinnett Dairies, Inc. v. Madigan*, 796 F. Supp. 515, 516 (M.D. Ga. 1992) (ordering refunds from producer-settlement funds and interest on the refunds); *Cumberland Farms, Inc.*, CIV. No. 88-2406(CSF) 1989 WL 85062, at *2 (D.N.J. July 18, 1989) (stating that "[i]t is well settled that a reviewing court may award monetary damages under the AMAA . . . and that a reviewing court may award interest on these amounts") (citations omitted).⁵

⁵This court finds Defendant's argument against awarding interest unpersuasive. First, Defendant cites *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59-60 (1985), *aff'd*, No. 85-7179(N.D. Ohio, Dec. 12, 1986), *aff'd* 857 F.2d 1065 (6th Cir. 1988), and *In re M.H. Renken Dairy Co.*, 14 Agric. Dec. 794, 807 (1955), for the proposition that "section 8c(15)(A) of the [AMAA] does not contain any language authorizing an award of interest to a handler who prevails in a 8c(15)(A) proceeding." (Def.'s Resp. Pl.'s Br. Supp. Mot. Summ. J. & Br. Supp. Cross-Mot. Summ. J. at 49.) These cases are clearly contradicted by the more recent cases cited in this memorandum. Second, Defendant's citation of *In re Lawson Milk Co.*, 22 Agric. Dec. 126, 22 Agric. Dec. 455 (1963), *aff'd*, 358 F.2d 647 (6th Cir. 1966), is inapposite. The *Lawson* court determined not that interest on an overpayment was inappropriate generally, but that by the terms of that particular milk marketing order the refund was not yet overdue and therefore interest had not yet accrued on it. *Lawson*, 358 F.2d at 650. Third, Defendant cites to several Supreme Court cases. However, these cases are distinguishable from the instant cases in that

Therefore, should it be determined that a refund is due to Kreider, such a refund should be awarded with interest based on the average monthly prime lending rate prevailing from the date Kreider first paid into the producer-settlement fund until the date Kreider is refunded in full. *See Sani-Dairy*, 1995 WL 848950 at *3 (ordering interest based on the average monthly prime lending rate prevailing from the date payment was first made into the producer-settlement fund "until the date that payment of damages to plaintiffs is made in full"). The Secretary of Agriculture is directed to calculate and award the interest due.

Therefore, if Kreider is eligible for producer-handler status, this court finds that the appropriate remedy is to direct the Secretary to apply the producer-handler status to Kreider and to provide Kreider with a refund plus interest on the sum of \$543,864.68, which Kreider has paid into producer-settlement and/or administrative funds.

CONCLUSION

This court finds that neither the plain language of Order 2 nor its promulgation history supports a finding that Kreider should be denied producer-handler status without further factual findings that Kreider is "riding the pool" in this factual context. Thus, the refusal to designate Kreider as a producer-handler appears arbitrary on the record before this court. Therefore, this action is remanded to the Secretary for further factual findings and a decision in accordance with this memorandum.

ORDER

AND NOW, this day of August, 1996, upon consideration of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, the responses thereto and the on-record hearing, it is hereby ORDERED that these motions are DENIED. The case is remanded to the Secretary of Agriculture for further factual findings and a decision consistent

⁵(...continued)

they pertain to the awarding of interest in contract or tort actions against the United States as opposed to the award of interest in connection with the refund of an overpayment. Finally, Defendant cites *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993) which this court finds unpersuasive, particularly in light of the fact that *Sani-Dairy* was recently affirmed by the Third Circuit.

with this memorandum. The clerk is directed to close the within case for statistical purposes.

ANIMAL QUARANTINE AND RELATED LAWS

DEPARTMENTAL DECISIONS

In re: HUGH TIPTON (TIP) HENNESSEY AND BERNARD JAMES VANDEBERG.

A.Q. Docket No. 95-7.

Decision and Order as to Hugh Tipton Hennessey filed October 10, 1996

Movement of cattle interstate without official health certificates - Sanction policy - Civil penalty.

Administrative Law Judge, Dorothea A. Baker, found that the Respondent moved test-eligible cattle from Oregon, a Class A State, to Idaho, a Class Free State, without testing the animals for brucellus thirty days prior to the movement and without accompanying the cattle with the required health certificates. She determined that Respondent's acts facilitated the spread of brucellosis and imposed Complainant's recommended sanction of \$500 for each count set forth in the Complaint, for a total of \$2,500.

Darlene M. Bolinger, for Complainant.

Respondent, Hugh Tipton (Tip) Hennessey, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative proceeding for the assessment of civil penalties under the Act of February 2, 1903, as amended (21 U.S.C. §§ 111, 120 and 122), for violations of the Act and the regulations promulgated thereunder (9 C.F.R. § 78.8) governing the interstate movement of cattle.

This disciplinary proceeding was instituted by a Complaint filed on November 3, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), seeking the assessment of a civil penalty of Three Thousand Dollars (\$3,000.00) because Respondent moved cattle interstate from Oregon, a Class A State, to Idaho, a Class Free State, without an official health certificate accompanying the cattle during the interstate movement. Respondent filed an Answer on December 6, 1994, denying all material allegations of fact.

Pursuant to Complainant's Motion therefor, on April 2, 1996, Respondent Bernard James Vande Berg was dismissed from this administrative proceeding. The administrative proceeding continued with only Hugh Tipton (Tip) Hennessey as a Respondent.

A hearing was held by means of Audio-Visual Transmission on June 6, 1996, with visual transmissions in Portland, Oregon; Boise, Idaho; and Washington, D.C. before Administrative Law Judge Dorothea A. Baker. Darlene M. Bolinger, Esquire, of the Office of the General Counsel, United States Department of Agriculture, appeared on behalf of the Complainant. Hugh Tipton (Tip) Hennessey appeared pro se.

Respondent, although filing an Answer denying the material allegations of the Complaint, did not file a list of anticipated witnesses or a prospective witness list; did not adduce any documentary or testimonial evidence at the Audio-Visual Transmission hearing; did not testify in his own behalf; did not give testimony under oath and subject to cross-examination; and, did not file any post-hearing briefs.

On brief, the Complainant requested that Count VIII of the Complaint, pertaining to allegations that Respondent on December 18, 1991, moved interstate at least three test-eligible cattle from Portland, Oregon, to Notus, Idaho, be dropped from the Complaint. That request is granted and Paragraph VIII of the Complaint is no longer under consideration. The Complainant also requested a revision in a civil penalty to reflect the removal of that Count. Thus, the requested civil penalty herein is \$2,500.00.

Pertinent Regulations

9 C.F.R. § 78.9 Cattle from herds not known to be affected.

Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restriction. Female cattle which are not test eligible and are from herds not known to be affected may be moved interstate only in accordance with § 78.10. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:

....

(b) *Class A States/areas.* Test-eligible cattle which originate in Class A States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be

moved interstate from Class A States or areas only as specified below:

....

(3) *Movement other than in accordance with paragraphs (b)(1) [Movement to recognized slaughtering establishments.] and (b)(2) [Movement to quarantined feedlots.] of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

....

(ii) Such cattle are negative to an official test within 30 days prior to such interstate movement and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, the test dates and results of the official tests;

9 C.F.R. § 78.41 State/area classification:

- (a) Class Free - . . . , Idaho, . . .
- (b) Class A - . . . , Oregon, . . .

Discussion

Respondent is an individual with a mailing address of (b) (6) (b) (6), (b) (6), and who does business as Hennessey Cattle Company. On or about October 29, 1991, December 4 [14], 6, 7 and 9, 1991, Respondent moved approximately nineteen head of test-eligible cattle from Oregon, a Class A State, to Idaho, a Class Free State, without the animals being tested prior to the movement and without the animals being accompanied by the required health certificate.

In determining the origin of a test-eligible cow, a method used by USDA/APHIS Veterinary Services is the backtag identification number ("backtag"). Backtag identification numbers consist of a prefix two digit numerical code signifying a particular State, followed by two letters signifying

a particular State livestock market, which, based on the sale volume for that livestock market is followed by the individual identifying three or four digit number. Three digit tags are generally used by markets which handle less than one thousand head of cattle per sale day, whereas four digit tags are used by markets which handle in excess of one thousand head of cattle per sale day. Backtags are generally laminated, oval-shaped paper applied to the hide of an animal. The backtag numbers are used on invoices, State brand inspection certificates and other documents to create a record of cattle sold and purchased at livestock markets.

Kirk Miller, Senior Investigator, APHIS, was informed that cattle were being moved interstate from Oregon livestock markets to the Marshbanks feedlot in Idaho without being qualified prior to entering Idaho. "Qualified" means the test-eligible cattle are destined for slaughter, a quarantined feedlot or have been tested thirty-days prior to moving interstate and are accompanied during the move by a health certificate, which states the test-results. (CX 2, 3; Tr. 11, 24, 40). The Marshbanks feedlot is neither a recognized slaughtering establishment, a quarantined feedlot, nor an approved intermediate handling facility. (Tr. 31, 32). Thus, cattle moving to the Idaho feedlot from the Oregon livestock markets had to be accompanied interstate by a health certificate. (Tr. 40). On December 13, 1991, Senior Investigator Miller, accompanied by Idaho's State Inspector Bill McKinster, visited the Marshbanks feedlot to determine the origin and health status of cattle located in the feedlot. (CX 1; Tr. 39, 45). They observed the backtags on the cattle and surmised that based on the prefix two digit numerical State code (92) the cattle originated in Oregon. To eliminate the risk of disease spreading from these nonqualified cattle, while investigating the health status, and the legality of the interstate movement from Oregon, Idaho Hold Order Notice No. 7785 was issued by State Inspector McKinster. (Exh. 13; Tr. 39, 40)

The health status of the cattle was determined by having them brucellosis tested by Gordon Cooper, D.V.M., an accredited veterinarian. (CX 2, 8, 9, 12; Tr. 42) The cattle that were healthy and met Idaho's requirements were released from the quarantine and the remaining cattle continued under quarantine pursuant to Idaho Hold Order Notice No. 5859. (Exh. 2, 8, 9, 11, 12; Tr. 42). These remaining animals were also tested by Dr. Cooper. (Exh. 8, 9; Tr. 42). Although no field strain reactives were found among the cattle and thus their health status was not a problem, the legality of their interstate movement was questionable.

In determining whether these animals were legally moved into Idaho, Senior Investigator Miller used the backtag identifications to trace the cattle back to their herd of origin and to search the records of the Idaho Bureau of

Animal Industry for health certificates that might have been issued to Respondent with respect to these cattle. No such documents were on file.

The testimony of record reflects the manner in which identification and tracing was done and how the cattle were traced to the Respondent. (Tr. 61, 62, 70, 71, 75).

Findings of Fact

1. On October 29, 1991, Respondent moved at least one head of cattle interstate from Woodburn, Oregon, to Notus, Idaho, without the cattle being accompanied by a certificate during the interstate movement in violation of 9 C.F.R. § 78.9(b)(3)(ii).

2. On December 7, 1991, Respondent moved at least three head of cattle interstate from Eugene, Oregon, to Notus, Idaho, without the cattle being accompanied by a certificate during the interstate movement in violation of 9 C.F.R. § 78.9(b)(3)(ii).

3. The Respondent on or about December 4 [14], 1991, moved interstate at least four test-eligible cattle from McMinnville, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate, as required.

4. The Respondent on or about December 6, 1991, moved at least eleven head of cattle from Corvallis, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate as required.

5. On December 9, 1991, Respondent moved interstate at least three test-eligible cattle from Portland, Oregon, to Notus, Idaho, in violation of 9 C.F.R. § 78.9(b)(3)(ii) of the regulations, because the animals were moved interstate without being accompanied by a certificate, as required.

Discussion

Brucellosis is a contagious bacterial disease that can affect livestock and human beings. In cattle it can cause abortions, infertility, as well as reduced milk production. In human beings, the disease is known as undulant fever and can cause flu-like symptoms which can be severe.

As part of the Brucellosis Eradication Program, the United States Department of Agriculture has promulgated regulations, in Part 78, Title 9, Code of Federal Regulations, that delineate certain requirements for the interstate movement of cattle. Cattle movement interstate from a Class A

State, other than to a quarantined feedlot or slaughtering establishment, must be tested for brucellosis thirty days prior to the movement and they must be accompanied interstate by a health certificate. A health certificate is used to document that the cattle moving interstate, from a Class A State to a place other than to a slaughter establishment or a quarantined feedlot, were tested for brucellosis thirty days prior to the movement. (Tr. 81, 83). The risk of cattle moving interstate without the health certificate involves the possibility of an infected animal going undetected, the inability to trace an infected animal back to its herd of origin, and the possible downgrading of a State's classification as Class Free, Class A, or otherwise. (Tr. 83, 84). Thus, such actions undermine the whole purpose of the program, namely, the eradication of the disease brucellosis.

Respondent's acts of noncompliance facilitate the spread of brucellosis. The Complainant recommends that the Respondent be assessed a civil penalty of \$500.00 per count, or \$2,500.00. (Tr. 85).

The Department's sanction policy is reviewed by the Judicial Officer in the case of *In re: John Casey, et al.*, 54 Agric. Dec. 91 (1995) which follows the rationale set forth in *In re: S.S. Farms Linn County, Inc., et al.*, 50 Agric Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) wherein it is stated, among other things, that, in determining sanction, 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.

In the present proceeding Dr. Eric Ebol, an employee of the United States Department of Agriculture, APHIS, Veterinary Services testified. He indicated, among other things, in his testimony the reasons why he was recommending a \$500.00 per count sanction with respect to the Respondent:

A Well, a Class A State has some level of infection. They have not achieved their class free status, therefore there is some risk of animals moving from a Class A state and having brucellosis. For the class free state that would receive such a movement, the potential for real problems is significant, simply because a class free state has gone to great lengths to achieve this status and the discovery of detection of infection in that state would automatically force them to go back to a Class A State. From the standpoint of a Class A state that cut [got] these cattle, lacking the proper certification and paperwork may make

the job of locating where that infection originated very difficult, and potentially would involve many other producers, innocent producers and require tests. (Tr. 84).

In response to the question as to what would be an appropriate sanction in this case, Dr. Ebol testified that according to the Veterinary Services memorandum, a fine of \$500.00 per cow would be an appropriate penalty and that was the penalty which he was recommending. (Tr. 85). It is noted that the Complainant on brief has not based a penalty on the number of cows, but rather upon the number of counts set forth in the Complaint.

The recommendation of Dr. Ebol is in accord with other cases and is warranted and appropriate herein. *In re: Terry Horton et al.*, 50 Agric. Dec. 430, 463-64 (1991); *In re: Grady*, 45 Agric. Dec., 66, 109, (1986) and *In re: Petty*, 43 Agric. Dec. 1406, 1409-10 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

For the foregoing reasons the following Order is issued.

Order

The Respondent, Hugh Tipton (Tip) Hennessey, is hereby assessed a civil penalty in the amount of Two Thousand Five Hundred Dollars (\$2,500.00). The civil penalty shall be payable to the Treasurer of the United States, by a certified check or money order and shall be forwarded to:

The United States Department of Agriculture
Animal & Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor,
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. Respondent shall indicate on the check or money order that payment is made in reference to A.Q. Docket No. 95-7.

All contentions, and motions of the parties have been carefully considered and, to the extent not ruled upon or not granted herein, they are denied.

This Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon Respondent, unless appealed to the Judicial

Officer pursuant to section 1.145 of the Rules of Practice and Procedures applicable to the proceeding (7 C.F.R. §§ 1.130 *et seq.*, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 12, 1996.-Editor]

ANIMAL WELFARE ACT

COURT DECISION

JULIAN TONEY and ANITA TONEY v. DAN GLICKMAN.

No. 96-1317.

Decided December 3, 1996.

(Cite as: 101 F.3d 1236)

Petition for review - Remand for redetermination of sanctions - Denial of request to reopen.

The United States Court of Appeals for the Eighth Circuit affirmed most of Secretary's findings but found that the evidence did not support two of the allegations and, therefore, remanded the case for a redetermination of the sanction. It also affirmed the Judicial Officer's refusal to reopen the hearing. The Court found that the Toney's: falsely identified the sources of dogs; kept the dog; in unsafe and unsanitary conditions; forged health certificates; failed to keep animals for the required holding period; and altered records. However, it also found that the evidence did not support the findings that the Toney's falsely received dogs from two of the sources alleged. The case was remanded for the ALJ to determine a sanction based only on the substantiated violations. In addition the Court denied the Toney's Request for Leave to Consider Additional Evidence. The Toney's sought to introduce inspection reports which stated that their records were in compliance with the regulation, as well additional evidence they acquired through the Freedom of Information Act. The request was denied because they failed to show good cause as to why the evidence was not introduced at the hearing. The evidence can be admitted on remand to the extent that it is relevant to sanctions.

Before ARNOLD, Chief Judge and GIBSON and ROSS, Circuit Judges.

**UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT**

ARNOLD, Chief Judge.

Julian and Anita Toney were in the business of selling animals to research facilities. The Administrative Law Judge (ALJ) found that they had committed hundreds of violations of the Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.* She then imposed what was, to that point, the harshest sanction in the history of the Act. The Judicial Officer affirmed the ALJ's findings and denied the Toney's request to reopen the hearing for consideration of new evidence. While we affirm most of these findings, we hold that the evidence does not support all of them. Accordingly, we remand this matter to the Department for redetermination of the sanction. We also affirm the Judicial

Officer's refusal to reopen the hearing and deny the Toney's Request for Leave to Adduce Additional Evidence.¹ The Toney's are free, however, to seek leave to offer this additional evidence on remand to the extent it is relevant to the sanction.

I. Background

Animal dealing is a strictly regulated business. In 1966, Congress passed the Animal Welfare Act to deter animal stealing and to ensure the humane treatment of animals involved in the animal research trade. Among other things, the Act prohibits dealers from obtaining animals from certain sources, requires that they keep detailed records of animal they obtain, and mandated that they hold such animals for a certain period of time prior to selling them. The Act also requires dealers to provide safe and sanitary shelter for animals in their care.

Julian Toney was a licensed animal dealer. Together with his wife Anita and his employee Cliff Waterburg, Mr. Toney obtained dogs from various sources and then sold them to animal research facilities. They had been in business since the mid-1980's without a formal complaint being lodged against them. In November of 1990, investigators from the Department of Agriculture (USDA) came to the Toney's home and asked to look at their records. The Toney's kept their records in spiral notebooks, a practice which was not in itself violative of the Act. They also used USDA forms on an intermittent basis, but these forms were incomplete at the time of the first inspection. The Toney's records were difficult to read and examine, and the Toney's later transposed the records onto USDA forms, and, at some point prior to the initiation of the first Complaint, supplied these records as well as the original notebook records to the USDA. As a result of its investigation, the Department issued the first of two complaints in September of 1992. A second investigation in early 1994 led to the filing of a second complaint, which was consolidated with the first.

The Administrative Law Judge found that: (1) the Toney's kept records that falsely identified the source of many of the dogs they obtained and contained incorrect information about the sources; (2) they used forged certificates when selling at least 44 dogs to research facilities; (3) they failed to hold at least 190 animals for the five days required by the Act and then

¹We have considered both the letter the Toney's sent to us after oral argument as well as the Government's response to it.

altered their records in some instances to conceal their violations; (4) they willfully failed to identify properly 60 dogs on the premises; (5) they failed to record other necessary information on 13 of those 60 dogs; (6) they willfully kept records that contained false information on an "undeterminable" number of the 60; and (7) they provided unsafe and unsanitary housing and contaminated food to the dogs. ALJ Dec. & Order 10-40. The ALJ fined the Toney's \$200,000, the amount requested by the Government, permanently revoked their license, and ordered them to cease and desist from the prohibited practices. *Id.* at 44-46.

The Toney's then appealed the Initial Decision and Order to the USDA's Judicial Officer, who, with minor modifications, affirmed the decision, incorporating the ALJ's findings and adding his own conclusions and discussion. J.O. Dec. 2. The Judicial Officer found that the Toney's had committed more than enough violations to justify the sanctions. *Id.* at 100. Finally, he denied the Toney's Request to Reopen the Record to Allow Additional Exhibits. *Id.* at 104. The Toney's then filed this petition for review.

II. The Violations

Animal dealers must maintain truthful and accurate records that identify the source of the animals they acquire and the date of acquisition. The records must also include the source's address and, if the source is not licensed or registered under the Act, the source's driver's license and vehicle identification numbers. 9 C.F.R. § 2.75(a)(1).

The Judicial Officer found that the Toney's records falsely stated that they acquired dogs from various pounds when in fact they had actually acquired them from individuals. J.O. Dec. 16. We uphold the Judicial Officer's findings that the Toney's records falsely claimed to have acquired dogs from the Marceline, Keytesville, Macon, Cameron, Brookfield, and Moberly pounds.

The evidence establishes that the town of Keytesville did not have a pound and the Marceline's pound was closed on the dates that the Toney's claim to have acquired the dogs. The Toney's concede in their brief that their agent actually acquired the Keytesville dogs from individuals who claimed they got the dogs from pounds. Petitioners' Br. 12. By admitting to this conduct, the Toney's are conceding a violation of the Act. The Act required the Toney's to identify correctly the immediate source of their animals. It is not enough that the animals may have been in a pound at some point. Indeed, as of 1990,

even if the Toney had kept proper records, it would have been illegal for them to obtain dogs from any individual who had not raised the dog on his or her own property. 9 C.F.R. § 2.132.

As to the Marceline pound, the Toneys claim that the dogs came from a veterinary facility which held them while the town pound was closed. Again, this concession makes their records false, for the present no evidence that the veterinary facility operated as the legal equivalent of a pound. Similarly, the Toneys argue that the dogs they claimed to have obtained from the Macon pound came from an individual who received these dogs from the town animal control officer, who got the dogs from the pound. All of these contentions may be true, but they are also irrelevant to the question of whether the Toneys correctly identified the source of these animals.

The Toneys make essentially the same argument with respect to the dogs they claimed to have received from the Cameron pound, and for the same reasons we reject the argument. Moreover, at least some of the dogs that the Toneys claimed to have obtained from the Brookfield pound in fact came from a Mr. Grimsley, who the Toneys claim got the dogs from the Brookfield facility. Though the Toneys' lawyer referred to Mr. Grimsley as the Toneys' agent at oral argument, the Toneys have pointed to no evidence in the record to support that characterization. Thus, the evidence supports the Judicial Officer's finding that the Toneys falsely claimed to have obtained some number of dogs from the Brookfield facility.

The record also establishes that the Toneys falsely claimed to have acquired dogs from the Moberly pound. They argue that while the pound has no record of a sale on the date claimed, the Toneys might have obtained the dogs from pound employees who neglected to record the transaction. The pound representative admitted that this was a possibility, but neither the Toneys nor their agent can point to positive evidence that they actually received the animals from such individuals. Accordingly, it was reasonable for the ALJ to infer that the Toneys did not acquire the animals from the pound.

The evidence does not support the ALJ's finding that the Toneys falsely claimed to have obtained dogs from the Trenton pound. Indeed, the record includes testimony from a Dr. Alambaugh that his veterinary facility had operated as the pound for the city, and that Cliff Waterbury would often pick up dogs from the facility. Tr. 391. Both the Government and the Judicial Officer agree that Mr. Waterbury (unlike Mr. Grimsley) was the Toneys' employee. As the ALJ wrote, "the [Government] has not contended . . . that the records were false because the [Toneys] did not personally acquire the dogs from the pounds as opposed to acquiring them through their employee. The [Toneys'] records are false because they did not acquire the dogs from

the pounds." ALJ Dec. & Order 29. In this instance, there is no evidence to support the finding that the Toney's did not acquire the dogs from the Trenton pound.

The ALJ and Judicial Officer also found a number of inaccuracies in the Toney's' identification of individuals from whom they obtained dogs. The Toney's' do not dispute that the record supports these findings with one notable exception. The Toney's' records disclosed a purchase of 48 dogs from Kenneth Hughes. The Judicial Officer found that the records contained an inaccurate address and driver's license number for Hughes for all 48 dogs. This part of the finding is undisputed, and by itself justifies a finding of 48 violations of the Act's record keeping requirements. The Officer also seemed to find, though it is not entirely clear from his Decision, that Toney's' did not obtain certain dogs from Mr. Hughes at all. If so, this finding would not be supported by substantial evidence. Mr. Hughes was unsure how many dogs he sold to the Toney's' agent, but testified that it could have been more than thirty. Though he thought he never sold the Toney's' agent more than six dogs at a time, and though the Toney's' records revealed much larger purchases, there is no evidence that directly contradicts their records as to the number of dogs they purchased from him. Thus, any finding that the Toney's' falsely claimed to have obtained certain dogs from Mr. Hughes at all should play no role in the calculation of the sanction on remand.

The Judicial Officer also found that the Toney's' kept dogs in unsafe and unsanitary conditions in violation of USDA regulations. Among other things, the Toney's' did not provide shelter that adequately protected the dogs from the elements, and they did not remove animal and food waste so as to minimize the risk of contamination and disease. For example, an inspector found a deteriorating cow carcass and other cow parts on the Toney's' premises and witnessed loose dogs eating the carcass. He also found two puppies "underneath one of the dog enclosures . . . in advance[d] stages of decomposition." Tr. 155-56. The Toney's' do not contest these findings, and we find that they are supported by the evidence. They argue only that there is no evidence that any dogs suffered from these conditions. Neither the Judicial Officer nor the ALJ based the size of the sanction upon a finding that the Toney's' had injured animals. This argument is thus irrelevant.

The remainder of the Toney's' arguments do not address the Judicial Officer's conclusion that certain violations occurred, but rather dispute that those violations were willful. Federal law directs the Secretary to give due consideration to, among other things, "the gravity of the violation" and the person's good faith" in determining how much of a fine to impose. 7 U.S.C.

§ 2149(b). The Judicial Officer considered the Toney's willfulness in upholding the monetary penalty imposed by the ALJ. J.O. Dec. 97.

"Willfulness . . . includes not only intent to do a prohibited act but also careless disregard of statutory requirements." *Cox v. United States Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860, 112 S. Ct. 178, 116 L. Ed. 2d. 141 (1991). The Toney's challenge the Judicial Officer's willfulness findings as to: (1) basic recordkeeping requirements; (2) the submission of forged certifications to animal research facilities; (3) violations of the holding-period requirements; and (4) violation of requirements for the identification of dogs on the premises.

The Judicial Officer found that the Toney's "falsified their records to claim that dogs had been acquired from pounds" and "willfully falsified these records to conceal their unlawful acquisitions of random source dogs from individuals." J.O. Dec. 96. He also found that they falsified their records to conceal their failure to obtain required information, and that they at the very least acted with careless disregard for the regulations by not verifying what turned out to be inaccurate names and addresses. *Id.* Finally, he found that they exaggerated the number of dogs that they purchased from "at least one individual." *Id.* We uphold these findings, only some of which the Toney's contest in their brief.

The Toney's response to these allegations is to point to the testimony and reports of the USDA inspector who apparently found no irregularities in the Toney's records when she inspected them three times in 1990. Petitioners' Br. 20-21. They argue that their practice was simply to comply with what their local inspector told them to do. *Id.* at 21. The Toney's, however, never say, nor could they, that they did not know that keeping false or inaccurate records was a violation of the Act. Moreover, it is certainly not clear that a USDA inspector making a routine records inspection would be likely to detect that the records were false, since such a discovery would entail an investigation that went beyond merely examining the records.²

²The Toney's point out that the inspector stated in her report that the identification of animals was "being conducted in compliance with Section 2.50 of the regulations." This is irrelevant, because the government did not base its allegations that the Toney violated Section 2.50 on its 1990 inspection of their facilities, but rather on its inspection four years later. They do not claim that their 1990 practice was the same as their 1994 practice, but instead that the latter was "an unusual or atypical situation." Petitioners' Br. 28. The inspector could hardly ratify the state of the Toney's dog identification four years in advance.

Next, the Judicial Officer agreed with the ALJ that the Toney's forged certificates used to authenticate the source of dogs and used them "to unlawfully sell dogs to research facilities." J.O. Dec. 97. When dealers sell dogs that they acquired from pounds, they must provide the buyer of the dog with a certificate from the pound describing the dogs and stating that the pound met federal holding-period requirements. 9 C.F.R. 2.133.

The Judicial Officer also found that the Toney's obtained copies of a blank certificate form signed by the Animal Control Officer at the Vinton, Iowa, pound, filled in the rest of the form themselves, and submitted the forms when selling 40 dogs to research facilities. The Animal Control Officer was unaware that his signature had been used in this way. Tr. 28-30. The Toney's deny filling in the forms themselves, but the evidence, including Mrs. Toney's handwriting on the forms (a point that the Toney's do not address in their brief), bears out the finding. They also argue that the "real question" is whether or not the dogs in these actually came from the Vinton pound and whether the certifications facilitated a dog theft.³ Once again, the only issue is whether the Toney complied with recordkeeping regulations. The Judicial Officer found that the Toney's willfully failed to do so, and we agree.

The Judicial Officer also found that in at least 190 instances, the Toney's failed to hold animals that they obtained for the five-day period that federal law mandates prior to selling them. J.O. Dec. 83. The purpose of the holding-period requirement is to give the owner of lost or stolen animals time to find them before they are sold to a research facility. See *ibid.*, citing S. Rep. No. 1281, 89th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N.2635, 2640. Moreover, he found many instances where the Toney's "falsified their records to conceal violations of the holding period requirements." J.O. Dec 96.

The Toney's do not appear to challenge the Judicial Officer's finding as to the number of holding-period violations. They protest instead that the

³They point out that there is no evidence that the 40 dogs came from anywhere other than the Vinton pound. This is true, although there also seems to be no evidence that they all did come from the pound. Either way, the certifications were false. The Toney's also argue that they have been singled out by the USDA since the dealer who gave the Toney's the blank certificates has not been prosecuted. There is no evidence, however, that Mr. Scherbring has committed all of the other violations that the Toney's have. The USDA may simply have decided that those violations alone were insufficient to warrant prosecution. Give the overwhelming deference that we must accord to an agency's exercise of its prosecutorial discretion, we reject the Toney's selective prosecution argument.

Government never delineated the specific violations in its complaint, and that they were thus unable to show which of the violations fell within applicable exceptions to the requirement. The Toneys do not suggest that they ever asked the Government to be more specific. Given that they do not actually deny the violations in their brief, we uphold this finding.

The Judicial Officer concluded, mainly from the Toneys' original notebook records, that they had altered records, principally by changing acquisition dates in their notebooks and then entering those dates on the USDA forms after the 1990 inspection. The Toneys argue that this conclusion "doesn't make any sense" because they would not have provided the notebook records to the USDA if they contained damaging information. Instead, they would have provided only the records onto which they had transposed the notebook information. There are many reasons, however, why they might have still chosen to provide the records, including a desire to create the impression of full disclosure, or a feeling that the USDA would eventually have asked for those records anyway. This kind of argument is insufficient to upset the evidence of alteration in the notebook that the Judicial Officer sets forth in his scrupulous opinion, and it was fully within his discretion to reject it.

Finally, the Judicial Officer found that petitioners ran afoul of federal regulations governing dealer identification of animals on the premises 9 C.F.R. §§ 2.50,2.53. The Toneys concede the violations but argue that because these violations were unusual and because past inspections had not uncovered similar violations, the violations were not willful. The mere fact that the Toneys had not violated these regulations in the past does not mean the violations at issue here were not willful.

We thus uphold the Judicial Officer's Decision except as to the findings that the Toneys falsely received dogs from the Trenton pound and that they falsely claimed to have received dogs from Mr. Hughes. Accordingly, we remand so that the Judicial Officer can recalculate the sanction without considering these violations.

III. The Size of the Sanction

The ALJ ordered and the Judicial Officer affirmed the imposition of a \$200,000 fine and permanent revocation of the Toneys' license. Because their decisions may have been based on violations that we have found to be unsubstantiated, we remand for a recalculation of the sanction. We remand so that the ALJ can determine the sanction based exclusively upon substantiated violations.

IV. The Request for Leave to Adduce Additional Evidence

The Toney's argue that the Judicial Officer erred in not reopening the hearing to allow the introduction of three 1990 inspection reports which state that their records were in compliance with applicable regulations. They fail to state a good reason why they could not have introduced this evidence at the original hearing, as a federal regulation requires. 7 C.F.R. § 1.146(a)(2). The fact that counsel was unaware of the reports is insufficient to justify reopening the hearing if the Toney's themselves knew about them, and there is nothing in the record or briefs to suggest that they did not. Moreover, we have no reason to dispute the Judicial Officer's conclusion that if received, "[the reports'] weight would be infinitesimal." J.O. Dec 107.

The Toney's also seek leave to adduce additional evidence to add information they received through a Freedom of Information Act request. Again, though they received the information after the hearing, they fail to explain why they could not have requested the information in time to present it at the hearing. We deny their request.

V. Conclusion

The Toney's repeatedly point out that there is no evidence that they have dealt in stolen dogs, and no one has argued to the contrary. The Animal Welfare Act does not penalize only those who steal dogs or who purchase stolen dogs. It also penalizes those who violate the regulations that are designated to make dog stealing more difficult. It may seem unfair to the Toney's that they are being punished when they have not helped to steal any dogs, but that does not change the fact that they repeatedly, and, in some cases, flagrantly violated the law. The law may or may not be overly harsh, but it is our job uphold it. Thus, with the exceptions noted above, we uphold the Judicial Officer's decision and remand for recalculation of the sanction. We also deny the Toney's Request for Leave to Adduce Additional Evidence.

ANIMAL WELFARE ACT
DEPARTMENTAL DECISIONS

In re: RONALD G. WACKERLA.
AWA Docket No. 95-0026.
Decision and Order filed July 19, 1996.

Operating as a dealer without a license - "Dealer" defined - Finding of wilfulness not required - Complainant's requested penalty too high - Cease and desist order - Civil penalty.

Judge Bernstein imposed a cease and desist order and assessed a civil penalty of \$7,000 upon Respondent for operating as a dealer without being licensed. In selling approximately 120 dogs and cats for resale as pets, Respondent operated as a dealer. There is no requirement that the Secretary prove that the violations were wilful to either assess a civil penalty or issue a cease and desist order. Judge Bernstein determined after reviewing recent decisions and the criteria set forth in the statute that Complainant's requested penalty of \$13,000 was too high.

Sharlene A. Deskins, for Complainant.

Bruce L. Hart, Cozad, NE, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("the Act") instituted by a Complaint filed on April 11, 1995, by the Acting Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"). The Complaint alleged that Respondent willfully violated the Act and its regulations by operating as a dealer without being licensed. Respondent denied the Complaint's material allegations in a timely Answer. A hearing was held on May 15, 1996, in Lincoln, Nebraska. Complainant was represented by Sharlene A. Deskins, Esq., Office of the General Counsel, USDA. Respondent was represented by Bruce L. Hart, Esq., Cozad, Nebraska.

Complainant filed proposed findings of fact, conclusions of law and a brief on June 28, 1996. Respondent filed a two-page written argument on June 28, 1996. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence. Complainant's exhibits are referred to as "CX"; Respondent's exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr."

Findings of Fact

1. Respondent Ronald G. Wackerla is an individual who has done business as RGW Kennels and RGW Cattery and whose address is [REDACTED] (b) (6) (Answer, ¶ 1).

2. Respondent has never held a license under the Animal Welfare Act (Tr. 53).

3. Until June 1992, Respondent sold dogs and cats in commerce (Answer, ¶ 3). Between February 6, 1991 and March 28, 1992, Respondent sold dogs through an arrangement with Roland and Terry Anderson. Respondent and the Andersons shipped dogs to Valley Pet in Phoenix, Arizona. Valley Pet also used the name Great Western Pet Supply. Valley Pet or Great Western Pet Supply sent payments to Roland and Terry Anderson or their firm, Countryside Kennel. In turn, Countryside Kennel sent checks paying for these dogs to Respondent (Tr. 43-50; CX-3, 4). Between March 9, 1991 and June 18, 1992, Respondent also sold dogs to American Kennels in New York City and to Bay Pet Center in Friendswood, Texas, and Respondent sold cats to Fabulous Felines in New York City (CX-4-10).

4. In 1991, before Respondent sold the dogs and cats, Respondent inquired as to what he needed to do to become licensed (Tr. 50). In February 1992, Respondent requested information as to how he could obtain a license.

5. Respondent rents the farm that he works from his mother (Tr. 58). He owns 35 head of cattle. He also works as a part-time bartender. His total annual income is [REDACTED] a year (Tr. 63).

Conclusion of Law

Respondent operated as a dealer as defined in the Act and regulations without being licensed from February 6, 1991 until June 18, 1992, in violation of section 4 of the Act (7 U.S.C. § 2132) and section 2.1 of the regulations (9 C.F.R. § 2.1) and Respondent sold or offered for sale in commerce approximately 120 dogs and cats for resale use as pets.

Discussion

In selling approximately 120 dogs and cats for resale as pets between February 6, 1991 and June 18, 1992, Respondent operated as a dealer as that term is defined. Section 2(f) of the Act defines dealer as follows:

The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. . .

Section 4 of the Act (7 U.S.C. § 2134) states:

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animal unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Section 2.1 of the regulations (9 C.F.R. § 2.1) has a similar requirement. It states:

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements of the paragraph (a)(3) of this section, must have a valid license.

The evidence is clear that Respondent was never licensed under the Act. Thus, in acting as a dealer without having a valid license, Respondent violated section 4 of the Act and section 2.1 of the regulations.

There is evidence that Respondent knew that he needed to be licensed. Terry Anderson testified that before the sales Respondent was attempting to determine what he needed to do to obtain a license (Tr. 50). In addition, Respondent admitted that in February 1992, after most of these sales had been completed, that he requested information as to how he could obtain a license (Tr. 55), and Respondent obtained a prelicensing packet from APHIS on March 10, 1992 (CX-11).

Respondent's attorney argues in his post-hearing written argument that Complainant has failed to prove wilfulness and, therefore, this proceeding should be dismissed. However, as the Judicial Officer has recently reiterated, "there is no requirement that the Secretary prove that the violations were wilful in order to assess either a civil penalty or issue a cease and desist order

under the Act." *Big Bear Farm, Inc., et al.*, AWA Docket No. 93-32 (March 15, 1996) at p. 42. See also *Delta Airlines, Inc.*, 53 Agric. Dec. 1076, 1080 (1994).

Complainant requests that Respondent be assessed a civil penalty of \$13,000. Respondent urges that, if he is found to have committed the alleged violation, he be assessed a civil penalty of only \$500.

Section 19(b) of the Act states:

The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and history of previous violations. See 7 U.S.C. § 2149(b) (1988).

Respondent's size was moderate. Although he sold approximately 120 dogs during the period of approximately 16 months covered by the allegations in the Complaint, he appears not to own much property. He rents the farm he works from his mother. He owns only 35 cows whose value is, at most, \$10,000. He works as a part-time bartender. His total annual earnings appear to be [REDACTED] a year.

There is testimony that Respondent knew that he needed to be licensed in 1991 before the sales in question. It certainly is clear that he knew about this requirement by February 1992. There is no history of prior violations.

A review of other recent decisions in which respondents failed to obtain licenses, reveals that the requested penalty of \$13,000 is too high. In *Jerome A. Johnson*, 51 Agric. Dec. 209 (1992), a \$10,000 penalty was assessed. In *Terry Lee Harrison*, 51 Agric. Dec. 234 (1992), a \$2,000 penalty was assessed. In *Lloyd Wenger*, 51 Agric. Dec. 247 (1992), a \$4,000 penalty was assessed. In *Lee Roach*, 51 Agric. Dec. 252 (1992), a \$5,000 penalty was assessed. In *David L. Twomey*, 50 Agric. Dec. 1575 (1991), a case that I decided which involved other violations, a \$4,000 penalty was assessed. In *Mary Bradshaw*, 50 Agric. Dec. 499 (1991), a \$10,000 penalty was assessed. In *Ronnie Faircloth*, 52 Agric. Dec. 171 (1993), a \$4,000 penalty was assessed in a case which involved other violations as well.

The purpose of sanctions is to deter this Respondent as well as other would be violators from committing the same violation. Taking into consideration this objective, the evidence, the criteria set forth in the statute, and the other referenced decisions, I conclude that a civil penalty of \$7,000 will be sufficient to deter this Respondent and others from committing this type of violation. I, therefore, issue the following Order.

Order

1. Respondent, 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 issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed.

2. Respondent is assessed a civil penalty of \$7,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States and shall be sent to Sharlene A. Deskins, Office of the General Counsel, Marketing Division, Room 2014, South Building, United States Department of Agriculture, Washington, DC 20250-1400. Respondent is disqualified from applying for a license under the Act until the civil penalty is paid.

This Decision and Order shall become final without further proceedings 35 days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final August 28, 1996.--Editor]

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

**JERRY GOETZ d/b/a JERRY GOETZ AND SONS v. DAN GLICKMAN,
SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 94-1299-FGT.
Filed September 24, 1996.**

Petition for injunction to stay administrative proceedings denied - Failure to show likelihood of success on appeal - No irreparable injury.

The United States District Court for the District of Kansas denied plaintiff's petition for an injunction to stay the administrative proceeding pending its appeal in Federal Court. The court found that the plaintiff failed to make the necessary showing of likelihood of success on appeal, and that the plaintiff will not suffer irreparable injury.

**UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS
MEMORANDUM AND ORDER**

THEIS, District Judge.

The plaintiff brought this action challenging the constitutionality of Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* The plaintiff sought to represent a class of all persons subject to the requirements of the Act, including all persons who have been required to pay the assessment of one dollar per head of cattle sold, as required by the Act. In a memorandum and order dated February 28, 1996, this court granted the motions to dismiss filed by the defendant and intervenors and denied the plaintiff's motion for summary judgment. On February 29, 1996, judgment was entered. Thereafter, the plaintiff filed a notice of appeal. Oral argument before the Tenth Circuit Court of Appeals is scheduled for November 21, 1996.

Presently pending before the court is the plaintiff's motion for injunction staying administrative case during the pendency of the appeal (Doc. 168, filed September 17, 1996). The plaintiffs seeks to stay the administrative hearing before the Department of Agriculture which is scheduled for September 25 and 26, 1996 in Wichita, Kansas. The court conducted a hearing by conference call on September 23, 1996. Following the conclusion of the

hearing, the court informed counsel that it was denying the plaintiff's motion and that a memorandum and order would follow.

On March 8, 1996, the Department of Agriculture resumed the administrative proceedings which had been pending against the plaintiff. This court had stayed those administrative proceedings during the pendency of this action. On March 8, 1996, the Department of Agriculture's Administrative Law Judge set the administrative hearing for July 31, 1996. In June 1996, a motion for continuance was granted and the administrative hearing was rescheduled for September 25, 1996.

The parties are in agreement that the following factors are relevant to the court's determination of whether to issue an injunction pending appeal: (1) whether the plaintiff has made a strong showing of the likelihood of success on appeal; (2) whether the plaintiff will be irreparably injured; (3) whether an injunction would injure other parties; and (4) where the public interest lies.

The court does not believe that plaintiff has made the necessary showing on the likelihood of success on appeal. This court followed the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), in upholding the constitutionality of the Beef Promotion Act. This court continues to believe that the Third Circuit's decision is correct. There is no case law from any other circuit to the contrary.

The plaintiff will not be irreparably injured by having to appear at a two day administrative hearing in Wichita. There has been no determination of liability under the Act, and no determination of what amounts, if any, may be due for unpaid assessments, late penalties, and civil penalties. At this time, there is nothing comparable to a money judgment which could be stayed upon the filing of a supersedeas bond. Following the hearing before the Administrative Law Judge, there would be an appeal to a judicial officer within the Department of Agriculture. If, at the conclusion of the administrative process, Goetz is ordered to pay monies and refuses to do so, the agency could initiate a collection proceeding. At that time, a stay of proceedings might be in order upon the filing of a bond in the nature of a supersedeas. If the plaintiff were to prevail on his constitutional challenge, he would be unable to obtain a refund of any monies paid because of the government's sovereign immunity. The plaintiff has suffered no harm to date, however. The inconvenience of attending a brief hearing does not constitute irreparable harm.

The plaintiff's refusal to pay assessments under the Act constitutes harm to the beef promotion program established by the Act. Income that was to have been used to conduct promotion and research has not been paid. The

government has a preliminary estimate that plaintiff owes nearly \$25,000 (through the first half of 1994), not including interest or penalties.

It is not in the public interest to allow the plaintiff to continue to refuse to participate in the beef promotion program established by the Act. The Act's provisions are mandatory. The plaintiff's views about the program do not justify his noncompliance. The plaintiff has delayed these administrative proceedings for approximately three years.¹ A determination of liability, if any, under the Act needs to be made. The public interest lies on the side of requiring compliance with the Act.

The court is troubled by the plaintiff's delay in filing the motion for injunction.² In this court's memorandum and order of February 28, 1996, the court lifted the injunction previously in effect. The plaintiff was aware no later than March 8, 1996 that the agency was going forward with the administrative proceedings. The plaintiff had notice for several months of the hearing date, yet plaintiff waited until the last moment to file his motion for injunction. Plaintiff's failure to act promptly weighs against his claim of irreparable harm.

IS BY THE COURT THEREFORE ORDERED that plaintiff's motion for injunction staying administrative case during the pendency of the appeal (Doc. 168) is hereby denied.

¹The Department of Agriculture initiated the administrative proceedings against the plaintiff in October 1993.

²Plaintiff appears to have a proclivity to wait until that last minute. Plaintiff filed this action on August 2, 1994 and immediately sought to obtain a stay of the administrative hearing which was scheduled for August 8, 1994.

FARM SERVICE AGENCY
DEPARTMENTAL DECISIONS

In re: JOANNE FRANTA.
FS Docket No. 96-0001
Decision and Order filed August 21, 1996.

Salary offset - 15% deduction of disposable pay.

Chief Judge Victor Palmer approved a 15% salary offset imposed by the FSA on the respondent, a federal employee, to collect an overdue loan owed to the United States government

Nancy L. New, Marc A. Smith and Craig Iverson, for Complainant.

Jack Crickenberger and Penny Walker, for Respondent.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to 7 C.F.R. § 1951.111, the Farm Service Agency (FSA), formerly Farmers Home Administration, on May 2, 1996, sent its employee, Joanne Franta, "Salary Offset" letters. The letters advised Ms. Franta that FSA had reviewed its records and determined that she owed the U.S. Government \$17,765.94 on an overdue loan, which it intended to collect by offsetting 15% of her net salary until the debt and all accumulated interest and other costs were paid in full in accordance with Department Regulation 2520-1, Interest on Delinquent Debt, and 4 C.F.R. 102.13.

The letters further advised Ms. Franta:

"As a Federal employee, you have the following rights:

1. The right to inspect and copy the records relating to the delinquency or other debt. Charges will be assessed for copying;
2. The right to enter into a written agreement for a repayment schedule different from that proposed so long as your terms of repayment are agreeable to FSA;
3. The right to a hearing conducted by a USDA Administrative Law Judge or a hearing official from outside USDA. The hearing will consider the existence of the delinquency or other debt, the amount of the delinquency or other debt, and/or percentage of disposable pay to

be deducted each pay period. The timely filing of a petition or a hearing will stop collection proceedings;

4. The right to a final decision on a hearing at the earliest practical date, but not later than 60 calendar days after you file your hearing petition;

5. The right to request a waiver of salary overpayment. You may also question the amount or the validity of a salary overpayment or general delinquency or other debt by submitting a claim to the Comptroller General in accordance with General Accounting Office procedures;

6. The right to have any moneys paid on or deducted for the delinquency or other debt which are later waived or found not owed to the United States to be promptly refunded to you unless there are applicable contractual or statutory provisions to the contrary."

Ms. Franta responded by letter, dated May 16, 1996, stating that she found the letters to be confusing. Her confusion was caused by another letter advising her that an administrative offset would also be made against sums accumulated in her pension fund to pay this debt. On May 30, 1996, Nancy L. New, Director Program Division, FSA, wrote to Ms. Franta and explained the distinction between a salary offset and an administrative offset. On June 12, 1996, Ms. Franta filed a petition for a hearing; because of her initial confusion her letter filed after the 30 day time limitation was accepted by the certifying official of FSA who wrote her to that effect on June 20, 1996.

On June 24, 1996, the underlying documents which constitute the administrative record was sent to me by the certifying official of FSA who appointed Nancy L. New, Director Program Division to make arrangements for a hearing in accordance with my directions.

I determined that it was appropriate to conduct a hearing by telephone conference call as authorized by the governing regulations (7 C.F.R. § 1951.111(g)(6).)

On July 2, 1996, at 2:00 P.M. EDT, a telephonic hearing was initiated. Participating were Nancy L. New, Marc A. Smith and Craig Iverson for FSA, and Ms. Franta together with her attorneys Jack Crickenberger and Penny Walker. The offices of the FSA representatives are at 441 South Salina Street, Suite 356, Syracuse, New York. Mr. Crickenberger and Ms. Walker are officed at 3921 Old Lee Highway, Suite 71A, Fairfax, Virginia 22030.

We reviewed the history and nature of the loan which the Farmers Home Administration had made to Ms. Franta and her then husband, David, whom she subsequently divorced and is now deceased. The arguments advanced on Ms. Franta's behalf, were all equitable in nature and a settlement proposal was advanced for consideration by FSA. I decided to adjourn the hearing to allow the proposal to be explored and to reconvene the hearing later in the month. Subsequently, I was advised that the parties required more time to explore settlement possibilities and the reconvening of the hearing was delayed. On August 19, 1996, the hearing by telephone conference was reconvened at 2:00 P.M. EDT. FSA was represented by Ms. New and Ms. Franta participated together with her attorneys Mr. Crickenberger and Ms. Walker.

I was advised that FSA had rejected the settlement proposal and that the amount now available in Ms. Franta's pension fund was adequate to pay in-full the debt and all accumulated interest. It again appeared that every argument asserted on Ms. Franta's behalf was equitable in nature and there were no legal arguments available against the imposition of the salary offset. I explained to the parties that the powers conferred by the governing regulation 7 C.F.R. § 1951.111(g), do not include equity powers. I am limited by the regulation to considering the written submissions and documents provided by the debtor and FSA unless a statute authorizes or requires consideration to also be given to a waiver of the debt. No statutory authority of this type was shown applicable. Inasmuch as Ms. Franta's attorneys requested the delay of the proceeding so that her settlement proposal could be considered by FSA, the sixty day period for issuing a written decision was accordingly lengthened as authorized by 7 C.F.R. § 1951.111(g)(7).

Upon consideration of the written submissions and documents provided by Ms. Franta and FSA as well as the arguments made at the hearing by telephone conference, the following findings, conclusions and analysis is made supporting the salary offset to collect the debt owed by Ms. Franta.

FINDINGS

1. In 1985, David and Joanne Franta borrowed \$13,000.00 from the Farmers Home Administration to start a small strawberry business. The annual interest rate was 10 1/4% and the loan was to be paid in 7 years through 8 installments due on the 1st of January of each year. The promissory note they signed contained a promise by each borrower to "jointly and severally" pay the loan's principal and interest.

2. Loan payments were not made as agreed and, in 1989, the Farmers Home Administration rescheduled the loan to better enable the Frantas to pay. The annual interest rate was reduced to 9 1/2% and the Frantas were given six years to pay the then balance of \$12,475.32.

3. In 1990, the Frantas separated with David Franta retaining possession of the farm equipment.

4. In 1994, the Frantas submitted a partial compromise offer under Farmers Home Administration Instruction 1956-B, which was rejected as incomplete. They were notified of the rejection by telephone on November 8, and November 16, 1994.

5. The Frantas divorced in 1994, and subsequent to his remarriage, David Franta died on December 7, 1994.

6. Joanne Franta had become a federal employee prior to the 1994 partial compromise offer she and David Franta submitted.

7. Upon their divorce, David Franta resided in New York where the farm equipment purchased with the loan money was located. Joanne Franta moved to Virginia where she is currently employed by the federal government.

8. On March 12, 1996, the entire indebtedness due on the promissory notes was accelerated for failure to make payments as scheduled and written notice to that effect was sent to Joanne Franta.

9. In that Joanne Franta is a federal employee, salary offset was initiated on May 2, 1996, and an administrative offset respecting her pension fund was initiated on May 3, 1996.

10. By letter dated May 16, 1996, Joanne Franta responded to the letters she received. Inasmuch as her response indicated she did not understand the differences between the two offset actions, Nancy L. New, Director Program Division, by letter dated May 30, 1996, undertook to explain the differences and Ms. Franta's right to a review by an Administrative Law Judge of the salary offset action, and a review by the USDA National Appeals Division of the administrative offset.

11. Joanne Franta has petitioned for review of both actions and the administrative offset review is currently pending.

12. As of April 30, 1996, Joanne Franta owed \$11,261.25 on the debt's principal and \$6,504.69 in interest. Interest continues to accrue at the rate of \$2.93 per day.

CONCLUSIONS

Joanne Franta and her then husband, David Franta borrowed \$13,000.00 on July 19, 1985, which they "jointly and severally" promised to fully pay with interest of 10 1/4% by July 19, 1992. Instead the note's installment payments were rescheduled in 1989 to better enable them to pay the debt at a reduced rate of interest. Currently, \$11,261.25 of the principal debt is still owed, plus interest to date of \$6,835.78, whereby, \$18,097.30 is owed as of August 21, 1996.

The various settlement proposals Ms. Franta submitted to FSA were considered and rejected. I have been advised that the amount of money that is currently set aside to pay her pension is sufficient to fully pay this debt and for that reason there is no incentive for FSA to accept a smaller amount or reduced installment payments. The administrative offset review is likely to be decided in approximately sixty days.

The regulations allow up to 15% of a federal employee's disposable pay to be deducted and sent directly to the creditor agency. FSA has requested that \$381.00 per pay period be deducted in repayment of the debt. Ms. Franta admits that this deduction would not exceed 15% of her disposable pay.

Accordingly, starting with her October 24, 1996, pay check, \$381.00 shall be deducted each pay period until such time as the entire debt which Ms. Franta owes to the Farm Service Agency has been paid or satisfied in full. Moreover, interest shall continue to accumulate on the debt until it is paid or satisfied in full.

[This Decision and Order became final August 21, 1996.--Editor]

In re: NANCY K. BENEDA.
FS Docket No. 97-0001
Decision and Order filed November 8, 1996.

Salary offset - Less than 15% deduction from disposable pay.

Chief Judge Victor Palmer approved the imposition of a salary offset on the respondent, but reduced the amount of the deduction. Respondent is a federal employee with an outstanding and overdue loan from the United States government. The FSA imposed a 15% offset, or a deduction of \$112 from each paycheck, which Chief Judge Palmer reduced to \$100.

Mike Robinson, Dean Altenhofen, Amy Roeder, and Jack Salava, for Complainant.

Dana Brewer, for Respondent.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

On August 16, 1996, the Farm Service Agency (FSA), sent its employee, Nancy K. Beneda notice that it intended to impose a salary offset pursuant to 7 C.F.R. § 1951.111. The letter informed Ms. Beneda that FSA had reviewed its records and determined that she owed the U.S. Government \$99,623.02 on an overdue farm loan, which it intends to collect by offsetting fifteen percent of her salary until the debt and all accumulated interest and other costs are paid in full. Pursuant to 7 C.F.R. § 1951.111(e), the letter also informed her of her rights and responsibilities including the right to a hearing by a USDA Administrative Law Judge. Ms. Beneda filed a petition for a hearing on September 16, 1996. The petition did not deny the existence of the debt, but requested that the offset amount be less than fifteen percent. I reviewed the administrative record--consisting of the salary offset notice, hearing petition, notice of acceleration, promissory notes, real estate mortgages, and shared appreciation agreement--and determined that an oral hearing was appropriate.

A telephone hearing was held on November 6, 1996, at 11:00 a.m., EST. Ms. Beneda participated, along with her attorney, Dana Brewer. FSA was represented by Mike Robinson, Dean Altenhofen, Amy Roeder, and Jack Salava.

Findings

1. On October 15, 1981, Nancy and Lonnie Beneda borrowed \$168,400 from the FSA. The annual interest rate was 13.25 %, and the loan was to be paid in annual installments of \$22,861. On February 16, 1989, the note was reamortized and a shared appreciation agreement was entered into in exchange for a write down of the debt. Under the new note, \$77,943.23 was due at a rate of 11.25 %, in annual installments of \$6,756.

2. Nancy and Lonnie Beneda failed to make the loan payments as agreed, and failed to respond to servicing notices sent by the FSA. Accordingly, on August 2, 1996, the FSA sent Mr. and Mrs. Beneda notice that the entire amount due was being accelerated.

3. Nancy Beneda is a federal employee subject to salary offset under 7 C.F.R. § 1951.111. FSA sent Ms. Beneda notice of its intent to offset her

salary on August 16, 1996. She responded with a petition for a hearing on September 16, 1996.

4. Ms. Beneda currently owes \$100,875.35 consisting of \$73,874.64 unpaid principal and \$27,000.70 unpaid interest, plus any amount due under the terms of the shared appreciation agreement.

5. Ms. Beneda currently earns a salary of [REDACTED] annually, or a net pay of approximately [REDACTED] biweekly. FSA seeks to deduct fifteen percent, which amounts to [REDACTED] from each paycheck.

6. Other financial obligations of the Beneda household include automobile payments, credit card debt, and another agricultural loan, which together amount to approximately [REDACTED] per month.

7. Other household income includes Mr. Beneda's salary of [REDACTED] per month, and any farm income; although, the farm suffered an overall loss for 1995.

Conclusions

Ms. Beneda has not denied the existence of the loan but has requested that the offset amount be less than fifteen percent to enable her to meet other financial obligations without suffering financial hardship. The regulations provide that:

If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in approximately 3 years. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. Certifying Officials are responsible for determining the size and frequency of the deductions. However, the amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

7 C.F.R. § 1951.111(i). Disposable pay is defined as:

Pay due an employee that remains after required deductions for Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for life and health insurance benefits, and such other deductions required by law to be withheld.

7 C.F.R. § 1951.111(b)(4).

I have noted Ms. Beneda's other financial obligations, as well as Mr. Lonnie Beneda's salary of [REDACTED] per month, and the potential for farm income. Upon consideration of the amount of the debt, as well as Ms. Beneda's ability to pay, I have determined that a deduction of \$100 from each paycheck--which is less than 15% of her net, or disposable, pay--is appropriate. Ms. Beneda is able to pay \$200 per month; and reducing the amount of the offset any further would be unrealistic considering the enormity of the debt.

Accordingly, \$100 shall be deducted each pay period until such time as the entire debt which Ms. Beneda owes to FSA has been paid or satisfied in full. Moreover, interest shall continue to accrue on the debt until it is paid or satisfied in full.

[This Decision and Order became final November 8, 1996.--Editor]

HORSE PROTECTION ACT
DEPARTMENTAL DECISION

In re: MIKE THOMAS.
HPA Docket No. 94-0028.
Decision and Order filed July 15, 1996.

Civil penalty — Disqualification order — Horse soring — Past recollection recorded — Palpation.

The Judicial Officer affirmed the Decision by Judge Hunt (ALJ) in which he found that Respondent entered, for the purpose of showing or exhibiting, a horse in a horse show while the horse was sore. The ALJ assessed a civil penalty of \$2,000 against Respondent and disqualified Respondent for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show or horse exhibition. A horse may be found to be sore based upon the professional opinion of USDA veterinarians who relied solely upon palpation of the horse's pasterns. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553). Hearsay evidence is admissible under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice governing this proceeding, (7 C.F.R. §§ 1.130-.151). Past recollection recorded in the form of affidavits and a summary made while the events were fresh in the witnesses minds is reliable, probative, and substantial. *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), is not controlling in this proceeding. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a \$2,000 civil penalty.

Sharlene A. Deskins, for Complainant.
Earl Rogers, III, Morehead, KY, for Respondent.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

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I. INTRODUCTION

This case is a disciplinary proceeding instituted pursuant to the Horse Protection Act, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary, (7 C.F.R. §§ 1.130-.151) (hereinafter the Rules of Practice).

The proceeding was instituted by a Complaint filed on April 4, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that on March 26, 1993, Mike Thomas (hereinafter Respondent) entered for the purpose of showing or exhibiting a horse known as "Jubilee's

True Love" as Entry No. 843, in Class No. 46, at the National Walking Horse Trainers Show at Shelbyville, Tennessee, while the horse was sore, in violation of section 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)).

On April 26, 1994, Respondent filed an Answer in which Respondent admits that on March 26, 1993, he entered for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" as Entry No. 843, in Class No. 46, at the National Walking Horse Trainers Show at Shelbyville, Tennessee, but denies that the horse was sore in violation of 15 U.S.C. § 1824(2)(B).

A hearing was held on May 10, 1995, in Lexington, Kentucky, before Administrative Law Judge James W. Hunt (hereinafter ALJ). Earl Rogers III, Esquire, of Michael R. Campbell & Associates, Morehead, Kentucky, represented Respondent, and Sharlene A. Deskins, Esquire, Office of the General Counsel, United States Department of Agriculture, represented Complainant.

The ALJ filed an Initial Decision and Order on September 7, 1995, in which the ALJ found that Respondent violated section 5(2)(B) of the Act, (15 U.S.C. § 1824(2)(B)); assessed a \$2,000 civil penalty against Respondent; and disqualified Respondent from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition for 1 year.

On October 10, 1995, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).¹ On December 15, 1995, Complainant filed Complainant's Opposition to the Respondent's Appeal Petition and Brief in Support Thereof, and on December 19, 1995, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's Conclusion of Law.

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

II. ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

....

A. Facts

Respondent . . . is in the business of training horses. He also owns horses. On March 26, 1993, [Respondent] entered for the purpose of showing or exhibiting one of the horses he owned, Jubilee's True Love, in the National Walking Horse Trainers Show in Shelbyville, Tennessee.

Jubilee's True Love was examined at the show by a designated qualified person (hereinafter DQP), Charles Thomas, [who] said the horse was alert and led freely, but reacted to palpation by flinching [her] foot and demonstrated "consistent sensitivity in the front of both front feet." [Charles] Thomas, who is not related to Respondent Mike Thomas, said a mild reaction to palpation is sufficient to "excuse" a horse from competing in the show but not enough to consider it sore. (Tr. 201-03, 216, 222.)

[Jubilee's True Love] was then examined by two [United States Department of Agriculture (hereinafter) USDA] veterinary medical officers, Dr. Lynn Bourgeois and Dr. Scott Price. Dr. Bourgeois testified that he and Dr. Price examined approximately 300 horses at the 4-day show and found 7 to be sore. [(Tr. 28-29.) Dr. Bourgeois] said that the DQPs disqualified about 4[6 horses from participation in the National Walking Horse Trainers Show. (Tr. 29-30.)] Both [Dr.] Bourgeois and [Dr.] Price are experienced veterinarians. (Tr. [14-16, 24, 79-81].)

[Dr.] Bourgeois said that USDA veterinarians conduct separate examinations of horses. They must agree before finding a horse sore. (Tr. 49-51.)

Dr. Bourgeois said that, when he examines a horse, he palpates its feet to determine whether it is sore. Palpation, he said, is one of various diagnostic tools to determine soreness. Other . . . "indicators" [of soreness] include a horse's gait, alertness, breathing, temperature, and inflammation. However, [Dr.] Bourgeois testified that even when these other indicators are normal, the horse may still be sore. Inflammation, for instance, may be subcutaneous and therefore not visible, and the gait of a sore horse may be normal when examined because of being ["basically]at rest,["]but [a horse may] experience pain when "youspeed him up" with a rider during the exhibition which would affect its gait in the show ring. Some horses, he said, are also more stoic

[than other horses and, therefore, do not manifest soreness as readily as horses that are less stoic]. (Tr. 30-3[6], 38, 56, 62, 70-71, 73-74.)

[Dr.] Bourgeois said that he relies on a horse's reaction to bilateral digital palpation to determine whether the horse is sore because he knows of no explanation for a bilateral reaction other than chemicals or devices. A horse's reaction to palpation, he said, provides [an] objective criterion [by which] to determine whether a horse is sore. (Tr. 45, 54-56, 70.)

[Dr.] Bourgeois said he does not remember his specific examination of Jubilee's True Love, but . . . he recorded the results on a USDA Summary of Alleged Violations form [(APHIS Form 7077)] on which he indicated "extreme pain responses" to bilateral palpation. (CX 2.) At the end of the show that day, [Dr.] Bourgeois prepared an affidavit in which he stated:

I approached the horse from the left side, put my hand on its neck and proceeded on down to pick up the forelimb. Palpation of anterior pastern elicited repeated marked pain responses characterized by attempts to remove limb from my grasp, abdominal tucking, and shuffling of hind feet forward. I then repeated this procedure on right forelimb and again elicited pain responses characterized by repeated attempts to remove limb from my grasp, abdominal muscle tucking, and shuffling of rear feet forward.

. . . .

This horse, in my professional opinion, was sored by overwork in action devices (chains), chemicals or a combination of both.

CX 3, pp. 1-2.

Dr. Bourgeois said that he relied only on palpation to find that the horse was sore. (Tr. 70-71.)

Dr. Scott Price testified that he observes examinations of a horse by other veterinarians and then conducts his own examination regardless of what the others may have found. The purpose in soring is not to cripple a horse, he said, but to exaggerate its gait when exhibited. When chains strike the sored area, they cause pain and affect the horse's gait. Like Dr. Bourgeois, [Dr.] Price said that there are various pain indicators, and that just one of them, if "bad enough," can show that a horse is sore. (Tr. 90, 111, 115.)

[Dr.] Price testified that palpation is a diagnostic tool and [is] one of the procedures he learned in veterinary medical school. [Dr. Price] said he palpates by applying pressure with the ball of his thumbs until the thumbnail

begins to change color. He then looks for a reaction. A sound horse, he said, does not react to palpation, whereas a sore horse will respond through consistent pain reaction to the palpation, such as flexing its shoulder muscles, clenching its abdominal muscles, or shifting its weight. (Tr. 99[-100], 104, 109-112. . . .)

When it was suggested that a horse's reaction to palpation was a "learned reaction" or "learned response," [Dr.] Price said that, if that were the case, 98 percent of the horses would be "written up" because of having "chains and weights and rollers applied to their feet." (Tr. 131.) He said that, of approximately 10,000 horses he has examined, he has found [between 1½ and] 2 percent [of the horses] sore. (Tr. 101.)

[Dr.] Price also said that a "silly" horse can be distinguished from a sore horse because its reactions to palpation are inconsistent:

A silly horse has an inconsistent response to our palpation, and we always give the benefit of the doubt to the exhibitor when we have any questions if that's the case. A sore horse gives a complete and repetitive and consistent response and I can elicit it when I go back to that spot repeatedly. And usually I go back and check that leg again to make sure in my mind that I can call this a sore horse.

Tr. 97.

He said that "anxious" or "nervous" horses are similar to "silly" horses, but that a "fractious" horse is one that will not allow itself to be examined. Price said fractious horses are usually excused from competition. (Tr. 97-98.)

[Dr.] Price said that, when he finds a horse sore, he prepares an affidavit when the examination is fresh in his mind and that he prepared [an] affidavit in this case[, (CX 4),] in the evening during the show. (Tr. 87.) In his affidavit concerning his examination of Jubilee's True Love, he said:

At 6:50 p.m., I examined the horse. The horse was extremely sore in a large area on the anterior aspect of both front pasterns. The horse jerked violently, and gave a consistent & repetitive withdrawal to palpation. Additional signs of soreness included shifting weight, and rippling of shoulder & abdominal muscles in response to palpation. This horse was definitely not silly; it was sore.

CX 4, p. 1.

Respondent . . . testified that he has never been charged with violating the Horse Protection Act in the years that he has been training and showing horses. He said that Jubilee's True Love was trained in chains, but that no chemicals or substances, other than grease, were ever put on the horse's feet. . . . (Tr. 315-30.)

The horse's trainer, [Mr.] Jimmy Acree, testified that he applied grease to [Jubilee's True Love's] legs to keep the skin moist and prevent chains from irritating the skin. He said that no substances other than grease were ever put on the horse's feet. [Mr.] Acree said he observed the USDA veterinarians examine [Jubilee's True Love] from about 40 feet away and that he did not see any pain reactions. He also said that, when he palpated the horse's feet, there was some movement but that it was not consistent. He said the horse was "silly." (Tr. 170-87.)

[Mr.] Jamie Hankins, another horse trainer, was asked to check the horse after [shé] was returned to the stable. [Mr.] Hankins said the horse was "flighty" and that, when he palpated the horse's pasterns, there was no consistent reaction. (Tr. 233[-34], 242-43, 267.)

[Dr.] Ray Miller, a doctor of veterinary medicine who was attending the show, then examined Jubilee's True Love at the request of Respondent's wife. Dr. Miller has 25 years of experience as an equine practitioner and is a member of the Equine Practitioner Association. [(Tr. 272.)] The record does not show how soon Dr. Miller examined the horse after the examination by the USDA veterinarians. [Dr.] Miller indicated that he was asked to examine the horse after "[t]hey had just gotten back to the barn with her." (Tr. 277.)

In any event, Dr. Miller said he started his examination by looking at the condition and attitude of Jubilee's True Love and that he observed that [she] "was a three year old mare in good health, in good condition, very alert, turning around." He said that there was no sign of inflammation, that the horse's temperature was normal, that [her] gait was normal, and that [she] moved freely. He testified that it is a common practice to put grease on a horse's legs and that grease sometimes, but not normally, causes an allergic reaction. (Tr. 277, 292-93.)

[Dr.] Miller then proceeded to palpate the horse's feet, which, he said, is a diagnostic tool to detect pain that he has used for 25 years, and which, he said, other veterinarians had been using to check horses for pain even before the enactment of the Horse Protection Act. (Tr. 279.) However, reaction to palpation, he said, may also be due to reasons other than pain, such as being a "learned response." [(Tr. 290-91.) Dr.] Miller further testified that, although palpation is a diagnostic tool, it alone is not sufficient to make a diagnosis that a horse is sore. He said that a group of veterinarians had concluded in a

study called the "Atlanta Protocol" that just one factor or indicator of pain, such as palpation, is not "definitive" in determining whether a horse is sore. (Tr. 288-89.)

[Dr.] Miller said, when he began his examination of Jubilee's True Love[, she] had an "arrogant" attitude and did not want to be palpated. [(Tr. 278-79.)] When he did palpate her, Dr. Miller said, there was "some movement," but he did not describe the nature of the movement or its intensity. However, he indicated that it was more than slight by not agreeing with a question that referred to the movement as only "slight." (Tr. 278, 312.)

Although the horse moved when palpated, [Dr.] Miller testified, the movement was not consistent. He said that for a reaction to palpation of a specific area to be a pain response it must be repeatable. (Tr. 279.) He further testified:

When you're palpating the area and you get movement from the horse, the movement, to have any diagnostic value, needs to be repeatable. So when I say repeatable, when I get movement right here, then I'll leave that area and I go on around and check elsewhere, taking my time so the horse will forget this area, and then I go back to it and palpate it again. And if, you know, you get the same response two, three or four times in a row, then that's repeatable and it's notable. If it's not, then it's not notable.

Tr. 310-11.

Dr. Miller concluded that, based on his overall exam of Jubilee's True Love, [she] was not sore. (Tr. 289, 312.)

B. Law

Section [2](3) of the Horse Protection Act . . . provides that:

- (3) The term "sore" when used to describe a horse means that—
 - (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
 - (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

[15 U.S.C. § 1821(3).]

Section [6](d)(5) of the Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore:

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

[15 U.S.C. § 1825(d)(5).]

Section [5](2) [of the Act] prohibits not only the showing or exhibiting of a sore horse, but also "(B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore." [(15 U.S.C. § 1824(2)(B).)] "'Entering,' within the meaning of the Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians." *In re William Dwaine Elliott* [(Decision as to William Dwaine Elliott)], 51 Agric. Dec. 334, 344 (1992), [aff'd, 990 F.2d 140 (4th Cir.), cert. denied, 114 S.Ct. 191 (1993)].

C. Discussion

Complainant contends that, based on the affidavits of Drs. Bourgeois and Price, Jubilee's True Love demonstrated bilateral pain when palpated.

[Complainant,] therefore, contends that the horse was sore when Respondent . . . entered [her] in the [National Walking Horse Trainers] Show.

Respondent, contending that the horse was not sore, argues that: (1) The affidavits by Drs. Bourgeois and Price were prepared in anticipation of litigation; (2) The affidavits are not reliable evidence; (3) Palpation alone cannot be relied upon to find that a horse is sore; (4) There has been no rule making on palpation; (5) Congress has prohibited the use of palpation; and (6) Respondent has rebutted any presumption that Jubilee's True Love was sore.

1. . . . Drs. Bourgeois and Price . . . were credible witnesses and they each conducted an independent examination of Jubilee's True Love as part of their job to seek compliance with the Horse Protection Act. . . . There is no evidence that anyone told them what findings to make or what to say in their affidavits. There is also no evidence that they were biased in favor of finding that [Jubilee's True Love] was sore. On the contrary, of 300 horses they examined [at the 4-day National Walking Horse Trainers Show], they found that only 7 were sore.

. . . [I]f their [affidavits] were to be regarded as unreliable just because of the potential for litigation, the farfetched argument could be made that any report prepared by an official in the course of seeking compliance with a federal statute could be considered unreliable for the same reason.

2. Respondent cites . . . *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), for the proposition that veterinarian-prepared affidavit[s and Summary of Alleged Violations forms are] unreliable hearsay. However, decisions by the [United States Court of Appeals for the] District of Columbia and [the United States] Court of Appeals [for the Sixth Circuit] in 1995 take the opposite position. They hold that such documents can constitute substantial evidence. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995)[, *cert. denied*, 116 S.Ct. 88 (1995)]; *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406 (6th Cir. 1995). The Secretary, of course, also takes the same position. [*In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio)], 52 Agric. Dec. 298 (1993)[, *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)].

It is notable that[, in *Young*, the United States Court of Appeals for] the Fifth Circuit cites the same [United States] Supreme Court decision, *Richardson v. Perales*, 402 U.S. 389 (1971), to support its holding that [the] veterinarian[-prepared affidavits and the Summary of Alleged Violations form at issue are] not reliable, as the [United States Court of Appeals for the] District of Columbia] and [the United States Court of Appeals for the] Sixth

Circuit cite to support their position[, in *Crawford* and *Bobo* respectively,] that [the veterinarian-prepared affidavits and the Summary of Alleged Violations forms at issue in those cases are] reliable. In *Perales*, [*supra*, 402 U.S.] at 402, the [United States Supreme] Court held that an unsworn written report by a physician of an examination he conducted can, despite being hearsay, constitute substantial evidence, even though the physician is not present at the hearing for cross-examination. According to *Perales*, therefore, it seems clear that a report by a veterinary medical doctor of a medical examination he or she conducted can be considered probative and reliable evidence. Moreover, it would appear that [Dr. Bourgeois' and Dr. Price's affidavits, (CX 3, 4),] are even more reliable and probative than the [report at issue] in *Perales* since [Dr. Bourgeois' and Dr. Price's affidavits] are sworn statements, and [Dr. Bourgeois and Dr. Price testified] at the hearing [and were available for and subjected to] cross-examination [by Respondent. Further, even the unsworn Summary of Alleged Violations form at issue in the instant proceeding, (CX 2), is more reliable and probative than the report at issue in *Perales* because those who prepared and signed the Summary of Alleged Violations form, Dr. Bourgeois, Dr. Price, and Mr. David B. Head, testified at the hearing and were available for and subjected to cross-examination by Respondent.] However, the actual weight to accord a[n affidavit or] report can, of course, vary, depending on such matters as the circumstances in which the [document] was prepared and its substantive content. . . . I find, in the circumstances here, as discussed below, that . . . Drs. Bourgeois' and Price's [affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2),] are reliable and probative.

3. Respondent also cites the Fifth Circuit's *Young* decision for the proposition that palpation is an unreliable indicator of soreness. In *Young*, the court found that palpation is not reliable because [several highly qualified experts for the Petitioner testified that soring could not be diagnosed through palpation alone, the Petitioner introduced a written protocol signed by a group of highly competent veterinarians coming to the same conclusion, and the Judicial Officer's basis for rejecting this evidence seemed, to the *Young* court, to be simply that the proposition that palpation alone is unreliable is contrary to agency policies and prior agency decisions. Further, the *Young* court found that the Judicial Officer failed to identify] medical or scientific data supporting palpation as a diagnostic technique. [*Young, supra*, 53 F.3d at 731.]

There is, however, no indication in this case that palpation is an unreliable pain indicator. On the contrary, Respondent's expert witness, Dr. Miller, used palpation to determine if [Jubilee's True Love] was sore and testified that

other veterinarians were using palpation [to determine whether horses were sore] even prior to [enactment of] the Horse Protection Act. [(Tr. 279.)] Veterinarians testifying for Respondents in other cases have also verified the reliability of palpation. For instance, in *In re William Earl Bobo*, 53 Agric. Dec. 176, 190 (1994), it was stated that, although they did not believe that palpation was sufficient to show that a horse was sore, "all four veterinarians who testified for Respondents acknowledged that repeated reaction to palpation of specific locations on a horse's pastern can be an authentic indication of soreness." Dr. Price also testified that palpation was a procedure he learned in veterinary medical school. [(Tr. 104.)]

In these circumstances, I find that palpation is a [reliable technique to detect pain in horses,] commonly used and accepted . . . by doctors of veterinary medicine. . . .

However, while Dr. Miller indicated that palpation is an accepted examination procedure, he also contended that it should not be relied on alone to determine whether a horse is sore. The Secretary's position, on the other hand, is that palpation alone is sufficient to determine whether a horse is sore. . . . The Secretary further states that [USDA] veterinarians also use other diagnostic techniques, such as observing the horse's gait, when examining a horse. However, in virtually all recent cases, as here, when USDA veterinarians determine that a horse is sore, it is on the basis of palpation alone.

The basic argument, therefore, is not whether palpation is a legitimate diagnostic tool -- which the record shows it is -- but whether the results of palpation constitute sufficient substantial evidence to raise the presumption that a horse is sore. As pointed out in *In re C.M. Oppenheimer*, 54 Agric. Dec. [221, 310] (1995), "USDA veterinarians are merely providing *evidence*, through their diagnosis, to fact-finders, who then determine if a particular horse is sore under the Act." It is the Secretary's policy . . . that a veterinarian's findings based solely on palpation can be sufficient to support such a presumption of soreness. However, the evidentiary value of the veterinarian's findings depends on whether the report of the examination was timely prepared, (*Cf. In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1369 (1994)), and whether the veterinarian specifically and accurately documents his or her findings in the report. "In order for a report of an examining veterinarian, as a medical expert in the field of animal care, to constitute the substantial evidence needed to show that a horse is sore, the report must do more than merely express the opinion that a horse is sensitive; the report must also set forth the facts (objective findings) that form the basis for the

expert's conclusion. Otherwise, the expert's opinion is entitled to little weight." *In re Linda Wagner, supra*, 52 Agric. Dec. at 305. A report that lacks adequate findings will therefore fail to support the conclusion that a horse is sore. . . .

In the instant case, . . . Drs. Bourgeois and Price . . . prepared [their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2),] when the events were fresh in their minds, and [the documents] contain adequate objective findings to support their conclusions that Jubilee's True Love was sore.

4. Respondent contends that, in relying on palpation, USDA has created a substantive rule without following the required notice-and-comment rule making process. Palpation, however, is [a procedure used to examine horses to determine compliance with the Act and regulations issued under the Act. A "rule" under the Administrative Procedure Act is defined as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be

important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy, nor does palpation describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making, nor does it regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

"Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the Act and regulations.

43 Fed. Reg. 18,514, 18,525 (1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Act and the regulations issued under the Act. Except for minor editorial changes, the definition of the word

"inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

"Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1.)]

Respondent argues that even though the regulations refer to palpation, they do not define the "protocol" [to be used to palpate horses,] except for [the protocol to be used by the] DQPs. (9 C.F.R. § 11.21[(a)](2).) The record in this case shows that palpation is a diagnostic procedure taught in veterinary medical school and is used not only by doctors of veterinary medicine and DQPs, but also by laypersons. Horse trainers [Mr.] Jimmy Acree and [Mr.] Jamie Hankins indicated that they knew the "protocol" for palpating horses, [(Tr. 192-93, 228, 241-43, 258-59),] while Respondent . . . said he knew the pain signs to look for when a horse is palpated. (Tr. 324.) Respondent's wife also apparently knew how to palpate. (Tr. 243.) Therefore, as palpation is a commonly known, accepted, and used diagnostic tool, there appears no need to spell out a "protocol" with which persons in the horse exhibition industry are already familiar.

This "protocol," as described at the hearing (and as described by the court in *Young, supra*, [53 F.3d] at 729-30), [consists of] pressure applied with the ball of the thumb to the horse's pastern areas while looking to see if there are any objective reactions or signs of pain by the horse, such as withdrawing its foot or tightening of its stomach muscles.

If there is a reaction, the examiner, as Drs. Bourgeois, Price, and Miller all emphasized, returns to the area causing the reaction to determine if the horse displays a consistent or repeatable bilateral "abnormal sensitivity." If the reaction is consistent, it is evidence of pain, and, [in accordance with section

6(d)(5) of the Act, (15 U.S.C. § 1825(d)(5)),] raises the presumption that the horse is sore. The presumption may, of course, be rebutted. . . .

In short, neither palpation nor the "protocol" [for conducting palpation] is a substantive rule that has to undergo the . . . rule making process. . . .

5. Respondent contends that [the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1993,] Pub. L. No. 102-341, 106 Stat. 873, 881-82 (1992), prohibits the use of palpation alone to determine whether a horse is sore. This question was certified in this case to the Judicial Officer, as the Secretary's representative, for a ruling. The Judicial Officer ruled that this law does not prohibit the finding that a horse was sore based solely on digital palpation as the only diagnostic test to determine whether a horse was sore. . . . [*In re Mike Thomas*, 54 Agric. Dec. 1096 (1995) (Ruling on Certified Question)].

6. Finally, Respondent argues that [he] has rebutted any presumption that Jubilee's True Love was sore. For the reasons already discussed, I find that the reports prepared by Drs. Bourgeois and Price are reliable and probative substantial evidence showing that [Jubilee's True Love] displayed signs of bilateral pain when [her] pasterns were palpated. There is no evidence that the horse's reaction to palpation was a "learned response."

The testimony presented by non-veterinarians [Mr.] Acree and [Mr.] Hankins, despite their [familiarity] with palpation, is insufficient to rebut the findings and conclusions of the USDA veterinarians, Drs. Bourgeois and Price. *In re Bill Young*, 53 Agric. Dec. 1232, 1291 (1994)[, *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)].

As for Dr. Miller, I find that he was a credible witness concerning his examination of Jubilee's True Love. However, he examined the horse at some undisclosed period of time -- possibly an hour or two -- after the examinations by Drs. Bourgeois and Price. While there is no evidence that an anesthetic was given to [Jubilee's True Love] before Dr. Miller's examination, it is not unusual for a horse to be found sore at one examination, but found not sore at a later examination during the same show. *In re Jackie McConnell*, 44 Agric. Dec. 712, 722 (1985). Dr. Miller, moreover, did find that [Jubilee's True Love] reacted when he palpated [her], but found that the reaction was not repeatable. The DQP, on the other hand, who examined the horse about the same time as the USDA veterinarians, did, like them, find that the horse's reactions were repeatable and consistent. Complainant has thus shown by a preponderance of the evidence that, when the USDA veterinarians examined [Jubilee's True Love, she] was sore. Accordingly, as Jubilee's True Love was sore at least during this phase of the entering process, [she] was sore when

[she] was entered in the [National Walking Horse Trainers] Show[, on March 26, 1993]. *In re William Dwaine Elliott, supra*.

As for the sanction, the Secretary's policy is to assess a minimum penalty of \$2,000 for a first-time violation and a 1-year disqualification. *In re Linda Wagner, supra*. That sanction . . . will be imposed here.

D. Findings of Fact

1. Respondent Mike Thomas was the owner and trainer of a horse known as "Jubilee's True Love."

2. On March 26, 1993, Respondent entered Jubilee's True Love for the purpose of showing or exhibiting [the horse] in the National Walking Horse Trainers Show in Shelbyville, Tennessee.

3. Jubilee's True Love was examined on March 26, 1993, by USDA veterinary medical officers, Drs. Lynn Bourgeois and Scott Price. When they palpated the horse's pastern areas, they observed consistent and repeatable signs of bilateral pain. They concluded that the horse would suffer pain while walking or moving.

4. Drs. Bourgeois and Price recorded their findings in sworn affidavits [and a Summary of Alleged Violations form] when the results of their examinations were fresh in their [minds].

5. No litigation was pending . . . at the time the affidavits [and Summary of Alleged Violations form] were prepared.

E. Conclusion of Law

Respondent Mike Thomas violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore.

III. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's Appellant Brief (hereinafter RAB).

A. Complainant's Past-Recollection Recorded Evidence Was Properly Admitted and Is Reliable, Probative, and Substantial

Respondent contends that:

I. THE ALJ ERRONEOUSLY ALLOWED INTO EVIDENCE THE AFFIDAVITS AND SUMMARY OF ALLEGATIONS [SIC] FORMS PREPARED BY THE USDA VETERINARIANS AND ERRONEOUSLY RELIED ON SAID DOCUMENTS TO SUPPORT A FINDING THAT THE HORSE IN QUESTION IN THIS ACTION WAS IN VIOLATION OF THE HORSE PROTECTION ACT.

RAB, p. 1.

I disagree with Respondent. The ALJ properly admitted into evidence and relied upon Dr. Bourgeois' affidavit, (CX 3); Dr. Price's affidavit, (CX 4); and the Summary of Alleged Violations form (APHIS Form 7077) prepared and signed by Drs. Bourgeois and Price, and Mr. Head, (CX 2).

Respondent contends that the admission of and reliance on CX 2, 3, and 4 were erroneous for a number of reasons. First, Respondent contends that CX 2, 3, and 4 were erroneously admitted because neither Dr. Bourgeois nor Dr. Price "could independently recall" their examinations of Jubilee's True Love on March 26, 1993. (RAB, p. 1.)

In almost every Horse Protection Act case, USDA veterinarians testifying about the examination of a horse have no recollection of the examination at the time of the hearing. Often USDA veterinarians examine hundreds of horses each year and are asked to testify about the examination of a single horse a year or more after conducting the examination.

In the instant proceeding, Dr. Bourgeois and Dr. Price conducted a routine examination of Jubilee's True Love over 2 years prior to the date of the hearing. Dr. Bourgeois testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, and examining horses, but he did not remember examining Jubilee's True Love. (Tr. 16-18.) Dr. Bourgeois' affidavit, (CX 3), is dated March 27, 1993, the day after he examined Jubilee's True Love at the National Walking Horse Trainers Show. Dr. Bourgeois testified that he prepares affidavits regarding horses that he has examined either during the show or on the day after the show at which he examines them, (Tr. 18-19); and that, while he could not recall the particular time he prepared the affidavit concerning his examination of Jubilee's True Love, he did prepare it the night he examined Jubilee's True Love. (Tr. 47, 51-52, 71.) Dr. Bourgeois' affidavit states:

I Lynn P. Bourgeois am a Veterinary Medical Officer employed by the United States Department of Agriculture, Animal Care. I was assigned to monitor the 25th Annual National Walking Horse Trainer's

Show held at the Calsonic Arena in Shelbyville[,]Tenn[.,] on March 24-27[,]1993. Other USDA personnel monitoring this show were Animal Care Veterinary Medical Officer Scott Price and Regulatory Enforcement Investigators David Head and John Eades. National Horse Show Commission Designated Qualified Persons working this show were Charles Thomas, Bob Flynn, Johnny Block and Rick Statham.

At approximately 6:45 PM on the evening of 3/26/93 a horse identified as Entry # 843 in Class 46 was presented to DQP Charles Thomas for pre-show examination. Mr. Thomas' palpation of anterior pasterns of both forelimbs revealed pain responses. Mr. Thomas excused horse from showing and issued a DQP ticket for bilateral sensitivity.

I then requested and received permission from custodian to examine horse. I approached the horse from the left side, put my hand on its neck, and proceeded on down to pick up the forelimb. Palpation of anterior pastern elicited repeated marked pain responses characterized by attempts to remove limb from my grasp, abdominal tucking, and shuffling of hind feet forward. I then repeated this procedure on right forelimb and again elicited pain responses characterized by repeated attempts to remove limb from my grasp, abdominal muscle tucking, and shuffling of rear feet forward.

Dr. Price then palpated this horse and found extreme pain responses in both fore pasterns. This pain response was also characterized by attempts to withdraw limb, shuffling hind feet forward and abdominal clenching.

Dr. Price and I conferred and concurred this was a sore horse as defined by the Horse Protection Act. Dr. Price then informed custodian of our decision and introduced him to Investigators John Eades and David Head who prepared an APHIS 7077 Alleged Violation of Horse Protection Act.

This horse, in my professional opinion, was sored by overwork in action devices (chains), chemicals or a combination of both.

This statement is true and correct to the best of my knowledge.

CX 3, pp. 1-2.

Dr. Price testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, and remembered examining Jubilee's True Love and finding that she was sore. (Tr. 81-85, 125-26.) Dr. Price's affidavit, (CX 4), is dated March 26, 1993, the day he examined Jubilee's True Love at the National Walking Horse Trainers Show. Moreover, Dr. Price testified that he remembered preparing the affidavit during the show, (Tr. 87). Dr. Price's affidavit states:

I was assigned to work the National Walking Horse Trainers Show in Shelbyville, TN, Mar. 24-27, 1993, to enforce the Horse Protection Act and evaluate the DQP's. Dr. Lynn Bourgeois and myself were the USDA veterinarians and Mr. David Head and Mr. John Eades represented Regulatory[.]

Exhibitor 843 entered in Class 46 presented a horse to DQP, Charles Thomas for pre-show inspection. The horse palpated extremely sore and I witnessed the horse present additional signs of soreness by clenching abdominal and shoulder muscles, shifting weight, and repeatedly and consistently jerking feet upon palpation. The horse was issued a 2-foot sensitivity by the DQP.

Dr. Lynn Bourgeois examined the horse next. I witnessed this inspection [illegible]. The horse was again extremely sore and clearly demonstrated the other indications of soreness mentioned above.

At 6:50 P.M., I examined the horse. The horse was extremely sore in a large area on the anterior aspect of both front pasterns. The horse jerked violently, and gave a consistent and repetitive withdrawal to palpation. Additional signs of soreness included shifting weight, and rippling of shoulder and abdominal muscles in response to palpation. This horse was definitely not silly; it was sore.

Dr. Bourgeois and I agreed the horse was in violation of the Horse Protection Act. I informed the custodian of the horse, Mike Thomas, that he was in violation of the Horse Protection Act.

In my professional opinion this horse was sore using action devices, chemical substances, or a combination. This horse was very sore, and would have definitely experienced pain while moving.

I swear these statements to be true and correct.

CX 4, pp. 1-2.

Mr. David B. Head, a USDA investigator authorized under section 1 of the Act of January 31, 1925, (7 U.S.C. § 2217), to take affidavits, testified that he remembered attending the National Walking Horse Trainers Show on March 26, 1993, (Tr. 143-44, 149), and remembered taking Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), the night Drs. Bourgeois and Price examined Jubilee's True Love. (Tr. 155-57.) Mr. Head testified that his signature on Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), signifies that the affidavits were signed and sworn by the affiants in Mr. Head's presence. (Tr. 148-49.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Head, Dr. Price, and Dr. Bourgeois. Dr. Price recalls completing that part of the form for which he was responsible within an hour or two after examining Jubilee's True Love. (Tr. 89, 95.) Mr. Head testified that, after Jubilee's True Love had been examined by Drs. Bourgeois and Price, he obtained information from Respondent at the National Walking Horse Trainers Show in order to complete lines 1 through 21 and line 27 on the Summary of Alleged Violations form. (CX 2; Tr. 144-45.)

The documents in question, (CX 2, 3, 4), are hearsay evidence. However, neither the Administrative Procedure Act under which this proceeding is conducted nor the Rules of Practice applicable to this proceeding precludes the introduction of hearsay evidence. The Administrative Procedure Act provides with respect to the taking of evidence that:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act. *See, e.g., Richardson v. Perales, supra*, 402 U.S. at 409-10 (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act, (5 U.S.C. § 556(d)), renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings).

The only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). The documents at issue in the instant proceeding bear satisfactory indicia of reliability and were properly admitted into evidence. The documents were signed by the individuals who prepared them and Dr. Bourgeois' and Dr. Price's statements are affidavits sworn before Mr. Head, an individual authorized by law, 7 U.S.C. § 2217, to take affidavits. Dr. Bourgeois and Dr. Price were trained to examine horses to determine whether they are "sore" as defined by the Horse Protection Act and had years of experience conducting these examinations.² Mr. Head testified that he is a trained investigator and had years of experience investigating cases under the Horse Protection Act.³ None of the individuals who prepared the

²Dr. Bourgeois testified that he has been examining horses to determine whether they are sore for 15 years and has taken at least one Horse Protection Act course each year for the last 15 years. (Tr. 15-16.) Dr. Price testified that he has been examining horses to determine whether they are sore since 1987, that he has examined more than 10,000 horses, and that, except for 1 year, he took yearly Horse Protection Act courses beginning in 1987. (Tr. 80-81.)

³Mr. Head testified that he has been an investigator for the Animal and Plant Health Inspection Service for "almost 15 years"; has attended three courses on investigation at the Federal Law Enforcement Academy in Glynco, Georgia; and has been investigating Horse Protection Act cases since February 1988. (Tr. 142-43.)

documents in question had reason to record their findings in other than an impartial fashion.⁴ The documents reflect a thorough recording of Dr. Bourgeois' and Dr. Price's activities conducted in the performance of their duties to enforce the Act and their observations and conclusions regarding Jubilee's True Love. While Dr. Bourgeois does not remember examining Jubilee's True Love and Dr. Price only remembers examining her and finding her sore, their affidavits and the Summary of Alleged Violations form were created almost contemporaneously with the observations they relay. All of the individuals who prepared the documents testified at the hearing in this proceeding and were available for and subject to cross-examination by Respondent. (Tr. 13-157.)

Further, hearsay evidence can constitute substantial evidence if reliable. *Bobo, supra*, 52 F.3d at 1414; *Crawford, supra*, 50 F.3d at 49; *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986); *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Past recollection recorded is reliable, probative, and substantial and fulfills the requirements of the Administrative Procedure Act, (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witnesses' minds. *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Bill Young, supra*, 53 Agric. Dec. at 1253; *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims*, 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995). Responsible hearsay has long been admitted and relied upon

⁴The DQPs disqualified approximately 46 horses from participation in the National Walking Horse Trainers Show. (Tr. 29-30.) Dr. Bourgeois and Dr. Price examined approximately 300 horses at the National Walking Horse Trainers Show and found only 7 to be sore. (Tr. 28-30, 43.) Dr. Price testified that, of the over 10,000 horses he has examined, he has only found between 1½ and 2 percent to be sore. (Tr. 101.) Dr. Bourgeois, Dr. Price, and Mr. Head all testified that at the time they prepared the affidavits and Summary of Alleged Violations form in question, they were USDA employees. (Tr. 13-15, 79-80, 142-43.) I infer, based upon their employment status, that Dr. Bourgeois, Dr. Price, and Mr. Head were all salaried employees and that their salaries, benefits, and continued employment by USDA were not dependent upon either their finding Jubilee's True Love "sore" or the statements they made in the affidavits and the Summary of Alleged Violations form in question. Dr. Price testified that, if we have any question whether a horse is sore or not sore within the meaning of the Act, "we always give the benefit of the doubt to the exhibitor" (Tr. 97.)

in the Department's administrative proceedings,⁵ and I find no basis for the exclusion of Dr. Bourgeois' affidavit, (CX 3), Dr. Price's affidavit, (CX 4), or the Summary of Alleged Violations form, (CX 2).

Second, Respondent contends that Dr. Bourgeois' affidavit, (CX 3), Dr. Price's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), are not reliable because they were prepared in anticipation of litigation. (RAB, pp. 2-3.) Respondent cites *Young* as authority for the proposition that documents prepared in anticipation of litigation are unreliable, as follows:

Relying on *Palmer v. Hoffman*, 318 US 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) and *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979)[, t]he *Young* Court noted that documents prepared in anticipation of litigation do not carry sufficient indicia of reliability.

RAB, p. 3.

The Court in *Young* states:

The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. See *Palmer v. Hoffman*, 318 U.S. [109], 63 S.Ct. [477], 87 L.Ed. [645] (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

⁵*In re Big Bear Farm, Inc.*, 55 Agric. Dec. ___, slip op. at 37 (Mar. 15, 1996); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 11 (Feb. 7, 1996); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

In *Young*, the court found that the Summary of Alleged Violations form and affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found, and, thus, were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act which provided:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading" (318 U.S. at 114). Specifically, the Court held:

The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees.

But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

....

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations form under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)). The documents were properly admitted. *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996); *In re James W. Hickey*, 47 Agric. Dec. 840, 850 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1222-24 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980)). The only issue was whether the affidavits prepared by USDA veterinarians and the Summary of Alleged Violation form in question in *Young* were inherently unreliable and lacking in probative value.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the USDA's Animal and Plant Health Inspection Service under the Horse Protection Act is investigating suspected violations of the Horse Protection Act and litigating Horse Protection Act cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of USDA veterinarians and inspectors to detect violations of the Horse Protection Act and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is "the inherent nature of the business in question," (318 U.S. at 115), and the preparation of the Summary of Alleged Violations forms and affidavits is the most important of the "methods systematically employed for the conduct of the business as a business." (*Id.*)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials

throughout the Federal Government who, like the USDA veterinarians and inspectors, "prepare summary reports and affidavits only when administrative proceedings are anticipated." (53 F.3d at 730.) Moreover, like the USDA veterinarians, there are undoubtedly law enforcement officers throughout the Federal Government who handle such a high volume of work that they could not possibly remember the details of a particular violation by the time they appear at an administrative hearing several years later, and who are, therefore, totally dependent on past records made while the events were fresh in their minds. Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

Stone, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*, just discussed. The issue in *Stone* was "whether the government violated the hearsay rule and the defendant's right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession." (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth "the activities of the office or agency." (604 F.2d at 925.) The court held, however, that the affidavit "violates the hearsay rule and the defendant's confrontation right" (604 F.2d at 924), as follows:

This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. *See, e.g. Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison's "regular course of business"); *United States v. Newman*, 468 F.2d 791, 795-96 (5 Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency's official records does not apply to Ford's personal statements prepared solely for purposes of this litigation. Ford's statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

As stated above, under the discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman*, was railroading, not litigating. That was not true in *Young*. Furthermore, here, again, we are not concerned with the admission of the USDA veterinarians' affidavits and the Summary of Alleged Violations form as business records, since they were properly admitted under the Administrative Procedure Act, (5 U.S.C. § 556(d), and the Rules of Practice, (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even under the Federal Rules of Evidence, it appears that the documents at issue in *Young* would have been admissible, and the documents at issue in the instant proceeding would be admissible, under Rules 803(5), 803(6), and 803(8)(C), which provide:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(5) Recorded Recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes

business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

....

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(5), 803(6), 803(8)(C).

USDA veterinarian affidavits and Summary of Alleged Violations forms such as those at issue in *Young* and the instant proceeding would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Bourgeois and Price and Mr. Head have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Act. Hence, there was no basis for the court's view in *Young*, and there is no basis in the instant proceeding, for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations forms lacked trustworthiness merely because they were prepared in anticipation of litigation.

The Judicial Officer has noted, with respect to affidavits prepared by USDA veterinarians for the same purpose as the affidavits and the Summary of Alleged Violations form at issue in the instant proceeding:

Such affidavits are regularly made as to all horses that are "written-up" and are kept in the ordinary course of the Government's business. There is no exclusionary rule applicable to our proceedings which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Similarly, the affidavits by Dr.

Kendall, Dr. Wood and Dr. Thompson should have been received as evidence. The affidavits were not unduly repetitious merely because the witnesses testified as to the same matters set forth therein. In fact, I would attach more weight to the affidavits prepared within a few days of the event than to the testimony given 17 months later.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1435 (1979).

Third, Respondent contends that Dr. Bourgeois' affidavit and Dr. Price's affidavit and the Summary of Alleged Violations form lack reliability because they only contain observations that Jubilee's True Love was sore and contain no observations that she was not sore. (RAB, p. 3.) Respondent cites *Young* as authority for this contention, as follows:

[T]he *Young* Court noted that the documents prepared by USDA veterinarians lack reliability because they contained only observations that the horse was sore and contained no observations that indicated that the horse was not sore. *Young* at 731. In that respect the *Young* case is exactly as the present case. Both USDA veterinarians noted only abnormalities with respect to the horse. (TR 37, 113) At the same time both doctors indicated that there were numerous other indicators of soreness which were not noted with respect to Jubilee's True Love. (TR 32-37, 109-114)

RAB, p. 3.

Both Dr. Bourgeois and Dr. Price testified that they only recorded observations that indicated that Jubilee's True Love was sore, (Tr. 37, 113-14). I disagree with Respondent's contention that Drs. Bourgeois' and Price's failure to record Jubilee's True Love's "normal conditions" on their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2), affects the reliability of those documents.

As early as 1978, the Department recognized the change in soring practices from the earlier years, stating:

Prior to and immediately after passage of the Horse Protection Act of 1970, it required little knowledge or skill to recognize a sored horse. Soring was flagrant and obviously visible to the naked eye. However, the horse with bloody legs and open sores on the pasterns is a thing of the past. Soring today is devious and is seldom evident to the untrained or inexperienced observer.

43 Fed. Reg. 18,514,18,521-22(1978).

In recent years, soring methods have become even more sophisticated. Therefore, USDA veterinarians do not see many of the signs of soring that were previously prevalent, and frequently all signs will be normal except the horse's reaction to palpation. *In re Kim Bennett*, 55 Agric. Dec. ____, slip op. at 32 (Jan. 3, 1996). When a horse consistently and repeatedly gives a pain reaction to palpation on both front feet only on particular areas of the pasterns (almost always symmetrically located on the pasterns where the chains will hit them), and USDA veterinarians have used techniques to determine that the reaction is not due to natural factors, such as excitement or nervousness, USDA veterinarians can reliably conclude that the horse is sore because of chemical or mechanical devices.⁶ The fact that in all other respects the horse is "normal" does not tend even in the slightest degree to prove that the horse was not sore. The failure of USDA veterinarians to record irrelevant data does not affect the reliability of the documents prepared.

Fourth, Respondent contends that:

Another indic[um] of unreliability of these documents is that although the ALJ specifically found that the doctors recorded their findings when the results of the examinations were fresh in their memor[ies] (Decision and Order of the ALJ page 15, Finding of Fact No. 4) neither of these doctors can recall when the documents were prepared. (TR 49, 122)

RAB, p. 4.

While neither Dr. Bourgeois nor Dr. Price could recall the exact time during which they completed and signed their respective affidavits, (CX 3, 4), and the Summary of the Alleged Violations form, (CX 2), the record clearly establishes that Dr. Bourgeois examined Jubilee's True Love at approximately 6:45 p.m., March 26, 1993, and Dr. Price examined Jubilee's True Love at 6:50

⁶In the instant proceeding, both Drs. Bourgeois and Price noted that Jubilee's True Love consistently and repeatedly gave "marked" and "extreme" pain responses to palpation on both front feet only on particular areas of the pasterns. (CX 2, 3, 4.) Further, Dr. Bourgeois and Dr. Price determined that Jubilee's True Love's reaction to palpation was not due to natural factors. (CX 4; Tr. 24-28, 83-84, 95-99, 114-15) Both Dr. Bourgeois and Dr. Price concluded that Jubilee's True Love was sore because of a chemical or mechanical device or a combination of the two. (CX 2, 3, 4.)

p.m., March 26, 1993, (CX 2, 3, 4); that Dr. Price's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), were completed before midnight, March 26, 1993; and that Dr. Bourgeois' affidavit, (CX 3), was completed early in the morning, March 27, 1993.

Dr. Bourgeois' affidavit, (CX 3), is dated March 27, 1993, the day after he examined Jubilee's True Love at the National Walking Horse Trainers Show. Dr. Bourgeois testified that he prepares affidavits regarding horses that he has examined either during the show or on the day after the show at which he examines them, (Tr. 18-19); and that, while he could not recall the particular time he prepared the affidavit concerning his examination of Jubilee's True Love, he did prepare it the night he examined Jubilee's True Love. (Tr. 47, 51-52, 71.)

Dr. Price's affidavit, (CX 4), is dated March 26, 1993, the day he examined Jubilee's True Love at the National Walking Horse Trainers Show. Moreover, Dr. Price testified that he remembered preparing the affidavit during the show. (Tr. 87.)

Mr. Head testified that he remembered taking Dr. Bourgeois' affidavit, (CX 3), and Dr. Price's affidavit, (CX 4), the night Drs. Bourgeois and Price examined Jubilee's True Love. (Tr. 155-57.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Head, Dr. Price, and Dr. Bourgeois. Dr. Price recalls completing that part of the form for which he was responsible within an hour or two after examining Jubilee's True Love. (Tr. 89, 95.) Mr. Head testified that, after Jubilee's True Love had been examined by Drs. Bourgeois and Price, he obtained information from Respondent during the National Walking Horse Trainers Show in order to complete the "top portion," "items one through 21," and line 27 on the Summary of Alleged Violations form. (Tr. 144-45; CX 2.)

The record establishes that all of the documents in question, (CX 2, 3, 4), were completed within 6 or 7 hours of Dr. Bourgeois' and Dr. Price's examinations of Jubilee's True Love while the events recorded were fresh in their minds. The fact that neither Dr. Bourgeois nor Dr. Price could recall the precise time they prepared the documents in question does not affect the reliability of the documents.

B. *Young* Is Not Controlling

Respondent contends that the decision in *Young* is controlling in this proceeding. (RAB, p. 4.) I disagree with Respondent. Section 6(b)(2) and section 6(c) of the Act, in relevant part, provide:

(b)(2) Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit

. . . .

(c) . . . The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)].

15 U. S. C. § 1825(b)(2), (c).

The record establishes that Respondent resides in and has his place of business in North Middletown, Kentucky. (Tr. 315, 325, 329.) Therefore, appeal of the instant proceeding will lie to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit, not the United States Court of Appeals for the Fifth Circuit.

Respondent further contends that the Fifth Circuit's decision in *Young* is controlling because Respondent presented testimony from individuals other than himself who examined Jubilee's True Love on March 26, 1993, and concluded that she was not sore. Respondent states:

[T]he *Young* Court . . . found it significant that in cases in which VMO Affidavits and Summary Reports constituted substantial evidence the owners and trainers in those cases presented no other evidence but their own testimony that the horse was not sore. *Young* at 731, (footnote 3) In the present case[, Respondent] presented not only his own testimony, but the testimony of the groom of Jubilee's True Love, the testimony of another trainer who observed the animal immediately prior to and after her examination, the testimony of the DQP, and the testimony of an independent veterinarian. Further, all of these individuals examined Jubilee's True Love. Further, all of these individuals found Jubilee's True Love was not sore. Therefore, the decision in *Young* is not inconsistent with other Circuit Court of Appeals decisions and is consistent with the facts in this case.

RAB, p. 4.

The court in *Young* states:

It is important to note that in reviewing an administrative decision, this court must look to the evidence in "the record considered as a whole, not just evidence supporting the [agency's] findings." *N.L.R.B. v. Pinkston-Hollar Constr. Services, Inc.*, 954 F.2d 306, 309 (5th Cir. 1992) (citation omitted). In this case the petitioners also presented substantial evidence indicating that the horse was not sore.³

³In cases rejecting the appeals of trainers and owners contesting a soreness finding on the grounds that VMO affidavits and summary reports cannot constitute substantial evidence, both the Third and Sixth Circuits found it important that the petitioners in the cases before them presented no counter-evidence, aside from the petitioner's own testimony, showing that the horse in question was not sore. *Gray v. U.S. Dept. of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Wagner v. Dept. of Agric.*, 28 F.3d 279, 282-83 (3d Cir. 1994).

Young, supra, 53 F.3d at 731 n.3.

An examination of Horse Protection Act cases reveals that testimony by persons other than those alleged to have violated the Act is not unique to *Young* and that courts have found affidavits prepared by USDA veterinarians and Summary of Alleged Violations forms to be substantial evidence despite testimony from persons, other than the alleged violators, that the horses that were the subject of those cases were not sore. For example, in *Crawford*, the United States Court of Appeals for the District of Columbia found that USDA veterinarians' affidavits constituted substantial evidence even though neither of the veterinarians had an independent recollection of the events recorded in their affidavits and persons other than those alleged to have violated the Act testified, as follows:

Petitioner offered her own testimony and that of her husband, her trainer, and a friend, as to the horse's condition and the circumstances surrounding the examination. Of those witnesses only petitioner observed the veterinarians' examination of the horse The others merely testified as to alternative reasons for the horse's reaction to diagnosis, that the horse was agitated because it had been transported with a mare in season and that the examination area, where the horse was required to remain for over an hour, was crowded. . . .

Crawford, supra, 50 F.3d at 49.

Similarly, in *Bobo*, the United States Court of Appeals for the Sixth Circuit found affidavits prepared by four USDA veterinarians sufficient to invoke the presumption of 15 U.S.C. § 1825(d)(5) that the horse in question was sore despite the failure of three of the USDA veterinarians to recall the events recorded in their respective affidavits and testimony of two veterinarians offered by Petitioner who examined the horse in question and found that he was not sore.

Therefore, if, as Respondent contends, *Young* stands for the proposition that affidavits given by USDA veterinarians and Summary of Alleged Violations forms cannot be substantial evidence, if persons, other than those charged with violating the Act, testify that the horse was not sore, then *Young* is inconsistent with decisions in other circuits. As appeal will not lie to the United States Court of Appeals for the Fifth Circuit, *Young* is not controlling in this proceeding. Moreover, I do not agree with Respondent's contention that the *Young* court held that affidavits given by USDA veterinarians and Summary of Alleged Violations forms cannot constitute substantial evidence of a violation of the Act if persons, other than those charged with violating the Act, testify that the horse in question was not sore. Rather, the decision in *Young* was limited to the particular record under review in *Young*. The court in *Young* states that, "[i]t is important to note that in reviewing an administrative decision, this court must look to the evidence in the 'record . . .'" *Young, supra*, 53 F.3d at 731.

C. Palpation Alone Is Sufficient to Establish That Jubilee's True Love Was Sore When Entered

Respondent contends that:

II. ABNORMAL RESPONSE TO DIGITAL PALPATION ALONE CANNOT JUSTIFY A FINDING THAT A HORSE IS SORE WITHIN THE MEANING OF THE HORSE PROTECTION ACT.

In the present case[,] both USDA veterinarians based their opinion that Jubilee's True Love was sore within the meaning of the Horse Protection Act upon the results of digital palpation. (TR 71 and Claimant's Exhibit 4) The ALJ also found that Jubilee's True Love was sore based upon the results of the digital palpation examinations. No other indicator of soreness [was] testified to as being present in this

action by any witness. The acceptance of digital palpation alone as the sole tool for determining whether or not a horse is sore and in violation of the Horse Protection Act was expressly rejected by the *Young Court*.

Therefore, not only were the documents introduced into evidence by the U.S. Department of Agriculture unreliable, but the examination and opinions generated therefrom are unacceptable.

RAB, p. 5.

1. Palpation Is a Highly Reliable Method of Determining Whether a Horse Is Sore

Palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Act. *In re Kim Bennett, supra*, slip op. at 6; *In re Eddie C. Tuck, supra*, 53 Agric. Dec. at 292. This Department's reliance on palpation alone to determine whether a horse is sore within the meaning of the Act is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses under the Act. *In re Kim Bennett, supra*, slip op. at 7.

2. Respondent's Reliance on *Young* Is Misplaced

Respondent's reliance on the rejection of digital palpation alone to determine whether a horse is "sore" within the meaning of the Act by the United States Court of Appeals for the Fifth Circuit is misplaced for three reasons.

a. Appeal of This Proceeding Will Not Be to the Fifth Circuit

First, appeal in this case will not lie to the United States Court of Appeals for the Fifth Circuit. Section 6(b)(2) and section 6(c) of the Act, in relevant part, provide:

(b)(2) Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such

person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit

. . . .

(c) . . . The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)].

15 U. S. C. § 1825(b)(2), (c).

The record establishes that Respondent resides in and has his place of business in North Middletown, Kentucky. (Tr. 315, 325, 329.) Therefore, appeal of the instant proceeding will lie to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit, not the United States Court of Appeals for the Fifth Circuit. Both the District of Columbia Circuit and the Sixth Circuit have accepted the view that reaction to digital palpation alone can provide a sufficient evidentiary basis to conclude that a horse is "sore" within the meaning of the Act. *Bobo, supra*, 52 F.3d at 1411-13; *Crawford, supra*, 50 F.3d at 49-50.

b. This Proceeding Is Distinguishable From the Proceeding Under Review in Young

This case is distinguishable from the case in *Young*. The court in *Young* arrived at its holding that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse based upon several factors that are not present in this proceeding.

First, the court in *Young* states that:

The reliability of the veterinarians' conclusions recorded in the hearsay documents, based almost exclusively on the results of digital palpation, are also called into question by significant evidence presented at the hearing supporting the conclusion that an observed reaction to digital palpation alone is not a reliable indicator of a sore horse. Several highly qualified expert witnesses for the petitioners testified that soreing could not be diagnosed through palpation alone. Petitioners also offered a written protocol signed by a group of prominent veterinarians coming to the same conclusion.

Young, supra, 53 F.3d at 731.

Respondent called five witnesses, only one of whom testified as an expert witness with respect to the reliability of palpation alone as an indicator that a horse is sore within the meaning of the Act. All five of Respondent's witnesses testified that they use palpation to determine whether a horse is sore.⁷ While one of Respondent's witnesses, Mr. Jamie Hankins, testified that he had attended seminars jointly conducted by USDA and the Horse Show Commission in which he was taught that digital palpation was not the sole method for determining whether a horse was sore, (Tr. 228-29), Respondent called only one witness, Dr. Ray Miller, who testified that based upon his experience and research there is no single "factor or indicator" that is definitively determinative of whether a horse is sore. (Tr. 288.)

Respondent did not introduce any written protocol which concludes that digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act. However, one of Respondent's witnesses, Dr. Ray Miller, did make reference to the "Atlanta Protocol" as support for his opinion that "you couldn't rely on one aspect of a diagnosis and consistently make a good diagnosis." (Tr. 288.)

Unlike the Petitioner in *Young*, Respondent did not present testimony of "[s]everal highly qualified expert witnesses" and offer "a written protocol signed by a group of prominent veterinarians" supporting a conclusion that an observed reaction to digital palpation alone is not a reliable indicator that a horse is sore within the meaning of the Act. *Young, supra*, 53 F.3d at 731.

Second, the court in *Young* based its observation that a reaction to digital palpation alone is not a reliable indicator of a sore horse on the court's

⁷Mr. Jimmy Acree, a horse trainer that worked for Respondent for 8 or 10 years, testified that he knew how to palpate a horse and that he palpated Jubilee's True Love on numerous occasions, including at the National Walking Horse Trainers Show on March 26, 1993. (Tr. 170-71, 182, 186-87, 192-93.) Mr. Charles Lavoy Thomas, the DQP who inspected Jubilee's True Love at the National Walking Horse Trainers Show on March 26, 1993, testified that he knew how to palpate a horse and that he palpated Jubilee's True Love on March 26, 1993. (Tr. 198, 202, 214, 216.) Mr. Jamie Hankins, a professional horse trainer who had horses stabled near Respondent's horses at the National Walking Horse Trainers Show, testified that he had been trained to palpate, palpated Jubilee's True Love on March 26, 1993, and observed others, including Respondent's wife, palpate the horse. (Tr. 226, 230-31, 240-41, 243-44, 259-60, 269-70.) Dr. Ray Miller, a doctor of veterinary medicine, testified that he knew how to palpate and that he palpated Jubilee's True Love on March 26, 1993. (Tr. 276-81, 301-02, 309-312.) Respondent testified that he observed palpation on numerous occasions and observed the DQP, Dr. Bourgeois, and Dr. Price palpate Jubilee's True Love on March 26, 1993. (Tr. 320, 322, 324.)

perception of the Judicial Officer's basis for rejecting evidence that palpation alone is not reliable. The *Young* court believed that the Judicial Officer's basis for rejecting such evidence was "simply that it is contrary to the agency's policies and the agency's prior decisions." *Young, supra*, 53 F.3d at 731. Since *Young* was decided, the Judicial Officer dispelled this misperception of the basis for rejecting such evidence. The Department's view that palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act is not based simply on "the agency's policies and the agency's prior decisions," as stated by the court in *Young, supra*, 53 F.3d at 731. Rather, the Department's position regarding the reliability of palpation is based on the experience of a large number of USDA veterinarians, many of whom have examined thousands of horses for soreness under the Act. *In re Kim Bennett, supra*, slip op. at 7.

Third, the court in *Young* found that:

In cases where the Secretary of an agency does not accept the findings of the ALJ, this court "has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement." *Pinkston-Hollar Constr. Services, Inc.*, 954 F.2d at 309-10 (citation omitted); *Garcia v. Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993) (stating that "[a]lthough this heightened scrutiny does not alter the substantial evidence standard of review, it does require us to apply it with a particularly keen eye, especially when credibility determinations are in issue. . . .).

....

. . . We hold that in light of the significant evidence calling into question the probative value and reliability of that documentary evidence where we are required to apply stricter scrutiny to the JO's conclusions which contradict the ALJ and in light of the substantial counter-evidence indicating that the horse was not sore, the JO's determination was not supported by substantial evidence and his decision should be reversed and judgment should be rendered in favor of *Young* and *Sherman*. [Footnote omitted.]

Young, supra, 53 F.3d at 732.

Since an important basis for the court's reversal in *Young* was the ALJ's adverse findings of fact, the court's decision in *Young* is not on point in the

instant proceeding, because the ALJ and the Judicial Officer herein agree on the findings of fact and the conclusion: *viz.*, Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore.

c. *Young* Was Erroneously Decided

Even if appeal herein went to the United States Court of Appeals for the Fifth Circuit, and the record herein was indistinguishable from that in *Young*, the split decision (2-1) that a reaction to digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act is erroneous and would not be followed by this Department. *See In re Kim Bennett, supra*, slip op. at 11 n.5. The Department's many other reasons for rejecting *Young* are fully articulated in *In re Kim Bennett*, which is attached hereto as an Appendix.

IV. SANCTION

Respondent contends that:

III. THE PENALTY ASSESSED AGAINST [RESPONDENT] WAS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE.

RAB, p. 5.

I disagree with Respondent. The evidence in the instant case supports the ALJ's conclusion that Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purpose of showing or exhibiting a horse known as "Jubilee's True Love" at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 26, 1993, while the horse was sore. The \$2,000 civil penalty assessed by the ALJ against Respondent and the 1-year disqualification period imposed against Respondent by the ALJ for Respondent's violation of the Act were reasonable, supported by the evidence, consistent with the Act and this Department's sanction policy, and designed to achieve the remedial purposes of the Act.

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals

the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained

sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

[T]he 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, and any history of prior offenses,

ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation." In most cases, the maximum civil penalty of \$2,000 per violation is warranted. *In re C.M. Oppenheimer*, *supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1323 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Linda Wagner*, *supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott*, *supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper*, 42 Agric. Dec. 20, 62 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Respondent violated section 5(2)(B) of the Horse Protection Act, (15 U.S.C. § 1824(2)(B)), by entering for the purposes of showing or exhibiting Jubilee's True Love at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while the horse was sore. The nature, extent, and gravity of the violation are revealed by Dr. Bourgeois' and Dr. Price's description of Jubilee's True Love's responses to palpation which they described variously as "extreme pain responses," (CX 2); "extreme pain—foot withdrawal, abdominal tucking & clenching, attempt to rock back on hind feet," (CX 2); "repeated marked pain responses characterized by attempts to remove limb . . . , abdominal tucking, and shuffling of hind feet forward," (CX 3, p. 1); and "[t]he horse jerked violently, and gave a consistent & repetitive withdrawal to palpation." (CX 4, p. 1.) I find that, under these circumstances, the nature, extent, and gravity of Respondent's violation of the Act were sufficient to warrant the assessment of a civil penalty of \$2,000.

The record also establishes Respondent's culpability. Respondent used action devices (chains) on Jubilee's True Love's legs during training. (Tr. 319.) Respondent, who was the owner of Jubilee's True Love, then entered her in the National Walking Horse Trainers Show. Persons who enter horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Act when entered. *See In re Keith Becknell*, 54 Agric. Dec. 335, 340 (1995) (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sore).

Although Respondent may not have intended to "sore" Jubilee's True Love by using chains during training, intent is of no consequence under the Act and regulations issued under the Act. The Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait," and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2:

The legislation makes the following substantive modifications in the existing law governing this program:

1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent, who at the time of the hearing in the instant proceeding was 42, had been training and exhibiting Tennessee Walking Horses his entire life as a full-time occupation. (Tr. 315-16.) Despite Respondent's experience as a trainer of Tennessee Walking Horses, he entered Jubilee's True Love while she was sore and breached his guaranty that Jubilee's True Love would not be sore when he entered her for the purpose of showing or exhibiting her in the National Walking Horse Trainers Show. I find that, under these circumstances, Respondent's degree of culpability was sufficient to warrant the assessment of a civil penalty of \$2,000.

Further, the record establishes that Respondent has the ability to pay a civil penalty of \$2,000 and that the assessment of a \$2,000 civil penalty would not affect Respondent's ability to continue to do business. (Mr. Acree testified that he worked for Respondent as an assistant trainer for 8 or 10 years, that he earned about \$170 per week in 1993, and that Respondent was training approximately 25 horses in 1993 (Tr. 171, 188-89)); (Respondent testified that he has clients that pay him on a monthly basis, that he owned Jubilee's True Love, that he owned one horse at the time of the hearing and could own as many as 10 horses within a day after the hearing, that he could not pay \$2,000, but he could probably borrow the money, that he gets paid \$350 per month or more for each horse he trains, and that he trains a maximum of 20 horses at one time (Tr. 316, 328-31).)

The administrative officials charged with responsibility for achieving the congressional purpose of the Act recommended and the ALJ assessed a \$2,000 civil penalty against Respondent. An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of \$2,000 per violation is warranted.

Section 6(c) of the Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under the Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Act or the regulations issued under the Act and for a period of not less than 5 years for any subsequent violation of the Act or the regulations issued under the Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Act by those persons who had the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1706.

Section 6(c) of the Act, (15 U.S.C. § 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty. Section 6(b)(1) of the Act, (15 U.S.C. § 1825(b)(1)), requires that the Secretary consider 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in

determining the amount of the civil penalty to be assessed, but the Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C. § 1825(c).) See *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Act for the first time. *In re Tracy Renee Hampton, supra* (Respondent assessed a \$2,000 civil penalty and disqualified for 1 year for first violation of the Act); *In re Cecil Jordan, supra* (Respondent Crawford assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Act); *In re Linda Wagner, supra* (Respondents assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Act); *In re John Allan Calloway*, 52 Agric. Dec. 272 (1993) (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Act).

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Act, in addition to the assessment of a civil penalty, is warranted.

The ALJ's Initial Decision and Order disqualified Respondent as follows:

Respondent Mike Thomas is disqualified for one year from showing, exhibiting, or entering any horse directly, or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition.

Initial Decision and Order, p. 15.

Section 6(c) of the Act provides, in relevant part, that:

[A]ny person who . . . is subject to a final order under [15 U.S.C. § 1825(b)] 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

15 U.S.C. § 1825(c).

The Complainant, one of the administrative officials charged with the responsibility for achieving the congressional purpose of the Horse Protection Act requested that the Order issued in this proceeding include a provision disqualifying Respondent from:

(1) showing, exhibiting or entering any horse, or otherwise participating in any horse show or exhibition, and (2) judging or managing any horse show, horse exhibition, horse sale or auction.

Complaint, p. 3.

The ALJ gives no explanation for not disqualifying Respondent from judging, managing, and otherwise participating in any horse sale or auction. (Initial Decision and Order.) Complainant did not appeal the Initial Decision and Order, and in Complainant's Opposition to the Respondent's Appeal Petition and Brief in Support Thereof (hereinafter CORA), states that the Initial Decision and Order should be affirmed. (CORA, p. 3.) While in most circumstances I would include in any disqualification order a disqualification from judging, managing, and otherwise participating in any horse sale or auction, I have not done so in the instant proceeding based upon

Complainant's request that the Initial Decision and Order be affirmed. (CORA, p. 3.)

For the foregoing reasons the following Order should be issued.

V. ORDER

1. Respondent Mike Thomas is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show or horse exhibition. The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

2. Respondent Mike Thomas is assessed a penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

APPENDIX

In re Kim Bennett, 55 Agric. Dec. ____ (Jan. 3, 1996).
[Not published herein--Editor.]

In re: JIM SINGLETON AND JACKIE SINGLETON.
HPA Docket No. 94-0012.
Decision and Order filed July 23, 1996.

Entering sore horse — Preponderance of the evidence — Appeal of credibility determinations — Complaint dismissed.

The Judicial Officer affirmed the decision by Administrative Law Judge Paul Kane (ALJ) dismissing the Complaint which alleges that Respondent Jim Singleton entered for the purpose of showing or exhibiting, showed, and allowed the entry and showing of a horse while it was sore, and Respondent Jackie Singleton showed a horse while it was sore. Complainant, as proponent of the Order, bears the burden of proof, and the standard of proof by which the burden of persuasion is met is preponderance of the evidence. Complainant's evidence is not strong enough to justify reversal of the ALJ's findings of fact. However, the Judicial Officer disagreed with most of the Initial Decision and Order and did not adopt it as the final Decision and Order. Even if a party's disagreement with the Judge's decision is based solely upon the Judge's determination as to the credibility of witnesses, the party may appeal to the Judicial Officer in

accordance with 7 C.F.R. § 1.145(a), and the Judicial Officer can, in appropriate circumstances, reverse a decision by an ALJ even though the ALJ's decision is based on the ALJ's determination as to the credibility of witnesses.

Denise Y. Hansberry, for Complainant.
Jim Singleton and Jackie Singleton, Pro se.
Initial decision issued by Paul Kane, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151).

The proceeding was instituted by a Complaint filed on March 30, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) on June 15, 1991, Respondent Jim Singleton entered for the purpose of showing or exhibiting, showed, and allowed the entry and showing of a horse known as "Lots A Cash" as Entry 402, in Class No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A), (B), and (D); and (2) on June 15, 1991, Respondent Jackie Singleton showed a horse known as "Lots A Cash" as Entry No. 402, in Class No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A). (Complaint, p. 2.)

On April 18, 1994, Respondents filed an Answer stating:

We are in receipt of the USDA Complaint, HPA Docket No. 94-12. We admit that Jim Singleton is the trainer and owner of the horse known as "Lots a Cash" and that he entered and showed this horse as Entry No. 402, Class No. 21, on June 15, 1991, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee. We further admit that Jackie Singleton was the exhibitor of the horse known as "Lots a Cash", Entry No. 402, Class No. 21, on June 15, 1991, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee. We do not admit to entering for the purpose of showing or exhibiting, showed, and allowed the entry and showing of the horse known as "Lots a Cash" as Entry No. 402, in Class

No. 21, at the Plantation Pleasure Summer Jamboree Horse Show at Murfreesboro, Tennessee, while the horse was sore.

Answer.

A hearing was held on January 27, 1995, in Murfreesboro, Tennessee, before Administrative Law Judge Paul Kane (hereinafter ALJ). Jim Singleton and Jackie Singleton appeared pro se and Denise Y. Hansberry, Office of the General Counsel, United States Department of Agriculture, represented Complainant.

On November 30, 1995, the ALJ filed an Initial Decision and Order dismissing the Complaint with prejudice. On February 2, 1996, Complainant appealed to the Judicial Officer, to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ Respondents filed a response to Complainant's appeal on February 28, 1996, and on February 29, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the entire record in this case, I am dismissing the Complaint. Complainant's evidence, when considered in the light of Respondents' evidence, is just barely adequate to sustain Complainant's burden of proof.² Had the ALJ found that Respondents

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

²The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), appeal voluntarily dismissed, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), appeal dismissed, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), printed in 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43

violated the Act, I would have affirmed. However, the record is not strong enough to justify a reversal of the ALJ's adverse findings of fact.

Moreover, since an appeal in this case would most likely be to the United States Court of Appeals for the Sixth Circuit,³ which circuit is of great importance to the Tennessee Walking Horse industry, and, thus, to the Department's Horse Protection Act regulatory program, I do not believe that such a close case should be presented to the Sixth Circuit.

Since the case turns on the particular testimony and exhibits in this case, no useful purpose would be served by analyzing the evidence in detail. It should be noted, however, that, while the record is not strong enough to justify a reversal of the ALJ's dismissal of the Complaint, I disagree with much of the ALJ's 28-page Initial Decision and Order. Therefore, I am not adopting the ALJ's Initial Decision and Order as the final Decision and Order in this case.

Moreover, I do not agree with Respondents' contention that Complainant should be chastised for appealing the ALJ's Initial Decision and Order. Respondents state in Respondents' Reply To Complainant's Appeal Of Administrative Law Judge's Decision (hereinafter RRCA) that:

(1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510(6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941, n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

³Section 6(b)(2) of the Act, in relevant part, provides that: "Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. . . ." (15 U.S.C. § 1825(b)(2).) Section 6(c) of the Act, in relevant part, provides that: "The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)]." (15 U.S.C. § 1825(c).) The record establishes that Respondents reside in and have their place of business in Nolensville, Tennessee. Therefore, appeal of the instant proceeding would be to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Sixth Circuit.

Respondents also request [that the Judicial Officer] chastise the Complainant for bringing this appeal in light of the fact that the decision below was based in great part on the ALJ's credibility assessment of numerous witnesses; a basis difficult to undermine in the appeal process.

RRCA, p. 4.

Section 1.145(a) of the Rules of Practice provides:

§ 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).

Section 1.145(a) of the Rules Practice, (7 C.F.R. § 1.145(a)), clearly provides that a party who, for any reason, disagrees with the Judge's decision, or any part thereof, may appeal to the Judicial Officer. Even if a party's disagreement with the Judge's decision is based solely upon the Judge's determination as to the credibility of witnesses, the party may appeal to the Judicial Officer in accordance with 7 C.F.R. § 1.145(a), and the Judicial Officer can, in appropriate circumstances, reverse a decision by an ALJ even though the ALJ's decision is based on the ALJ's determination as to the credibility of witnesses.⁴

⁴*In re William Joseph Vergis*, 55 Agric. Dec. ___, slip op. at 15-16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *appeal docketed*, No. 95-3552 (8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Leon Farrow*, 42 Agric. Dec. 1397, 1405 (1983), *aff'd in part and rev'd in part*, 760 F.2d 211 (8th Cir. 1985); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D.

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

Order

The Complaint is dismissed with prejudice.

In re: JOHN T. GRAY AND GLEN EDWARD COLE.
HPA Docket No. 94-0035.
Decision and Order as to Glen Edward Cole filed August 19, 1996.

Horse soiling — Allowing entry of a sore horse — Credibility determinations — Hearsay admissible — Past recollection recorded — Palpation — Civil penalty — Disqualification order.

The Judicial Officer reversed the Decision of Judge Kane (ALJ) and found that Respondent Cole allowed the entry, for the purpose of showing or exhibiting, of a horse in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). The proponent of an order has the burden of proof in proceedings under the Administrative Procedure Act, and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. Hearsay evidence is admissible in administrative proceedings and can constitute substantial evidence if reliable. Past recollection recorded is reliable, probative, and substantial

Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See also *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (per curiam) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Mattes v. United States*, 721 F.2d 1125, 1129 (7th Cir. 1983) (the Judicial Officer is not required to accept the ALJ's findings of fact even when those findings are based on credibility determinations); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

evidence if recorded while the events were fresh in the witnesses' minds. Respondent admitted that he was the owner of the horse and the horse was entered in a horse show. Complainant proved that the horse was entered while sore and that the entry was with Respondent's authorization. Respondent introduced evidence that he took an affirmative step to prevent soreing. However, even applying the test in *Baird v. United States Dep't of Agric.*, 39 F.3d 131 (1994), Respondent allowed the entry of the horse while sore because Respondent's evidence that he instructed his trainer not to sore the horse is not credible. Palpation alone is a reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Thus, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 1-year disqualification period on Respondent, in addition to a \$2,000 civil penalty.

Tejal Mehta, for Complainant.

L. Thomas Austin, Dunlap, TN, for Respondent Glen Edward Cole.

Initial decision issued by Paul Kane, Administrative Law Judge.

Decision and Order issued by William G. Jensen, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (hereinafter the Rules of Practice), (7 C.F.R. §§ 1.130-.151).

The proceeding was instituted by a Complaint filed on April 4, 1994, by the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter Complainant). The Complaint alleges that: (1) on March 9, 1991, John T. Gray entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); and (2) on March 9, 1991, Glen Edward Cole allowed the entry, for the purpose of showing or exhibiting, of a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D). (Complaint, p. 2.)

Pursuant to section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), Mr. Gray agreed to the entry of a Consent Decision in which he admitted that he was the trainer of Threat's Black Bum and entered Threat's Black Bum as Entry No. 530, in Class No. 155, on March 9, 1991, at the Georgia National Horse Show at Perry, Georgia. (Consent Decision and Order as to John T. Gray, pp. 1-2.) Administrative Law Judge Paul Kane (hereinafter ALJ)

entered a Consent Decision and Order as to John T. Gray on February 2, 1995.

On May 2, 1994, Glen Edward Cole (hereinafter Respondent) filed an Answer of Glen Edward Cole (hereinafter Answer) admitting that at all times material to this proceeding he was the owner of Threat's Black Bum which was entered as Entry No. 530, in Class No. 155, on March 9, 1991, at the Georgia National Horse Show at Perry, Georgia, and denying that on March 9, 1991, he allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore. (Answer, pp. 1-2.)

On January 18, 1995, pursuant to section 1.137 of the Rules of Practice, (7 C.F.R. § 1.137), Complainant filed a Motion to File Amended Complaint to add an allegation that on March 9, 1991, Respondent also *entered*, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). Complainant cited as the basis for the motion the need "to accom[m]odate recent case law (*Baird v. [United States Dep't of Agric.]*, 39 F.3d 131 [6th Cir. [1994]])." (Motion to File Amended Complaint, p. 1.) On February 1, 1995, Respondent filed an Objection to Amended Complaint stating that Complainant's Motion to File Amended Complaint "comes late and the [C]omplainant filed this matter quite sometime ago and has failed to file any amendments to its [C]omplaint." (Objection to Amended Complaint.)

Section 1.137(a) of the Rules of Practice provides:

§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with the consent of the parties, or as authorized by the Judge upon a showing of good cause.

7 C.F.R. § 1.137(a).

Complainant had filed a Motion to Assign a Date for Oral Hearing prior to filing Complainant's Motion to File Amended Complaint, and on February 8, 1995, the ALJ issued an Order Denying Motion to Amend Complaint on

the ground that Complainant had not shown the required good cause to amend the Complaint.

A hearing was held on February 14, 1995, in Chattanooga, Tennessee, before the ALJ. Mr. L. Thomas Austin, Esq., represented Respondent and Tejal Mehta, Esq., Office of the General Counsel, United States Department of Agriculture, represented Complainant. During the hearing, Complainant moved to amend the Complaint to conform to the evidence to add an allegation that on March 9, 1991, Respondent entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). (Tr. 80-81.) The ALJ denied Complainant's motion on the grounds that: (1) Complainant had not introduced evidence that establishes that Respondent entered, for the purpose of showing or exhibiting, a horse known as "Threat's Black Bum" as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B); and (2) Complainant did not have good cause for amending the Complaint. (Tr. 81-82.) Complainant renewed the Motion to File Amended Complaint and the motion to amend the Complaint to conform to the evidence in Complainant's Proposed Findings of Fact, Proposed Conclusions of Law, Proposed Order, and Memorandum in Support Thereof (hereinafter Complainant's Proposal), filed April 13, 1995. (Complainant's Proposal, p. 10.)

On October 12, 1995, the ALJ filed an Initial Decision and Order dismissing the Complaint with prejudice. (Initial Decision and Order, p. 25.) Moreover, the ALJ denied Complainant's renewed Motion to File Amended Complaint and Complainant's motion to amend the Complaint to conform to the evidence. (Initial Decision and Order, pp. 23-24.) On December 12, 1995, Complainant appealed to the Judicial Officer, to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35),¹ and on March 4, 1996, the case was referred to the Judicial Officer for decision.

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

Based upon a careful consideration of the entire record in this case, I find that Complainant has carried his burden of proof by a preponderance of the evidence, which is all that is required,² with respect to the allegation that on March 9, 1991, Respondent allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D).

The allegation that Respondent also entered Threat's Black Bum in the Georgia National Horse Show is more difficult. I agree with Complainant that both the ALJ's denial of Complainant's Motion to File Amended Complaint and Complainant's motion to amend the Complaint to conform to the evidence were in error. To forego any possibility, or even an appearance, of prejudice against Respondent, I would have remanded this proceeding to the ALJ had he not retired. Respondent would then have had an opportunity to reopen the hearing and offer further evidence regarding the entry of Threat's Black Bum in the Georgia National Horse Show. However,

²The proponent of an Order has the burden of proof in proceedings conducted under the Administrative Procedure Act, (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 3 n.2 (July 23, 1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941, n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

inasmuch as a Remand Order to the original ALJ is not possible, and I do not believe, in any event, that any anticipated evidence regarding Respondent's *entry* of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, would be quite strong enough to justify remanding the case for a new hearing before a different Administrative Law Judge, I do not here remand the proceeding. Thus, I do not find that Respondent *entered* Threat's Black Bum in the Georgia National Horse Show.

I have not adopted the ALJ's Initial Decision and Order in this case because I disagree with much of the Initial Decision and Order. Nevertheless, I do agree with a number of the ALJ's findings of fact, which are referenced in the discussion and findings of fact in this Decision and Order.

Applicable Statute

Section 2(3) of the Horse Protection Act provides:

....

- (3) The term "sore" when used to describe a horse means that--
- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
 - (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
 - (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
 - (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

Section 5(2) of the Horse Protection Act provides:

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.

15 U.S.C. § 1824(2).

Section 6(d)(5) of the Horse Protection Act provides:

(d)

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

Discussion

Respondent is an individual whose mailing address is (b) (6) (b) (6) (Answer ¶ 2, p. 1; Initial Decision and Order, Findings of Fact No. 1, p. 4.) Respondent testified that he has been in the blue jean manufacturing business most of his life and has owned horses for approximately 30 years, many of which have been Tennessee Walking Horses. (Tr. 83, 92.) While Respondent shows Tennessee Walking Horses, he is primarily engaged in breeding and selling Tennessee Walking Horses. (Tr. 93-95.) At the time of the hearing in this proceeding, Respondent owned between 12 and 15 Tennessee Walking Horses. (Tr. 92.)

Respondent acquired a Tennessee Walking Horse known as "Threat's Black Bum" in May 1990, (CX 7), and was the sole owner of Threat's Black Bum at all times relevant to this proceeding. (Answer ¶ 4, p. 1; Initial Decision and Order, Findings of Fact No. 2, p. 2; CX 7.) In November 1990, Respondent moved Threat's Black Bum and a number of his other horses from Tennessee to Florida for boarding with and training by John T. Gray. (CX 7; Tr. 15-17, 22-23, 25, 84, 99-100.) Mr. Gray testified that his training methods included the use of chains. (Tr. 17.) Threat's Black Bum remained in Mr. Gray's custody until April 1991, when Respondent moved Threat's Black Bum back to his premises in Tennessee. (Tr. 22-23, 88, 95-96.)

On March 9, 1991, Mr. Gray entered Threat's Black Bum as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (CX 1, 2, 3; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.) Mr. Gray testified that, while Respondent did not know that Mr. Gray was going to enter Threat's Black Bum in the Georgia National Horse Show, he had general authorization from Respondent to enter Threat's Black Bum in horse shows and entered Threat's Black Bum in two or three shows during the period Threat's Black Bum was in his custody, (Tr. 18-19, 32, 99-100, 108).

Respondent testified that he did not know that Threat's Black Bum would be entered in the Georgia National Horse Show and learned of the entry 2 weeks after the show. (Tr. 88-89.) Moreover, Respondent testified that he did not authorize Mr. Gray to show Threat's Black Bum in horse shows. (Tr. 87, 91.)

The ALJ found that:

Based upon visual and aural observations, the appearance and demeanor at the hearing, their recollections and qualifications, the testimony of Messrs. Gray and Cole is assigned great credibility. The evidence presented by Messrs. Gray and Cole at the hearing establish the truth of the matters therein described, being worthy of belief and entitled to credit.

Initial Decision and Order, Findings of Fact No. 12, p. 7.

Normally the Judicial Officer accords great weight to the ALJ's credibility determinations, but the Judicial Officer is not bound by them and may make separate determinations of witnesses' credibility. The standard on court review is whether there is substantial evidence to support the Judicial Officer's

contrary decision. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).³

The evidence presented by Mr. Gray regarding Mr. Gray's authority to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show, is in direct conflict with the evidence presented by Respondent.

If I were to find, as the ALJ did, that the evidence presented by Mr. Gray and the evidence presented by Respondent each establish the truth of the matters therein described, I would be required to make contradictory findings of fact; viz., that Respondent did, and did not, authorize Mr. Gray to enter Threat's Black Bum in horse shows while Threat's Black Bum was in Mr. Gray's custody. I therefore reject the ALJ's finding that the evidence

³See also *In re Jim Singleton*, *supra*, slip op. at 5; *In re William Joseph Vergis*, 55 Agric. Dec. ____, slip op. at 16 (Apr. 1, 1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72(1995), *appeal docketed*, No. 95-3552(8th Cir. Oct. 16, 1995); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc., v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by ALJ credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (while considerable deference is owed to credibility findings by the ALJ, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (the Commission is not strictly bound by the credibility determinations of the ALJ); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (the Board has the authority to make credibility determinations in the first instance, and may even disagree with a trial examiners finding on credibility); 3 *Kenneth C. Davis, Administrative Law Treatise* § 17:16(1980 & Supp. 1989) (the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

presented by Mr. Gray and Respondent "establish the truth of the matters therein described," (Initial Decision and Order, Findings of Fact No. 12, p. 7), and make my own credibility determinations regarding whether Respondent gave Mr. Gray authority to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show.

I find Mr. Gray's consistent testimony that Respondent gave him general authorization to enter Threat's Black Bum in horse shows credible. Respondent's testimony that Mr. Gray did not have authority to enter Threat's Black Bum in horse shows is not credible because: (1) Respondent's affidavit states that he both transferred complete custody of Threat's Black Bum to Mr. Gray and hired Mr. Gray to train Threat's Black Bum by methods and devices chosen by Mr. Gray, (CX 7); and (2) Respondent testified that, in January 1991, he attended the "Howie in the Hills" horse show, in which Threat's Black Bum was entered and shown by Mr. Gray, but had no objection to Mr. Gray's entering or showing Threat's Black Bum in that horse show, (Tr. 86, 91).

On March 9, 1991, at the Georgia National Horse Show, designated qualified person (also known as a "DQP"),⁴Bo Turner, conducted a pre-show examination of Threat's Black Bum, found Threat's Black Bum to be bilaterally sensitive in the front feet, disqualified Threat's Black Bum from showing, and issued a DQP ticket. (Initial Decision and Order, Findings of Fact No. 5, p. 5; CX 3, 4; Tr. 71.)

Two veterinarians, Dr. Hugh V. Hendricks and Dr. Ronald S. Zaidlicz, employed by the United States Department of Agriculture (hereinafter USDA), examined Threat's Black Bum after the DQP examination. While both Dr. Hendricks and Dr. Zaidlicz recall attending the Georgia National Horse Show on March 9, 1991, neither could recall their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 6, p. 5; Tr. 48-49, 68-69.)

At the time of his examination of Threat's Black Bum, Dr. Hendricks had extensive experience examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act. Specifically, Dr. Hendricks testified that: (1) he had been examining horses to determine whether they were sore since 1978; (2) he personally examined over 1,000

⁴The term "Designated Qualified Person or DQP" is defined in 9 C.F.R. § 11.1. The certification and licensing requirements for designated qualified persons are set forth in 9 C.F.R. § 11.7. The inspection procedures required to be followed by designated qualified persons are described in 9 C.F.R. § 11.21.

horses to determine whether they were sore; (3) he saw at least 10,000 horses examined; (4) he had attended approximately one Horse Protection Act course each year since 1978; and (4) he taught a number of Horse Protection Act courses. (Tr. 44-45.) The record does not establish how much experience Dr. Zaidlicz had examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act, at the time he examined Threat's Black Bum. (Tr. 62-64.)⁵

Dr. Hendricks recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 3), as follows:

I, H. V. Hendricks am a veterinarian employed with USDA, APHIS, AC. On 3/9/91 I was assigned to work the GA National Horse Show held at Perry, GA. My duties were to inspect horses for compliance with the Horse Protection Act.

On this date I observed the DQP examine a horse entered by John T. Gray. This was a black, 4 year old, male horse named "Threats Black Bum" entered into Class # 155 as exhibitor # 530. On palpation by the DQP he found the horse to be sensitive in both front feet. The horse was disqualified by the DQP and a ticket was issued.

I then examined this entry. Upon palpation of the right and left fore pasterns the horse exhibited a strong and definite pain response. The anterior surface of the fore pasterns just above the coronet band were very sensitive. The horse was also sensitive on the posterior-medial and lateral aspects of both fore pasterns. When the painful areas were palpated the horse would jerk his head upward and try to

⁵At the time of the hearing in this proceeding, February 14, 1995, Dr. Zaidlicz had been employed by USDA as a veterinary medical officer for 4½ years. Therefore, at the time Dr. Zaidlicz examined Threat's Black Bum, he had only been employed by USDA for approximately 7 months. While Dr. Zaidlicz testified that he attended one Horse Protection Act training course in 1991, (Tr. 63), the record does not establish whether Dr. Zaidlicz attended this course prior to or after his examination of Threat's Black Bum on March 9, 1991. Further, while Dr. Zaidlicz testified that he attended approximately 25 or 26 horse shows to examine horses to determine whether they were sore during the first year he was employed by USDA as a veterinary medical officer, (Tr. 62), the record does not establish how many, if any, of these horse shows preceded the Georgia National Horse Show at which Dr. Zaidlicz examined Threat's Black Bum.

remove his foot from my grip. The abdominal muscles would tighten in response to the pain. The left fore limb was very stiff and was reluctant to flex. The way of going was not normal in that the horse was reluctant to lead.

Dr. Ron Zaidlicz another USDA veterinarian was asked to examine this horse. The horse exhibited the same responses that I found upon his palpation.

Dr. Zaidlicz and I conferred and were in total agreement that this horse was "sore" as defined by the Horse Protection Act.

CX 3.

Dr. Hendricks completed his affidavit on March 9, 1991, within a few hours after his examination of Threat's Black Bum, and executed the affidavit on March 12, 1991. (CX 3; Tr. 37, 55.)

Dr. Zaidlicz recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 4), as follows:

I Ronald S. Zaidlicz DVM am a veterinarian employed with USDA APHIS/REAC. On March 9, 1991 I was assigned to work in the inspection area of the Georgia National Horse Show Perry Georgia. My duties were to work with Dr. Hugh Hendricks USDA APHIS/REAC to monitor and evaluate the Designated Qualified Person (DQP) in the performance of his duties and to examine horses for compliance with the Horse Protection Act.

On this day March 9, 1991 I observed DQP AM "Bo" Turner perform a Preshow exam on a Black 4 yr old stallion named "Threats Black Bum" entered in class # 155 as exhibitor # 530. This horse exhibited pain responses in both front pasterns and was turndown for showing by the DQP Turner and issued a ticket for soreness in both front feet. The horse was then examined by Dr. Hendricks and I observed the same pain responses in both front pasterns when palpated. Dr. Hendricks then asked me to examine the horse. I performed a soreness exam on the horse myself and upon digital palpation of the left forepastern area using light to moderate pressure the horse exhibited definite pain responses over the anterior, posterior lateral & medial surfaces of the pastern. Upon examination and digital palpation of the right forepastern the horse show definite pain responses on the

anterior, posterior, lateral & medial aspects of the pastern. The horses left forelimb was also very stiff and the horse was reluctant to flex left leg for examination of left forepastern. In observing the way of going of the horse he was tucked up behind and very stiff on left hind leg at a walk. Upon examination of both right and left forepasterns the horse would exhibit pain by pulling head up, pulling affected limb back, tensing the abdominal & flank muscles and shifting his weight to the rear. The pain responses were consistent and repeatable each time the areas marked on VOWS Form 19-7 were palpated.

After my exam Dr. Hendricks and I conferred and were in complete agreement that the horse was bilaterally sore and met the criteria to be classified as a "sore" horse as defined by the Horse Protection Act.

Dr. Hendricks then informed the custodian of the horse Mr. John Gray of our findings and that the USDA was writing the horse up as a "sore" horse.

CX 4.

Dr. Zaidlicz completed and executed his affidavit on March 9, 1991, within a few hours after his examination of Threat's Black Bum. (CX 4; Tr. 37-38, 70-71.)

Drs. Hendricks and Zaidlicz also recorded their observations and conclusions regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after their examinations of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.) The Summary of Alleged Violations form, (CX 2), is signed by Drs. Hendricks and Zaidlicz and Mr. Austin L. Bellflower, a USDA investigator, who testified that he completed lines 1 through 23 on the form immediately after Threat's Black Bum was found to be sore. (Tr. 36-37.)

Based upon their examinations of Threat's Black Bum, Drs. Hendricks and Zaidlicz believe that Threat's Black Bum experienced pain while moving. (Tr. 52-53, 71-72.)

Mr. Gray offered no evidence which might controvert the findings made by Drs. Hendricks and Zaidlicz. Mr. Gray did assert that he had examined the forelimbs of Threat's Black Bum prior to proceeding to the exhibition area and that the results of his examination were negative. (Initial Decision and Order, Findings of Fact No. 7, pp. 5-6; Tr. 108.) Mr. Gray asserted that any

pain displayed by Threat's Black Bum upon examination by Mr. Turner and Drs. Hendricks and Zaidlicz was the result of injury suffered by Threat's Black Bum when he tripped over a concrete curbing. (Initial Decision and Order Findings of Fact No. 7, p. 6; Tr. 28, 107-08.) Mr. Gray did not display any history of education in veterinary sciences. (Initial Decision and Order, Findings of Fact No. 7, p. 6.) Respondent stated in his affidavit that he was not at the Georgia National Horse Show, and, therefore, did not know whether Threat's Black Bum was sore or not when he was entered in the Georgia National Horse Show. (CX 7.)

I disagree with the ALJ's findings that testimony given by Dr. Hendricks and Dr. Zaidlicz regarding their actions and observations of March 9, 1991, is not credible, because they had no recollection of their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 12, p. 7.) I agree with the ALJ's finding that Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), are admissible hearsay, but I find it difficult to discern from the Initial Decision and Order the weight that the ALJ gave these documents.⁶

In almost every Horse Protection Act case, USDA veterinarians testifying about the examination of a horse have no recollection of the examination at the time of the hearing. Often USDA veterinarians examine hundreds of horses each year and are asked to testify about the examination of a single horse a year or more after conducting the examination.

In the instant proceeding, Dr. Hendricks and Dr. Zaidlicz conducted a routine examination of Threat's Black Bum almost 4 years prior to the date of the hearing. Dr. Hendricks' affidavit concerning his examination of Threat's Black Bum, (CX 3), is dated March 12, 1991, 3 days after he examined Threat's Black Bum. Dr. Hendricks testified that he prepared the affidavit on March 9, 1991, the date he examined Threat's Black Bum, while the examination was fresh in his mind. (Tr. 55.) Dr. Zaidlicz's affidavit concerning his examination of Threat's Black Bum, (CX 4), is dated March 9, 1991, the date he examined Threat's Black Bum, and Dr. Zaidlicz testified that he prepared the affidavit concerning his examination of Threat's Black Bum, while the examination was fresh in his mind. (Tr. 71.)

⁶The ALJ states: "The record does not enjoy the testimony of Drs. Hendricks and Zaidlicz which might describe that which they did and saw. Thus, there was no testimony concerning their examinations to which credibility might be attached. The memorializations of their activities, CX 2, 3 and 4, are hearsay documents received into the record for what they are." (Initial Decision and Order, Findings of Fact No. 12, p. 7.)

Mr. Austin L. Bellflower, a USDA investigator authorized under section 1 of the Act of January 31, 1925, (7 U.S.C. § 2217), to take affidavits, testified that he remembered attending the Georgia National Horse Show on March 9, 1991, (Tr. 34), and remembered taking Dr. Hendricks' affidavit, (CX 3), in Atlanta on March 12, 1991. Mr. Bellflower testified: "I believe [Dr. Hendricks] said he wrote [his affidavit] directly after he left the horse show that night and drove home, but I met him in Atlanta, Georgia, on the following Monday morning and I took this affidavit. He swore to it then." (Tr. 37.) Mr. Bellflower also testified that he remembered taking Dr. Zaidlicz's affidavit, (CX 4), on March 9, 1991, the night Dr. Zaidlicz examined Threat's Black Bum. (Tr. 36-37.)

The Summary of Alleged Violations form, (CX 2), is signed by Mr. Bellflower, Dr. Hendricks, and Dr. Zaidlicz. Dr. Hendricks testified that he completes that part of the Summary of Alleged Violations form for which he is responsible within a few minutes after his examination. (Tr. 50-51.) Mr. Bellflower testified that, "[d]irectly after" Threat's Black Bum had been examined by Drs. Hendricks and Zaidlicz, he completed lines 1 through 23 on the Summary of Alleged Violations form. (CX 2; Tr. 36-37.)

Dr. Hendricks' and Dr. Zaidlicz's affidavits and the Summary of Alleged Violations form in question, (CX 2, 3, 4), are hearsay evidence. However, neither the Administrative Procedure Act under which this proceeding is conducted nor the Rules of Practice applicable to this proceeding precludes the introduction of hearsay evidence. The Administrative Procedure Act provides with respect to the taking of evidence that:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Section 1.141(h)(1)(iv) of the Rules of Practice provides:

Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act. *See, e.g.*,

Richardson v. Perales, 402 U.S. 389, 409-10 (1971) (even though inadmissible under the rules of evidence applicable to court procedure, hearsay is admissible under the Administrative Procedure Act); *Bennett v. National Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995) (the Administrative Procedure Act, (5 U.S.C. § 556(d)), renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (it is well established that hearsay evidence is admissible in administrative proceedings).

The only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability. *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981). The documents at issue in the instant proceeding bear satisfactory indicia of reliability and were properly admitted into evidence. The documents were signed by the individuals who prepared them and Dr. Hendricks' and Dr. Zaidlicz's statements are affidavits sworn before Mr. Austin L. Bellflower, an individual authorized by law, 7 U.S.C. § 2217, to take affidavits. Dr. Hendricks was trained to examine horses to determine whether they are "sore" as defined by the Horse Protection Act and Dr. Hendricks had years of experience conducting these examinations. Mr. Bellflower testified that he had been an investigator for the Animal and Plant Health Inspection Service for 20 or 25 years, (Tr. 33), and had investigated cases under the Horse Protection Act for 8 or 10 years, (Tr. 34). None of the individuals who prepared the documents in question had reason to record their findings in other than an impartial fashion.⁷ The documents reflect a thorough recording of Dr. Hendricks' and Dr. Zaidlicz's activities conducted

⁷Dr. Hendricks, Dr. Zaidlicz, and Mr. Bellflower all testified that, at the time they prepared the affidavits and Summary of Alleged Violations form in question, they were USDA employees. (Tr. 33, 42, 60-61.) I infer, based upon their employment status, that Dr. Hendricks, Dr. Zaidlicz, and Mr. Bellflower were all salaried employees. Moreover, I infer that their salaries, benefits, and continued employment by USDA were neither dependent upon their finding Threat's Black Bum either sore or not sore, nor upon the statements they made in the affidavits and the Summary of Alleged Violations form in question. Drs. Zaidlicz and Hendricks testified that, if they have any doubt about whether a horse is either sore or not sore, within the meaning of the Horse Protection Act, they always give the benefit of the doubt to the owner or custodian of the horse. (Tr. 48, 67.)

in the performance of their duties to enforce the Horse Protection Act and their observations and conclusions regarding Threat's Black Bum.

While neither Dr. Hendricks nor Dr. Zaidlicz remembers examining Threat's Black Bum, (Tr. 49, 68-69), their affidavits, (CX 3, 4), and the Summary of Alleged Violations form, (CX 2), were created almost contemporaneously with the observations and conclusions they relay when their examinations of Threat's Black Bum were fresh in their minds. (Tr. 55, 71.)

All of the individuals who prepared the documents testified at the hearing in this proceeding and were available for and subject to cross-examination by Respondent. (Tr. 33-75, 112-116.)

Hearsay evidence can constitute substantial evidence if reliable. *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1414 (6th Cir. 1995); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995); *Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986); *Johnson v. United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980). Past recollection recorded is reliable, probative, and substantial and fulfills the requirements of the Administrative Procedure Act, (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witnesses' minds. *In re Mike Thomas*, 55 Agric. Dec. ___, slip op at 29 (July 15, 1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Bill Young*, 53 Agric. Dec. 1232, 1253 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision); *In re Eddie C. Tuck*, *supra*, 53 Agric. Dec. at 284; *In re Jack Kelly*, *supra*, 52 Agric. Dec. at 1300; *In re Charles Sims*, *supra*, 52 Agric. Dec. at 1264; *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995).

Even under the Federal Rules of Evidence, it appears that the Summary of Alleged Violations form, (CX 2), Dr. Hendricks' affidavit, (CX 3), and Dr. Zaidlicz's affidavit, (CX 4), would be admissible under Rules 803(5), 803(6), and 803(8)(C), which provide:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(5) Recorded Recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

....

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(5), 803(6), 803(8)(C).

USDA veterinarian affidavits and Summary of Alleged Violations forms, such as those at issue in the instant proceeding, would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate

circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Hendricks and Zaidlicz and Mr. Bellflower have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Horse Protection Act. Hence, there is no basis, in the instant proceeding, for finding that the USDA veterinarians' affidavits or the Summary of Alleged Violations form lacked trustworthiness.

The Judicial Officer has noted, with respect to affidavits prepared by USDA veterinarians for the same purpose as the affidavits and the Summary of Alleged Violations form at issue in the instant proceeding:

Such affidavits are regularly made as to all of the horses that are "written-up" and are kept in the ordinary course of the Government's business. There is no exclusionary rule applicable to our proceedings which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Similarly, the affidavits by Dr. Kendall, Dr. Wood and Dr. Thompson should have been received as evidence. The affidavits were not unduly repetitious merely because the witnesses testified as to the same matters set forth therein. In fact, I would attach more weight to the affidavits prepared within a few days of the event than to the testimony given 17 months later.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1435 (Remand Order), final decision, 38 Agric. Dec. 1539 (1979).

Responsible hearsay has long been admitted and relied upon in the Department's administrative proceedings.⁸ I find that Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged

⁸*In re Mike Thomas*, *supra*, at 29; *In re Big Bear Farm, Inc.*, 55 Agric. Dec. ___, slip op. at 37 (Mar. 15, 1996); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 11 (Feb. 7, 1996); *In re Dane O. Petty*, *supra*, 43 Agric. Dec. at 1466; *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, *supra*, 38 Agric. Dec. at 1435; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

Violations form, (CX 2) are admissible and reliable, probative, and substantial evidence, and that Dr. Hendricks and Dr. Zaidlicz are credible witnesses.

Dr. Hendricks' and Dr. Zaidlicz's affidavits describing their findings that Threat's Black Bum exhibited abnormal sensitivity in both front feet are sufficient to raise the statutory presumption of soreness, (15 U.S.C. § 1825(d)(5)), which was not rebutted by Respondent. Moreover, there is no need to rely on the statutory presumption since both Drs. Hendricks and Zaidlicz expressed their expert opinions, which I accept, that Threat's Black Bum was "sore" within the meaning of the Horse Protection Act, (CX 3, 4), and that Threat's Black Bum would have been likely to experience pain while moving. (Tr. 52-53, 71-72.)

Based upon Dr. Hendricks' testimony, Dr. Zaidlicz's testimony, Dr. Hendricks' affidavit, (CX 3), Dr. Zaidlicz's affidavit, (CX 4), and the Summary of Alleged Violations form, (CX 2), I agree with the ALJ's finding that Threat's Black Bum was sore when he was entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show on March 9, 1991. (Initial Decision and Order, Findings of Fact No. 13, p. 7.)

Respondent admits that at all times material to this proceeding he was the owner of Threat's Black Bum and that Threat's Black Bum was entered as Entry No. 530, in Class No. 155, on March 9, 1991, in the Georgia National Horse Show at Perry, Georgia. (Answer ¶ 4, p. 1.) Complainant proved by much more than a preponderance of the evidence, which is all that is required,⁹ that Threat's Black Bum was sore when he was entered in the Georgia National Horse Show, and that Threat's Black Bum was entered in the Georgia National Horse Show with Respondent's permission or acquiescence. These facts are sufficient to establish that Respondent allowed the entry, for the purpose of showing or exhibiting, of Threat's Black Bum as Entry No. 530, in Class No. 155, at the Georgia National Horse Show at Perry, Georgia, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D).

Moreover, even applying the test in *Baird v. United States Dep't of Agric.*, *supra*, the record establishes that Respondent allowed the entry of Threat's Black Bum in violation of 15 U.S.C. § 1824(2)(D). The *Baird* court states:

In our view, the government must, as an initial matter, make out a prima facie case of a § 1824(2)(D) violation. It may do so by

⁹See footnote 2.

establishing (1) ownership; (2) showing, exhibition, or entry; and (3) soreness. If the government establishes a prima facie case, the owner may then offer evidence that he took an affirmative step in an effort to prevent the soring that occurred. Assuming the owner presents such evidence and the evidence is justifiably credited, it is up to the government then to prove that the admonitions the owner directed to his trainers concerning the soring of horses constituted merely a pretext or a self-serving ruse designed to mask what is in actuality conduct violative of § 1824. [Footnote omitted.]

Baird v. United States Dep't of Agric., *supra*, 39 F.3d at 137.

The *Baird* court reversed the Judicial Officer's finding that the Petitioner allowed the entry of sored horses "[b]ecause we find that petitioner actually attempted to prevent, rather than allow, the exhibition or entry of his horses while they were sore." *Baird v. United States Dep't of Agric.*, *supra*, 39 F.3d at 132.

In the instant proceeding, Complainant has "made out a prima facie case of a § 1824(2)(D) violation" required by *Baird*. The record clearly establishes that: (1) Respondent owned Threat's Black Bum at all times relevant to this proceeding, (Answer ¶ 4, p. 1); (2) Threat's Black Bum was entered in the Georgia National Horse Show, (Answer ¶ 4, p. 1); and (3) Threat's Black Bum was sore when entered, (CX 2, 3, 4). While Respondent did offer evidence that he took an affirmative step in an effort to prevent the soring that occurred, I cannot "justifiably credit" that evidence because it is contradicted not only by Mr. Gray, the trainer who entered Threat's Black Bum in the Georgia National Horse Show, but also by Respondent himself.

During the period November 1990 to April 1991, Respondent repeatedly inspected his horses at Mr. Gray's Florida premises. (Tr. 18, 85.) Mr. Gray consistently testified that Respondent never gave him any instructions regarding the method by which Respondent's horses, including Threat's Black Bum, were to be trained. Specifically, Mr. Gray testified as follows:

[BY MS. MEHTA]

Q. How long had you been training Threats Black Bum for Mr. Cole?

[BY MR. GRAY]

A. At the time of the show or --

Q. Well, prior to the show how long did you train it?

A. The horses came in late November of 1990.

Q. Okay. And you stated that the horse was also boarded at your stable; right?

A. Yes.

Q. Did Mr. Cole give any instructions to you as to how to train a horse?

A. No, he did not.

Q. There were no instructions whatsoever?

A. No.

Q. So did he leave it completely to your judgment on how to train the horse?

A. All decisions were made by myself when I was in Florida or whoever rode or took the horse out. Mr. Cole had no input whatsoever into it.

Q. Okay. Did Mr. Cole ever come to inspect the horse while it was being trained by you?

A. He came down occasionally on other business and would stop in and if one of his horses happened to be working or happened to be out, he might watch it for a few minutes. And I do recall one specific show that he went to watch his horses be ridden.

....

Q. Okay. Were the other two of Mr. Gray's horses that you trained, were they also entered in horse shows at the same time?

A. I believe only one other was ever taken to a show.

Q. How long have you trained Tennessee Walking Horses?

A. Well, as a trainer -- I am not a trainer. I've always been an amateur and sometimes not a very good one at that. I've never held a trainer's license or professed to be a trainer of horses, but if any time you take a horse out of the stall or ride a horse or whatever you personally do handling a horse, you're training the horse, you are actually training the horse, and if that is training a horse, then I am the trainer.

.....

Q. And [Respondent] authorized your training of [Threat's Black Bum]?

A. Yes.

Q. And the horses you had with him?

A. Yes.

.....

Q. You stated earlier that Mr. Cole said nothing at all about the training of the horse or anything that he wanted or did not want done to the horse?

A. No, he gave no specific guidelines as far as --

Q. Did he say anything, you better not do this, you better do this?

A. No.

.....

BY MR. AUSTIN

Q. Mr. Gray, as far as the horses you had down there, did Mr. Cole -- when he brought those down there -- I think that was in late November; is that correct?

[BY MR. GRAY]

A. Yes.

Q. And was it pretty well assumed that you would not be soring horses? I mean, was that pretty well a normal assumption that you and Mr. Cole had, that you wouldn't be soring these horses or anything like that?

A. I would believe that to be an assumption, yes.

Tr. 17-19, 100, 105-06.

Respondent's affidavit of May 10, 1991, clearly states that Respondent did not take affirmative steps to prevent soring of Threat's Black Bum, as follows:

I make this affidavit to J. R. Odle who has identified himself as an employee of the U.S. Department of Agriculture.

I am the sole owner of a Tennessee Walking Horse named "Threats Black Bum." I have owned this horse since May 1990. I own about 30 Walking Horses and have been owning Walking Horses for about 30 years. I hired John Gray to train this horse along with about 4 other show horses. He had complete custody of my horses and chose all the methods and devices used to train the horse.

CX 7.

On the one hand, Respondent variously testified regarding the steps he took to prevent the soring of Threat's Black Bum while he was in Mr. Gray's custody, as follows:

[BY MR. AUSTIN]

Q. And did you and Mr. Gray prior to moving the horses down there ever have any discussion about what you were telling him as far as how you wanted your horses taken care of or anything about the soring devices?

[BY MR. COLE]

A. To my knowledge he wasn't even supposed to even show the horses. That's the way we discussed that, and I'm opposed to the soring devices in any way. Never have sored one and of course I've never shown one.

Q. Did you talk to Mr. Gray about the soring situation?

A. Yes.

Q. And what did he assure you as far as the soring was concerned?

A. Well, Mr. Gray assured me he wouldn't do that.

....

Q. Mr. Cole, you've given an affidavit to Mr. Odle and told him, you know, you've been I guess trail riding and living with horses for some 30 years. Do you condone soring of any kind?

A. No.

Q. And did you specifically let Mr. Gray know that?

A. Yes.

....

[BY MS. MEHTA]

Q. Did you leave any instructions with Mr. Gray regarding the training of the horses?

[BY MR. COLE]

A. No. I don't know how to train.

- Q. So you didn't tell him anything about that?
- A. No, ma'am.
- Q. Did you leave it completely to his judgment?
- A. Yes, ma'am.

Tr. 87-91.

On the other hand, Mr. Gray consistently testified that he never received any instructions from Respondent regarding the method by which Threat's Black Bum was to be trained.

Respondent's sworn affidavit clearly states that Respondent left "the methods and devices used to train [Threat's Black Bum]" to Mr. Gray. (CX 7.) Respondent's testimony variously supports and contradicts both Mr. Gray's testimony and Respondent's own affidavit. Under these circumstances, Respondent's testimony that he instructed Mr. Gray not to sore Threat's Black Bum is not credible, and I find that Respondent did not take affirmative steps to prevent Mr. Gray's soring Threat's Black Bum.

The ALJ devoted a significant portion of the Initial Decision and Order to a discussion of palpation. (Initial Decision and Order, pp. 8-19.) The ALJ concludes that the determination that palpation alone is sufficiently reliable to evidence soring is a rule and that USDA failed to promulgate this rule in accordance with the Administrative Procedure Act, (5 U.S.C. § 553). (Initial Decision and Order, pp. 14, 19.) Not only is the ALJ's discussion irrelevant to this proceeding because Dr. Hendricks and Dr. Zaidlicz based their conclusions on Threat's Black Bum's "way of going" as well as palpation, but the ALJ's conclusion that palpation is a rule is in error.

Palpation alone is a highly reliable method of determining whether a horse is sore within the meaning of the Horse Protection Act. *In re Mike Thomas*, *supra*, slip op. at 45; *In re Kim Bennett*, 55 Agric. Dec. ___ slip op. at 6 (Jan. 3, 1996); *In re Eddie C. Tuck*, *supra*, 53 Agric. Dec. at 292. This Department's reliance on palpation alone to determine whether a horse is sore within the meaning of the Horse Protection Act is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses under the Horse Protection Act. *In re Kim Bennett*, *supra*, slip op. at 7.

Palpation is a procedure used to examine horses to determine compliance with the Horse Protection Act and the regulations issued under the Horse

Protection Act. A "rule" under the Administrative Procedure Act is defined as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy and does not describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making or regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in

accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Horse Protection Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

"Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the [Horse Protection] Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the [Horse Protection] Act and regulations.

43 Fed. Reg. 18,514, 18,525 (1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Horse Protection Act and the regulations issued under the Horse Protection Act. Except for minor editorial changes, the definition of the word "inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

"Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the [Horse Protection] Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from

the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1).

Findings of Fact

1. Respondent Glen Edward Cole is an individual whose mailing address is (b) (6) (Answer ¶ 2, p. 1; Initial Decision and Order, Findings of Fact No. 1, p. 4.)
2. At all times relevant to this proceeding, Respondent was the owner of the horse known as "Threat's Black Bum." (Answer ¶ 4, p. 1; Initial Decision and Order, Findings of Fact No. 2, p. 5; CX 7.)
3. In November 1990, Respondent moved a number of his horses, including Threat's Black Bum, from Tennessee to Florida for boarding with and training by John T. Gray. (CX 7; Tr. 15-17, 22-23, 25, 84, 99-100.) Threat's Black Bum remained in John T. Gray's custody until April 1991, when Respondent moved Threat's Black Bum back to his premises in Tennessee. (Tr. 22-23, 88, 95-96.)
4. At all times relevant to this proceeding, John T. Gray was the trainer of Threat's Black Bum. (Consent Decision and Order as to John T. Gray, pp. 1-2; CX 7; Tr. 16-17, 84, 91.)
5. During the period November 1990 to April 1991, Respondent repeatedly inspected his horses at John T. Gray's Florida premises. (Tr. 18, 85.) Respondent did not instruct John T. Gray with respect to the methods or devices to be used to train his horses, including Threat's Black Bum. Respondent failed to direct John T. Gray not to sore Threat's Black Bum, and Respondent did not take any affirmative steps to prevent soring of Threat's Black Bum, while Threat's Black Bum was in Mr. Gray's custody. (CX 7; Tr. 17-18, 91, 105-06.) John T. Gray's training methods included the use of chains. (Tr. 17.)
6. On March 9, 1991, Threat's Black Bum was entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (Answer ¶ 4, p. 1; CX 1, 2, 3, 4; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.)
7. On March 9, 1991, John T. Gray entered Threat's Black Bum as Entry No. 530, in Class No. 155, in the Georgia National Horse Show at Perry, Georgia. (CX 1, 2, 3; Consent Decision and Order as to John T. Gray, pp. 1-2; Tr. 19.)

8. Respondent knew that John T. Gray showed Threat's Black Bum in horse shows and, in January 1991, attended one of the shows in which Threat's Black Bum was entered and shown. (Tr. 18, 86, 91, 99-100.) John T. Gray had general authorization from Respondent to enter Threat's Black Bum in horse shows, including the Georgia National Horse Show at Perry, Georgia, during the period November 1990 to April 1991, when Threat's Black Bum was in John T. Gray's custody. (Tr. 18-19, 91, 99-100.)

9. On March 9, 1991, at the Georgia National Horse Show, designated qualified person ("DQP"), Bo Turner, conducted a pre-show examination of Threat's Black Bum, found Threat's Black Bum to be bilaterally sensitive in the front feet, disqualified Threat's Black Bum from showing, and issued a DQP ticket. (Initial Decision and Order, Findings of Fact No. 5, p. 5; CX 3, 4; Tr. 71.)

10. Two veterinarians, Dr. Hugh V. Hendricks and Dr. Ronald S. Zaidlicz, employed by USDA, examined Threat's Black Bum after the DQP examination. Both Dr. Hendricks and Dr. Zaidlicz recall attending the Georgia National Horse Show on March 9, 1991, but at the time of the hearing in this proceeding neither Dr. Hendricks nor Dr. Zaidlicz could recall their examinations of Threat's Black Bum. (Initial Decision and Order, Findings of Fact No. 6, p. 5; Tr. 48-49, 68-69.)

11. At the time of his examination of Threat's Black Bum, Dr. Hendricks had extensive experience examining horses to determine whether they were "sore," as that term is defined in the Horse Protection Act. (Tr. 44-45.)

12. Both Dr. Hendricks and Dr. Zaidlicz found that Threat's Black Bum experienced pain in both front legs in the same areas. (Initial Decision and Order, Findings of Fact No. 6, p. 5; CX 2, 3, 4.)

13. Dr. Hendricks observed that, upon palpation, Threat's Black Bum exhibited strong and definite pain responses by jerking his head upward, trying to remove his foot from Dr. Hendricks' grasp, showing a reluctance to flex his limbs, and tightening of abdominal muscles. Dr. Hendricks observed that these pain responses were consistent and repeated. Dr. Hendricks also observed that Threat's Black Bum's "way of going" was not normal. (CX 2, 3.)

14. Dr. Zaidlicz observed that, upon palpation, Threat's Black Bum exhibited definite pain responses by pulling his head up, pulling his affected limbs back, tensing his abdominal muscles, and shifting his weight to the rear. Dr. Zaidlicz observed that these pain responses were consistent and repeated. Dr. Zaidlicz also observed that Threat's Black Bum's "way of going" was not normal. (CX 2, 4.)

15. Drs. Hendricks and Zaidlicz conferred after their examinations of Threat's Black Bum and agreed that Threat's Black Bum was "sore," as that term is defined in the Horse Protection Act. (CX 2, 3, 4; Tr. 54, 71.)

16. Dr. Hendricks recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 3), which he completed on March 9, 1991, within a few hours after his examination of Threat's Black Bum, and executed on March 12, 1991. (CX 3; Tr. 37, 55.) Dr. Hendricks also recorded his observations and conclusion regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after his examination of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.)

17. Dr. Zaidlicz recorded his observations and conclusion regarding Threat's Black Bum in an affidavit, (CX 4), which he completed and executed on March 9, 1991, within a few hours after his examination of Threat's Black Bum. (CX 4; Tr. 37-38, 70-71.) Dr. Zaidlicz also recorded his observations and conclusion regarding Threat's Black Bum on a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), within a few minutes after his examination of Threat's Black Bum. (CX 2; Tr. 50-52, 69-70.)

18. Dr. Hendricks' affidavit, (CX 3), which contains a record of his observations and conclusion regarding Threat's Black Bum, was recorded when his examination of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, was fresh in Dr. Hendricks' mind. (CX 3; Tr. 55.) Dr. Zaidlicz's affidavit, (CX 4), which contains a record of his observations and conclusion regarding Threat's Black Bum, was recorded when his examination of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, was fresh in Dr. Zaidlicz's mind. (CX 4; Tr. 71.) Drs. Hendricks and Zaidlicz completed and signed a Summary of Alleged Violations form (VOWS Form 19-7), (CX 2), when their examinations of Threat's Black Bum at the Georgia National Horse Show on March 9, 1991, were fresh in their minds. (CX 2; Tr. 50-52.)

19. Based upon their examinations of Threat's Black Bum, Drs. Hendricks and Zaidlicz believe that Threat's Black Bum experienced pain while moving. (Tr. 52-53, 71-72.)

20. Mr. Gray offered no evidence which might controvert the findings made by Drs. Hendricks and Zaidlicz. However, Mr. Gray did assert that he had examined the forelimbs of Threat's Black Bum prior to proceeding to the exhibition area and that the results of his examination were negative. (Initial Decision and Order, Findings of Fact No. 7, pp. 5-6; Tr. 108.) Mr. Gray asserted that any pain displayed by Threat's Black Bum upon examination by

Mr. Turner and Drs. Hendricks and Zaidlicz was the result of injury suffered by Threat's Black Bum when he tripped over a concrete curbing. (Initial Decision and Order, Findings of Fact No. 7, p. 6; Tr. 28, 107-08.) Mr. Gray did not display any history of education in veterinary sciences. (Initial Decision and Order, Findings of Fact No. 7, p. 6.)

21. Threat's Black Bum was sore when Respondent allowed Threat's Black Bum to be entered as Entry No. 530, in Class No. 155, in the Georgia National Horse Show on March 9, 1991. (CX 2, 3, 4.)

Conclusion of Law

Respondent Glen Edward Cole violated section 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)), by allowing the entry, for the purpose of showing or exhibiting, of a horse known as "Threat's Black Bum" at the Georgia National Horse Show in Perry, Georgia, on March 9, 1991, while the horse was sore.

Sanction

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a

blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflammation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

[T]he 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation." In most cases, the maximum civil penalty of \$2,000 per violation is warranted. *In re Mike Thomas, supra*, slip op. at 53; *In re C.M. Oppenheimer, supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1323 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Linda Wagner, supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott, supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper, supra*, 42 Agric. Dec. at 62.

Respondent violated section 5(2)(D) of the Horse Protection Act, (15 U.S.C. § 1824(2)(D)), by allowing the entry, for the purpose of showing or exhibiting, of Threat's Black Bum at the Georgia National Horse Show in Perry, Georgia, while the horse was sore. The nature, extent, and gravity of

the violation are revealed by Dr. Hendricks' and Dr. Zaidlicz's description of Threat's Black Bum's responses to palpation and "way of going," as follows:

Upon palpation of the right and left fore pasterns[, Threat's Black Bum] exhibited a strong and definite pain response. The anterior surface of the fore pasterns just above the coronet band were very sensitive. The horse was also sensitive on the posterior-medial and lateral aspects of both fore pasterns. When the painful areas were palpated the horse would jerk his head upward and try to remove his foot from my grip. The abdominal muscles would tighten in response to the pain. The left forelimb was very stiff and was reluctant to flex. The way of going was not normal in that the horse was reluctant to lead.

CX 3.

On this day March 9, 1991 I observed DQP AM "Bo" Turner perform a Preshow exam on a Black 4 yr old stallion named "Threats Black Bum" entered in class # 155 as exhibitor # 530. This horse exhibited pain responses in both front pasterns and was turndown for showing by the DQP Turner and issued a ticket for soreness in both front feet. The horse was then examined by Dr. Hendricks and I observed the same pain responses in both front pasterns when palpated. Dr. Hendricks then asked me to examine the horse. I performed a soreness exam on the horse myself and upon digital palpation of the left forepastern area using light to moderate pressure the horse exhibited definite pain responses over the anterior, posterior lateral & medial surfaces of the pastern. Upon examination and digital palpation of the right forepastern the horse show definite pain responses on the anterior, posterior, lateral & medial aspects of the pastern. The horses left forelimb was also very stiff and the horse was reluctant to flex left leg for examination of left forepastern. In observing the way of going of the horse he was tucked up behind and very stiff on left hind leg at a walk. Upon examination of both right and left forepasterns the horse would exhibit pain by pulling head up, pulling affected limb back, tensing the abdominal & flank muscles and shifting his weight to the rear. The pain responses were consistent and repeatable each time the areas marked on VOWS Form 19-7 were palpated.

CX 4.

I find that, under these circumstances, the nature, extent, and gravity of Respondent's violation of the Horse Protection Act are sufficient to warrant the assessment of a civil penalty of \$2,000.

The record also establishes Respondent's culpability. Respondent hired Mr. Gray to train Threat's Black Bum and some of his other horses, (CX 7; Tr. 15, 84-85, 100). Respondent failed to direct Mr. Gray not to sore his horses, (Tr. 17-18, 105-06), and, in fact, Respondent states in his affidavit that Mr. Gray "had complete custody of my horses and chose all methods and devices used to train the horse[s]." (CX 7.) John T. Gray, Respondent's trainer, used action devices (chains) on Threat's Black Bum's legs during training. (Tr. 17.) Respondent then allowed the entry of Threat's Black Bum in the Georgia National Horse Show. Owners who allow the entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when entered. *In re Mike Thomas, supra*, slip op. at 54 (Respondent is an absolute guarantor that his use of action devices during training will not cause the horse to be sore); *In re Keith Becknell, supra*, 54 Agric. Dec. at 340 (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sore).

Although Respondent did not instruct Mr. Gray to sore Threat's Black Bum, (Tr. 108), and there is no evidence in the record that Respondent intended to have Threat's Black Bum sore, intent is of no consequence under the Horse Protection Act and regulations issued under the Horse Protection Act. The Horse Protection Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sore" only if the device was used on a horse "for the purpose of affecting its gait," and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th

Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2:

The legislation makes the following substantive modifications in the existing law governing this program:

1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent, at the time of the hearing, had owned Tennessee Walking Horses for approximately 30 years, (CX 7; Tr. 83), and then owned approximately 12-15 Tennessee Walking Horses, (Tr. 92). Despite Respondent's experience as an owner of Tennessee Walking Horses, Respondent allowed the entry of Threat's Black Bum while the horse was sore. I find that, under these circumstances, Respondent's degree of culpability is sufficient to warrant the assessment of a civil penalty of \$2,000.

Further, the record establishes that Respondent has the ability to pay a civil penalty of \$2,000 and that the assessment of a \$2,000 civil penalty would not affect Respondent's ability to continue to do business. (Respondent testified that: he owned approximately 12-15 Tennessee Walking Horses, (Tr. 92); he is in the blue jean manufacturing business, (Tr. 83); and he breeds and sells Tennessee Walking Horses for pleasure, (Tr. 92, 94)).

The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend that a \$2,000 civil penalty be assessed against Respondent. (Complainant's Proposal, pp. 22, 28; Complainant's Appeal Brief, p. 26.) An examination of the record in the instant proceeding does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of \$2,000 per violation is warranted.

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under section 6(b) of the Horse Protection Act, (15 U.S.C. § 1825(b)), may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Horse Protection Act or the regulations issued under the Horse

Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act or the regulations issued under the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who had the economic means to pay civil penalties as a cost of doing business. See H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1706.

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty assessed under 15 U.S.C. § 1825(b). While section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), requires that the Secretary consider 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in determining the amount of the civil penalty to be assessed, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C. § 1825(c).) *In re Mike Thomas, supra*, slip op. at 57 (the nature, circumstances, extent, and gravity of the prohibited conduct and the degree of culpability, the history of prior offenses, ability to pay, and effect on ability to continue to do business are not relevant factors in determining whether to issue a disqualification order under the Horse Protection Act); *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Horse Protection Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Horse Protection Act for the first time. *In re Mike Thomas, supra* (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for

first violation of the Horse Protection Act); *In re Tracy Renee Hampton, supra* (Respondent assessed a \$2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Cecil Jordan, supra* (Respondent Crawford assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Linda Wagner, supra* (Respondents assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re John Allan Callaway, supra* (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act).

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824. The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend that Respondent be disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. (Complainant's Proposal, pp. 22, 28; Complainant's Appeal Petition, p. 26.)

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for the first violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

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

Order

1. Respondent Glen Edward Cole is assessed a civil penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Tejal Mehta, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

2. Respondent Glen Edward Cole is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

**In re: GARY R. EDWARDS, LARRY E. EDWARDS, CARL EDWARDS & SONS STABLES, WILLIAM V. BARKLEY, JR., and KAY BARKLEY.
HPA Docket No. 91-0113.**

Decision and Order as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables filed November 5, 1996.

Civil penalty — Disqualification order — Exhibiting a sore horse — Preponderance of the evidence — Statutory presumption — Palpation — Past recollection recorded.

The Judicial Officer reversed the decision by Judge Kane (ALJ) dismissing the Complaint. The Judicial Officer held that Respondent Gary R. Edwards exhibited a horse while the horse was sore, but held that the other Respondents, Larry E. Edwards and Carl Edwards & Sons Stables, did not violate the Horse Protection Act (the owners had earlier consented). Respondent Gary R. Edwards was assessed a civil penalty of \$2,000 and was disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, and from managing, judging, or otherwise participating in any horse show, exhibition, sale, or auction. Much more than a preponderance of the evidence supports the findings, which is all that is required. A horse may be found to be sore based upon the professional opinions of veterinarians who relied solely upon palpation of the horse's pasterns. Past recollection recorded made while the events were still fresh in the minds of the witnesses is reliable, probative, and substantial. Bilateral, reproducible pain in response to palpation, standing alone, is sufficient to be considered abnormal sensitivity and thus raises the statutory presumption of a sore horse. The evidence of very extreme pain response upon palpation is also sufficient to make a *prima facie* case, which supports a finding of a violation of the Horse Protection Act, even in the absence of the presumption. There is no substantial evidence to support the ALJ's conclusion that the horse's abnormal sensitivity was caused by a "stumble" in the show. The *Martin* case does not help Respondents. Only

Respondent Gary R. Edwards exhibited Rare Coin; Respondent Larry E. Edwards, a partner, and Carl Edwards & Sons Stables, the partnership, did not violate the Horse Protection Act. Pre-show passage by the DQP is meaningless to the post-show USDA inspection. Respondents' expert who had never examined the horse, but merely analyzed the videotape, given little weight. Respondent who exhibited the horse has no status to direct USDA veterinary staff on the proper method of examination of the horse. USDA and its witnesses are not biased against owners, exhibitors, or trainers of Tennessee Walking Horses. ALJ's Third Initial Decision and Order, like the two before it, are reversed and vacated because the ALJ failed to correct errors as directed by the Judicial Officer. ALJ's two new theories on palpation, that palpation is a rule subject to APA rule making and that palpation lacks a required "scientific" basis, are both rejected. ALJ erred: by giving no or scant credibility to USDA witnesses, by inferring that testimony of additional USDA experts would have been adverse to Complainant, and by assigning unwarranted great weight and credibility to Respondents' witnesses, even after Judicial Officer guidance on this issue. The ALJ's attack on palpation evidence, based upon the *Young* decision, is refuted by the Judicial Officer's *Bennett* decision. Respondent was an absolute guarantor that the horse would not be sore when exhibited. The facts and circumstances of this case reveal no basis for an exception to the general policy of imposing the minimum 5-year disqualification on Respondent, in addition to a \$2,000 civil penalty.

Colleen A. Carroll, for Complainant.

Peter N. Priamos, Torrance, CA, for Respondents.

Initial decision issued by Paul Kane, Administrative Law Judge.

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

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I. INTRODUCTION.

This case is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), which proceeding the Judicial Officer remanded to Administrative Law Judge Paul Kane (hereinafter ALJ) for correction of enumerated ALJ refusals to follow established United States Department of Agriculture (hereinafter USDA) policy and precedent. My review of the record and of the ALJ's Third Initial Decision and Order (Aug. 11, 1995) (hereinafter Third IDO) reveals that the ALJ's refusals to follow USDA policy and precedent are not corrected therein. Consequently, this proceeding would have been now thrice remanded to Judge Kane had he not retired. However, a third remand not being possible, the Third IDO is necessarily reviewed herein.

The ALJ summarizes the Complaint (which was amended to charge "exhibiting" in lieu of "entering"), as follows:

The Administrator of the Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture, by complaint filed March 11, 1991, alleges that on May 30, 1990, respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables, acting through Gary R. Edwards, entered, and William V. Barkley, Jr. and

Kay Barkley allowed the entry,¹ of a horse, for the purpose of showing or exhibiting, while the horse was sore, in violation of the Horse Protection Act, Pub. L. 91-540, December 9, 1970, 84 Stat. 1404, as amended. . . .

Third IDO, pp. 1-2 (footnote omitted). However, the ALJ erroneously concludes by ordering that "[p]roof of the essential allegation having failed, the complaint as to Gary R. Edwards, Larry E. Edwards and Carl Edwards & Sons Stables is, in all aspects, dismissed with prejudice." (Third IDO, p. 31.)

On November 20, 1995, Complainant appealed to the Judicial Officer to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated, (7 C.F.R. § 2.35).² On January 23, 1996, Respondents filed "Respondent's Response to Appeal Petition of Third Initial Decision and Order, and Points and Authorities in Opposition to Appeal of Complainant" (hereinafter Respondents' Response), and on January 29, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Third IDO is reversed and vacated. My final Decision and Order finds that Respondent Gary R. Edwards committed the violation charged in the Amended Complaint, and imposes a \$2,000 civil penalty and a 5-year disqualification order on Respondent Gary R. Edwards, which is the sanction requested by the administrative officials for this Respondent.

A. Complaint.

The Administrator of the Animal and Plant Health Inspection Service, USDA (hereinafter Complainant), by Complaint filed March 11, 1991, alleges in pertinent part:

I

¹Respondents William V. Barkley, Jr., and Kay Barkley entered into a Consent Decision filed January 10, 1992, and are, therefore, no longer parties to this proceeding.

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

A. Respondent Gary R. Edwards is an individual whose mailing address is (b) (6)

B. Respondent Larry E. Edwards is an individual whose mailing address is (b) (6)

C. Respondent Carl Edwards & Sons Stables is a partnership in which Respondents Gary R. Edwards and Larry E. Edwards are partners.

D.

E. At all times material herein, Respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables were the trainers of the horse known as "Rare Coin" and, through Respondent Gary R. Edwards, entered this horse as Entry No. 524, in Class No. 9, on May 30, 1990, at the Money Tree Classic Horse Show at Columbia, Tennessee.

II

On May 30, 1990, Respondents Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables, acting through Respondent Gary R. Edwards, 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 the horse known as "Rare Coin" as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show at Columbia, Tennessee, while the horse was sore. (The Amended Complaint charges Respondents with *exhibiting* a sore horse under section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)).

Complainant seeks the imposition of civil penalties and the disqualification of Respondents from participation in horse shows, exhibitions, sales, and auctions for a period of time. By separate Answers filed April 3, 1991, Respondents, through counsel, deny the allegation of the Complaint that the horse was sore.

B. Chronology.

A hearing was held on December 19 and 20, 1991, in Birmingham, Alabama, before the ALJ. Proposed findings and briefs were subsequently filed by counsel. The ALJ issued three successive Initial Decisions and Orders, each dismissing the Complaint. Dismissals were based in large part on the ALJ's erroneous conclusion that the documentary evidence, which the ALJ determined was the sole evidentiary basis in support of the Complaint, lacked trustworthiness sufficient to sustain the government's burden of proof by a preponderance of the evidence, because the government's witnesses had

no present recollection of the events alleged in the Complaint. Complainant timely appealed each Initial Decision and Order, *seriatim*.

Complainant is represented by Colleen A. Carroll, Esq., Washington, D.C. Respondents are represented by Paul D. Priamos, Esq., Torrance, California.

C. Statutes.

The following statutory provisions are applicable to this case:
Section 2(3) of the Horse Protection Act provides:

As used in this chapter unless the context otherwise requires:

....

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

Section 5(2) of the Horse Protection Act provides:

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.

15 U.S.C. § 1824(2).

Section 6(b)(1) of the Horse Protection Act provides:

(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.

15 U.S.C. § 1825(b)(1).

Section 6(c) of the Horse Protection Act provides:

(c) 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. § 1825(c).

Section 6(d)(5) of the Horse Protection Act provides:

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

II. RESPONDENT GARY R. EDWARDS EXHIBITED RARE COIN AT THE MONEY TREE CLASSIC HORSE SHOW WHILE THE HORSE WAS SORE.

Upon consideration of all matters of record, the following Findings of Fact and Conclusions of Law are reached. As a result thereof, there is entered an Order assessing Respondent Gary R. Edwards a civil penalty of \$2,000 and disqualifying Respondent Gary R. Edwards from showing, exhibiting, or entering any horse or from otherwise participating in any horse show, exhibition, sale, or auction for a period of 5 years.

A. Findings of Fact.

1. Respondents Gary R. Edwards and Larry E. Edwards are individuals whose mailing address is (b) (6) they are general partners, along with their mother, Etta Edwards, in Respondent Carl Edwards & Sons Stables. (Answer ¶ I; Tr. 374-77, 467, 471-72.)

2. Respondent Carl Edwards & Sons Stables is a general partnership engaged in the business of boarding and training Tennessee Walking Horses; the business address is Route 4, Box 212, Dawson, Georgia 31742. (Answer ¶ I; Tr. 409-11.) However, while the partnership's trainers, Larry E. Edwards, Gary R. Edwards, and Ernest Upton, are all trainers licensed by the National

Horse Show Regulatory Commission, Carl Edwards is deceased, and neither Etta Edwards nor Carl Edwards & Sons Stables are licensed trainers. The licensed trainers all train their own separate horses and very rarely, if ever, work with another trainer's horses. (CX 6, p. 1; Tr. 376-77, 409-12, 467, 472.)

3. At all times material herein, Respondent Gary R. Edwards was the trainer of the horse known as "Rare Coin," and, on May 30, 1990, Respondent Gary R. Edwards exhibited Rare Coin as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show in Columbia, Tennessee (hereinafter the Money Tree Classic). (CX 4, item no. 14, CX 6, p. 1; RX 1, p. 1; Tr. 376.)

4. On May 30, 1990, Rare Coin tied for second place in his class, and was thereafter examined by Dr. Tyler Riggins and Dr. Allen M. Knowles, two highly qualified and very experienced USDA, Animal and Plant Health Inspection Service (hereinafter APHIS), Veterinary Medical Officers (hereinafter VMOs), who found a "very extreme pain response" on the front and rear of Rare Coin's right pastern and an "extreme pain response" on the front and rear of Rare Coin's left pastern. Both VMOs' expert opinions were that the soreness was caused by either caustic chemicals, mechanical devices, or a combination of caustic chemicals and mechanical devices. (CX 2, 3, 4; Tr. 102, 108-09, 187.)

5. Rare Coin was likely to have experienced pain in both pasterns of his front feet when exhibited as Entry No. 524, in Class No. 9, at the Money Tree Classic, on May 30, 1990. (CX 2, 3, 4.)

6. Drs. Riggins and Knowles recorded their findings in sworn affidavits and a Summary of Alleged Violations, VOWS Form 19-7, while the results of their examinations were fresh in their minds.

7. Although Drs. Riggins and Knowles did not remember the Money Tree Classic in great detail, they did remember working that show. Their testimony, based upon their affidavits, (CX 2, 3), and Summary of Alleged Violations, VOWS Form 19-7, (CX 4), is past recollection recorded, and is routinely admitted and given appropriate weight.

8. The horse show interruption episode on the videotape, (RX 3), does not reveal that Rare Coin stumbled, or that his forelegs hit the ground, each other, or anything else; but, rather, that Rare Coin reared and moderately bucked.

B. Conclusion of Law.

On May 30, 1990, Respondent Gary R. Edwards, in violation of section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), exhibited the

horse known as "Rare Coin" as Entry No. 524, in Class No. 9, at the Money Tree Classic, while the horse was sore.

C. Discussion.

The Amended Complaint alleges that Rare Coin was sore on May 30, 1990, when Gary R. Edwards exhibited Rare Coin at the Money Tree Classic, and that, the partnership, Carl Edwards & Sons Stables, and a general partner, Larry E. Edwards, are deemed also to have violated the Horse Protection Act. (The Amended Complaint did not name general partner Etta Edwards as a Respondent deemed also to have violated the Horse Protection Act.)

Complainant, as the proponent of an Order, has the burden of proof in cases under the Administrative Procedure Act (hereinafter APA), such as this one, and the standard of proof by which the burden is met is the preponderance of the evidence standard.³ In this proceeding, Complainant has shown by much more than a preponderance of the evidence that Respondent Gary R. Edwards has committed the violation alleged in the Amended Complaint. However, Complainant has failed to show that either

³See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Jim Singleton*, 55 Agric. Dec. ___, slip op. at 3 n.2 (July 23, 1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

Larry E. Edwards or Carl Edwards & Sons Stables can properly be deemed also to have violated the Horse Protection Act.

1. Complainant's Case.

Complainant presented the testimony of two highly qualified and very experienced USDA VMOs, Drs. Tyler Riggins and Allen Knowles. Both VMOs examined Rare Coin on May 30, 1990, and determined that Rare Coin was abnormally and bilaterally sensitive. (Tr. 101-04, 112-21 (Dr. Riggins), Tr. 185-208 (Dr. Knowles).) Dr. Riggins has been a VMO for 26 years, and was previously in private practice. (Tr. 83.) Dr. Knowles was in private practice for 2 years and has been a VMO for 18 years. (Tr. 171-72.) Dr. Riggins has examined 7,000 to 8,000 horses over the past 10 years, and Dr. Knowles has examined around a thousand horses each year, between 1974 and 1990, for soreness under the Horse Protection Act. (Tr. 84-85, 172.)

Each VMO described in detail the procedure he uses to examine a horse for abnormal, bilateral sensitivity. (Tr. 85-87 (Dr. Riggins), Tr. 174-80 (Dr. Knowles).) Both VMOs conducted the same basic examination, and they both followed their normal procedures when they examined Rare Coin. (Tr. 86-87, 111-12, 157-58, 174-75, 193.)

The VMOs, as explained by Dr. Riggins, watch the way a horse walks and look for signs of pain during palpation, including withdrawing of the feet, tucking of the abdominal muscles, jerking of the head, and rearing, as follows:

[BY MS. CARROLL:]

Q. And what are you looking for when you're doing this examination?

[BY DR. RIGGINS:]

A. I'm looking for how the horse will react to my palpation. Moving the foot, jerking the foot, moving the body, shifting of the weight to the back, tightening of muscles and jerking of the head and all those [things]

. . . .

Q. And what kind of things are you looking for in the horse's way of walking?

A. Well, a free, easy kind of gait and not pulling or he's walking like he's not kind of sore-footed or something. It's just a free and easy gait is one we like to see.

Tr. 87-88.

The VMOs always return to the area which, upon palpation, caused a pain response from the horse to see if the response is repeated. (Tr. 93-94, 175-76.) Dr. Riggins testified that a horse that is not sore will not respond repeatedly to palpation of specific areas, as follows:

[BY MS. CARROLL:]

Q. . . . Can you tell me what you mean by sore?

[BY DR. RIGGINS:]

A. When I apply pressure on a horse's pastern, the horse will respond and I will have some body movement or jerking the foot or have a pain response to that pressure, that's what I kind of define as being sore.

Q. And are those responses that would not come from a horse that's not sore?

. . . .

A. When you apply pressure on a horse, sometimes a horse will move his foot. But a horse won't consistently move the foot when you apply pressure unless it's sore in that area. And that's why I can't respond to that yes or no, because some time a horse will just move his foot. And, then, you've got to determine whether he's moving it from being sore and, therefore, you go back to the place a time or two just to determine this.

Tr. 92-93.

The veterinarians testified that they must agree that a horse is sore in both feet before they will "write it up." (Tr. 98, 181-82, 184.) When they agree, they document their findings on a Summary of Alleged Violations, VOWS

Form 19-7. (Tr. 97-98, 100-01, 182-84.) Thereafter, each VMO prepares an affidavit based on that form and his memory of the examination. (Tr. 101.)

Both VMOs recalled working at the Money Tree Classic in May 1990, and both testified that their duties were to observe the DQPs examine the horses, try to prevent sore horses from entering the show, and examine horses after they come out of the show. (Tr. 101, 184-85.) The USDA examines winning horses because, as Dr. Knowles testified: "[W]e decided several years ago that if anything was done to one of the horses to aid in winning that it would obviously be one of the winners that it was done to." (Tr. 185; also, see Dr. Riggins' similar testimony at Tr. 101-02.)

Dr. Riggins testified that he recalled examining Rare Coin because he won second place. (Tr. 102, 108-09, 111; CX 2.) Dr. Knowles prepared a VOWS Form 19-7 immediately after he and Dr. Riggins examined Rare Coin and agreed that the horse was sore. (Tr. 203-04.) Both VMOs testified that Complainant's Exhibit No. 4 is the same VOWS Form 19-7 they filled out on Rare Coin, that it accurately reflects their examinations, and that they had agreed on what Dr. Knowles wrote. (Tr. 102-04, 106, 108, 187-88, 203.) Although Dr. Knowles did not remember the details of his examination, he testified that his notations on the VOWS Form 19-7 accurately reflect his observations at the time and were made on the day he examined Rare Coin. (CX 4; Tr. 187-89.) Each VMO prepared an affidavit within 24 hours of his examination. (CX 2, 3; Tr. 29-31, 108, 161, 203-05, 209.)

Rare Coin was written up as sore because of bilateral, abnormal pain responses to palpation. Moreover, the VMOs' testimony and documentary evidence allows the conclusion that Rare Coin probably experienced pain during his performance in the show. (CX 4, item no. 35; Tr. 291.)

Rare Coin's bilateral, abnormal pain responses raises the presumption under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)), that Rare Coin was sore. See *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), *printed in* 40 Agric. Dec. 922, 924-25 (1981) (burden of persuading trier of fact that horse was sored remains with Secretary, and presumption in 15 U.S.C. § 1825(d)(5) shifts burden of going forward with evidence to Respondent, once the Secretary has introduced evidence of bilateral, abnormal sensitivity or inflammation); *In re Eldon Stamper*, 42 Agric. Dec. 20, 27 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

Respondents failed to rebut the presumption through evidence that the horse's abnormal, bilateral sensitivity was caused by something other than soring. Gary R. Edwards testified that he had added "a wedge" to Rare Coin's

shoes that morning, and suspected that it caused the horse to stumble and injure himself. (Tr. 384-85.) Under the Horse Protection Act, a horse that suffers physical pain or distress, inflammation, or lameness as a result of artificial means is a sore horse. (15 U.S.C. § 1821(3).) Therefore, even if it were true and could be proven that the added wedge caused the stumble and a resultant injury, which I find is by no means clearly the case on this record, (as is explained, *infra*), it still would not necessarily relieve Gary R. Edwards from liability for exhibiting Rare Coin, while the horse was sore.

Rare Coin gave an "exaggerated pain response" when the USDA veterinarians palpated his front pasterns. (Tr. 113.) Dr. Riggins examined the horse first, as described in his testimony:

Q. (By Ms. Carroll) Can you describe your examination of Rare Coin?

[BY DR. RIGGINS:]

A. I picked up the left front foot -- left front foot, examined the posterior pastern, moved to the -- pulled the foot forward, examined the right, I mean, the pastern on the same foot, on the left foot, anterior pastern. Put it down, went around the horse and examined the back pastern on the right foot and the front pastern. And I got pain responses in both posterior and anterior pastern on both feet.

Q. Were there any specific areas that gave you a response?

A. Yes, across the back on the back pastern and across the front of the front pastern on both feet.

Q. Can you gauge how much response you got?

A. I got exaggerated pain response.

Q. How was that demonstrated to you?

A. By trying to pull the foot back, raising that foot up, jerking the head back, tightening muscles, shifting the feet and type responses like that.

Q. Okay. Was one foot more responsive than the other?

A. Yes, I had the right foot got more pain response than I did on the left foot.

Q. Okay. And you talked about some withdrawal. I mean, would that -- a quick motion or a slow motion?

A. Just -- it was a rather quick one. When I would put pressure on the foot, the horse would try to withdraw the foot from me.

Q. And during your examination were you -- you were able to complete the examination according to the procedure you described earlier?

A. Yes, ma'am.

Q. Did you revisit areas that gave you a response?

A. I went back to them enough times so that I was sure I was getting a pain response in those areas.

Q. Okay. Did you palpate any area above the pastern?

....

A. Yes, I normally -- that's what I do.

Q. Okay. Did you get any response in these areas?

A. I -- the only pain response I got was when I examined the pastern, the anterior and frontier [sic] pastern.

Tr. 112-14.

Dr. Riggins recorded the results of his examination in his affidavit the next day, as follows:

On this night I examined a sorrel horse that showed in class 9 as exhibitor #524 and tied in second place. I first checked the left foot. When I palpated the posterior and anterior pasterns, the horse showed

extreme pain responses by jerking its foot and tucking the abdominal muscles.

When I palpated the posterior and anterior pasterns of the right front foot, the horse would raise its head, jerk the foot and tuck the abdominal muscles showing signs of very extreme pain.

CX 2, p. 1.

Dr. Knowles noted that, during Dr. Riggins' examination, the horse showed take-away movement of the forelimbs along with tightening of the abdominal muscles. (CX 3; Tr. 207-08.) When Dr. Knowles examined Rare Coin, he responded the same way. (CX 3; Tr. 196-98, 208.)

I approached the left side of the horse and picked up the left front foot. I found an extreme pain response on both the posterior and anterior pastern. The horse tried to withdraw his foot, tightened his abdominal muscles, and shifted weight to his rear legs when the painful areas were palpated. I moved to the right foot and found an even more severe pain response on this posterior and anterior pastern. The horse showed an extreme take-away response, along with tightening of the abdominal muscles, and shifting of weight to the rear feet when the painful areas were palpated.

CX 3.

Dr. Riggins watched Dr. Knowles' examination and saw that "[h]e got practically the same response that I did and in the same areas of the foot that I got." (Tr. 120.) Even Gary R. Edwards agreed that Rare Coin reacted abnormally when Drs. Riggins and Knowles and DQP Charles Thomas palpated his feet. (Tr. 424.)

An examination of the evidence convinces me that Rare Coin was likely to have experienced pain while moving in the show, and, therefore, was "sore" within the meaning of the Horse Protection Act, (15 U.S.C. § 1821(3)). Rare Coin wore chains in the show. (CX 4, item no. 25; RX 3 at 9:59.) These action devices hit Rare Coin in the same areas that responded to palpation, as described by Dr. Riggins specifically, as "across the back on the back pastern and across the front of the front pastern on both feet," (Tr. 113, 291). Dr. Knowles, moreover, testified that the VOWS Form 19-7 indicates exactly where he (Dr. Knowles) illustrated that Rare Coin responded to palpation on specific areas of his front pasterns, (CX 4, item no. 35):

[BY MS. CARROLL:]

Q. . . . What do they indicate?

[BY DR. RIGGINS:]

A. The Xs indicate where we found the painful responses.

Q. And where are those Xs?

A. All across the anterior pastern and the posterior pastern.

Tr. 199-200.

Those areas correspond to the places where the chains were placed during the actual exhibition of Rare Coin. (RX 3 at 9:59.) Dr. Knowles testified that: "We found pain in the pastern area on both anterior and both posterior surfaces, which is essentially the same places that the chain would contact the horse." (CX 4, item no. 35; Tr. 291.) Thus, I infer, that Rare Coin, who abnormally responded to palpation of certain areas on both his front pasterns, was in pain when he was exhibited just moments before with action devices that hit the pasterns on those same areas.

Dr. Riggins concluded that Rare Coin was sore by the use of caustic chemicals and/or chains, based on the "way the horse reacted to my examination" and on his knowledge of no "other way that a horse could be sore except by those two." (Tr. 124, 144, 149.) Dr. Knowles agreed, adding that caustic chemicals can be visually undetectable. (CX 3; Tr. 162, 198-99.)

2. Respondents' Case.

In Respondents' Proposed Findings of Fact, Conclusions of Law, Order and Brief; and Memorandum of Points and Authorities in Opposition to Complainant's Motion to Amend Complaint (hereinafter Respondents' Proposal) (June 17, 1992), Respondents proposed findings and made other arguments, some of which are reproduced here below, as pertinent:

- that at all times material herein, Gary R. Edwards was Rare Coin's trainer;

- that Gary R. Edwards exhibited Rare Coin as Entry No. 524, in Class No. 9, at the Money Tree Classic Horse Show in Columbia, Tennessee, on May 30, 1990;
- that other Respondents named in the Complaint (Larry E. Edwards and Carl Edwards & Sons Stables) and one non-Respondent (Etta Edwards), whether variously licensed as horse trainers, or not, or included as general partners in Carl Edwards & Sons Stables, or not, were in no way involved, or assisted Gary R. Edwards, in any of the training, entering, or exhibiting of Rare Coin at the Money Tree Classic;
- that Complainant's CX 4, VOWS Form 19-7, lists Gary R. Edwards as the trainer (item no. 14), the presenter (item no. 7), and the rider (item no. 16) of Rare Coin, but the form does not mention Larry E. Edwards or Carl Edwards & Sons Stables;
- that Gary R. Edwards entered Rare Coin in the pertinent event, as the two involved VMOs watched DQP Charles Thomas pass Rare Coin in pre-show inspection, which makes clear that the horse was not sore before the show;
- that the horse's owner (W.V. Barkley, Jr.) took a video of Rare Coin in the pertinent event, which is in this record as RX 3;
- that, after the pertinent event, on the video appear Dr. Randy Baker and Respondent Gary R. Edwards, as Dr. Baker examines Rare Coin; and
- that the videotape, made during the event, shows that Rare Coin "stumbled" twice, breaking the horse's breast strap, which stumbling occasioned a several-minute break for horse and rider to compose themselves.

Up to this point, I agree with Respondents' arguments and proposed findings, except I find that the horse did not actually stumble and that the pre-show passage by a DQP for entry does not "make clear that the horse was not sore before the show," even when the DQP's examination is witnessed by two

USDA VMOs. Moreover, I do not agree with the remainder of Respondents' case, reproduced below, for the reasons explained, *infra*:

- that during the pertinent event, Rare Coin injured himself in the pastern area of both front legs when Rare Coin twice stumbled in the ring;
- that qualified horse expert Dr. Jay Humburg testified that the video, (RX 3), caused Dr. Humburg to believe that it is possible that Rare Coin injured both front pasterns when he stumbled;
- that Dr. Humburg testified he could not determine soreness in a horse by palpation alone, but he would need to see the horse move;
- that the government VMOs relied upon palpation alone, and barely saw the horse led up to them;
- that Gary R. Edwards right away took Rare Coin through post-show inspection, telling the DQP and both VMOs that the horse had stumbled badly and had hurt himself;
- that the VMOs did not adequately examine Rare Coin post-show for injuries;
- that the video-taped, post-show examination of Rare Coin by Dr. Baker revealed no evidence of heat, redness, scurf, inflammation, or swelling in either front pastern;
- that Dr. Baker's statement after his examination and his testimony at the hearing was that the horse was not chemically sores;
- that there are no scientific studies to show whether digital palpation tests can determine soreness under the Horse Protection Act;
- that the evidence of Rare Coin's stumbling twice in the ring, and resultant injury, rebuts the presumption that the horse was sore by artificial means;

- that Respondents urge that it is not irrelevant that Rare Coin passed the pre-show inspection; and
- that USDA and government witnesses are biased against the owners, exhibitors, and trainers of Tennessee Walking Horses, that USDA VMOs do not even examine other breeds at multi-breed shows, and that this bias caused Drs. Riggins and Knowles to assume that Rare Coin was sore.

3. A Preponderance of the Evidence Supports a Finding That Rare Coin Was Sore at the Post-Show Inspection at the Money Tree Classic, on May 30, 1990, in Columbia, Tennessee.

Much more than a mere preponderance of the evidence supports the finding that Respondent Gary R. Edwards exhibited Rare Coin, while sore. I adopt Complainant's version of the facts set forth in the *Discussion, supra*, because those facts are fully supported in the record. To summarize: two very experienced and well-qualified USDA VMOs both found Rare Coin bilaterally and abnormally sensitive during the routine post-show exam for a (tied for) second place horse. They agreed to write up Rare Coin as sore when both VMOs got "very extreme pain response" in the front and back of the right pastern and "extreme pain response" in the front and back of the left pastern. They concluded that Rare Coin probably experienced pain during the show. Their conclusion was based on the fact that the chains Rare Coin wore in the show were configured to strike directly upon the spots determined to be extremely painful by the VMOs. The VMOs documented their findings on VOWS Form 19-7 and both VMOs supplemented their VOWS Form 19-7 with testimony and a sworn affidavit. Both VMOs testified that part of their routine examination is to observe whether the horse leads freely.

Abnormal, bilateral sensitivity raises the statutory rebuttable presumption of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)). I find that this record evidence is sufficiently strong to support a *prima facie* case of soring irrespective of, and in addition to, the rebuttable presumption.

Respondents' case, in summary, is that Rare Coin was not sore pre-show, as evidenced by the fact that Rare Coin was passed by the DQP in the presence of the two attending USDA VMOs. Moreover, Respondents argue that any soreness found post-show was caused by Rare Coin stumbling twice during the show and not caused by chemical soring. Respondents attack, as

unreliable, digital palpation evidence if used as the only diagnostic evidence. Also, Respondents challenge the methodology and efficacy of the examinations performed on Rare Coin by USDA's VMOs.

Additionally, Respondents' expert witnesses, Drs. Humburg and Baker, supported Respondents' argument that stumbling could possibly have caused Rare Coin's bilateral, abnormal sensitivity. Respondents' veterinary witnesses testified that Rare Coin had no heat, scurf, swelling, inflammation, or redness in either leg after the show. Dr. Baker testified that he opined that Rare Coin was not chemically sores.

Finally, Respondents argue that the digital palpation test has no scientific basis; that the stumbling evidence rebuts the statutory presumption that Rare Coin's abnormal, bilateral sensitivity was artificially induced; and that, in any event, USDA and government witnesses are biased against the Tennessee Walking Horse breed, and its owners, exhibitors, and trainers.

I have carefully examined the record evidence, in light of Respondents' arguments, and I find that Respondents have neither rebutted the statutory presumption nor overcome the preponderance of the evidence produced by Complainant.

a. Rare Coin's "Stumbling" Was Actually Rearing and Bucking, Which Do Nothing to Rebut the Presumption.

Respondents' most important argument is that Rare Coin stumbled twice during the show, which Respondents contend explains any soreness detected by the USDA VMOs in the horse's pasterns. Respondents' argument actually has two parts: (1) that Respondents' evidence of a non-artificial cause (stumbling) for abnormal, bilateral sensitivity of both of the horse's pasterns rebuts the presumption of soreness under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)); and (2) that should the presumption of soreness be rebutted, the evidence of a non-artificial cause (stumbling) is sufficiently dispositive of the evidence of abnormal, bilateral sensitivity that Complainant's *prima facie* case is not then supported by a preponderance of the evidence, unless Complainant has specific evidence of an artificial means of soring under *Martin v. United States Dep't of Agric.*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24).

I have very carefully examined the autoptic⁴ evidence, the horse show videotape, (RX 3). I find that Rare Coin did not "stumble" in either alleged "stumbling" sequence; but, rather, that Rare Coin did "rear," and moderately "buck." These distinctions are important because the definitions of these words, as used in horse parlance, place a very different connotation on what the videotape reveals that Rare Coin actually did at the Money Tree Classic.

Webster's Ninth New Collegiate Dictionary 1171 (1986) defines "stumble" as "to trip in walking or running" and "to walk unsteadily or clumsily." However, the word "rear" has a specific horse connotation: "to cause (a horse) to rise up on the hind legs," and "*of a horse*: to rise up on the hind legs." (Emphasis in original) (*Id.* at 981.)

Similarly, although not as descriptive of what Rare Coin actually did--but still more accurate than "stumble"--is that Rare Coin "bucked." "Buck" also has a horse parlance meaning: "to throw (as a rider) by bucking" and "*of a*

⁴I find RX 3, the videotape of Entry No. 524 (Rare Coin), Class No. 9, at the Money Tree Classic, showing Rare Coin (*but not* including Dr. Baker's subsequent examination, which is recorded on RX 3 after the horse show), to be autoptic/demonstrative evidence, upon which no testimony is needed to determine the truth of the matter contained therein:

Evidence

....

Autoptic evidence. Type of evidence presented in court which consists of the thing itself and not the testimony accompanying its presentation. Articles offered in evidence which the judge or jury can see and inspect. Real evidence as contrasted with testimonial evidence; e.g. in contract action, the document purporting to be the contract itself, or the gun in a murder trial. *See Demonstrative evidence.*

Black's Law Dictionary 556 (6th ed. 1990).

Demonstrative evidence. That evidence addressed directly to the senses without intervention of testimony. Such evidence is concerned with real objects which illustrate some verbal testimony and has no probative value in itself. *People v. Diaz*, 111 Misc.2d 1083, 445 N.Y.S.2d 888, 889. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

Id. at 432.

horse or mule: to spring into the air with the back arched." (Emphasis added) (Id. at 184.)

Rare Coin did not throw the rider, when he sprang into the air with back arched, but observation of the videotape, (RX 3), reveals that the horse reared and moderately bucked. Rare Coin can be seen putting both front feet forcefully down at the same time; but, at no time can Rare Coin be seen to trip or stumble. Rare Coin's pasterns, then, certainly never made contact with the ground, or with each other. Therefore, I find that the videotape reveals that Rare Coin did not stumble, trip, or bring his pasterns into contact with the ground, with other objects, or with each other.

However, Rare Coin did rear and buck at two easily discernible points in the exhibition, breaking a "breast" strap. After a period of time, the competition resumed, with no discernible harm to Rare Coin. (RX 3.) I find that the broken strap likewise had no discernible effect on Rare Coin.

I am also convinced that Rare Coin was not injured in the rearing episode, because Rare Coin continued to perform and performed well enough to tie for second place in a 5-horse field. Thus, I reject the ALJ's conclusion, (Third IDO, p. 28), that Dr. Knowles deviated from proper regulatory parameters when he testified that he assumed Rare Coin was not injured because he was allowed to continue to compete after the "stumble" and won second place (tied). (Tr. 290.) Moreover, Rare Coin was not chosen for examination by USDA VMOs because the horse appeared injured, was lame, or had a suspicious gait; but, rather, the horse was examined for the routine reason that the horse placed second (tied). All first and second place horses are examined post-show by these USDA VMOs. (Tr. 185-86.)

Initially, as for "stumbling" as an explanation for soreness, the United States Court of Appeals for the Sixth Circuit has not accorded stumbling the status of automatically explaining bilateral sores conditions in horses sensitive to touch in suspicious places on both front legs, as explained in *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). In the *Fleming* case, the Judicial Officer addressed such stumbling, as follows:

Chief Judge Campbell's findings and conclusions are abundantly supported by the record and the applicable law. The evidence against respondent is as strong as in any case I have seen under the Horse Protection Act. Accordingly, the initial decision and order is adopted as the final decision in this proceeding. . . .

. . . .

3. Respondent further urges that the horse[] injured itself while in the show ring (Finding of Fact 4) and, presumably, that injury was mistaken by the USDA veterinarians as an indication of abusive soring.

Respondent's explanation is that the horse stumbled in the ring and dragged its right leg in the dirt. While this might explain a bruise on the horse's right foreleg, the USDA veterinarians, however, found abnormal sensitivity on both the anterior and posterior aspects of both forelegs. The horse also had an abnormal thermal pattern (indicating abnormal inflammation) on both the anterior and posterior aspect of both forelegs. Thus, the accidental injury could not have produced the sensitivity found in both forelegs. Further, there is also evidence in the record which tends to show that the fall would not have resulted in the open wound on the horses' right front pastern. Dr. James' deposition, pp. 9-10.

In re Preach Fleming, supra, 40 Agric. Dec. at 1522, 1530.

On review, the Sixth Circuit disposed of the stumbling-made-the-horse-sore argument in a footnote, as follows:

The appellants did present some alternative explanations for their horses' sores conditions. Appellant Preach Fleming argued that his horse slipped to one "knee" during its performance and Joe Fleming stated that his horse had suffered a flare-up of tendonitis. Rowland and Meadows suggested that their horse had been "quicked" in one hoof by improper shoeing. None of these explanations, however, contradict the USDA proofs. Neither quicking in one hoof or a slip to one knee, for example, explains why both of the horse's legs were abused, inflamed and sensitive to touch in an equal degree in the same locations. Tendonitis, the examining veterinarians testified, would not cause the soreness they found. There was also evidence that tendonitis would not explain the variations in thermo patterns found on the horse. The ALJ fully considered these arguments and weighed the evidence accordingly.

Fleming v. United States Dep't of Agric., 713 F.2d 179, 187-88 n.12 (6th Cir. 1983) (emphasis added).

Similarly, USDA VMOs in the case, *sub judice*, testified that stumbling did not explain the pattern and type of abnormal, bilateral sensitivity they found in Rare Coin. (Tr. 93-95, 132-34, 166-67, 178, 180-81, 314-15, 323-26.)

Moreover, the VOWS Form 19-7 clearly shows "very extreme pain response" on the front and back of the right pastern, and "extreme pain response" on the front and back of the left pastern.

Thus, in the *Fleming* case, where the horse actually stumbled, and the horse's leg actually made contact with the ground, the Sixth Circuit still did not accept stumbling as an explanation for bilateral, abnormal sensitivity. Here, as in *Fleming*, I conclude that, even if the horse stumbled, (I do not believe Rare Coin actually stumbled), it does not explain the (very) extreme pain responses on the front and back of both of Rare Coin's pasterns, at just the locations on the pasterns at which the chains would hit. I find that Rare Coin did not injure himself by stumbling, but merely, and harmlessly, reared and bucked. Nevertheless, as in *Fleming*, even if Rare Coin is seen to have stumbled, it does not explain the pattern and severity of the sore spots detected.

b. The *Martin* Decision Does Not Help Respondents.

The ALJ and Respondents hinge a great deal of their conclusions and arguments herein, respectively, on *Martin v. United States Dep't of Agric., supra.*⁵ (Third IDO, pp. 24, 27-28; Complainant's Appeal of Third Initial Decision and Order; and Memorandum of Points and Authorities in Support of Appeal (hereinafter Complainant's Appeal of Third IDO), p. 33 (Nov. 20, 1995); Respondents' Response, p. 5).

⁵The United States Court of Appeals for the Sixth Circuit did not publish *Martin*, instead placing it under Sixth Circuit Rule 24, which reads in pertinent part:

(c) Citation of Unpublished Decisions. Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel *serves a copy thereof on all other parties* in the case and on the court. *Such service may be accomplished by including a copy of the decision in an addendum to the brief.*

United States Court of Appeals for the Sixth Circuit, Rule 24(c) (emphasis added). (A copy of *Martin* is attached as Appendix A.)

A citation to *Martin* in either the United States Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit,⁶ where *Martin* does not obtain, is certainly not controlling there. Yet, *Martin* may be addressed hypothetically under the facts of this case, *sub judice*.

I conclude that *Martin* does not help Respondents herein. Since the *Martin* opinion is attached hereto, there is no need to explicate the whole case, which contains other issues such as burden of proof, burden of persuasion, and past recollection recorded, which are important elsewhere. For this part of the case, the statutory presumption, and the Department's burden after a Respondent rebuts the presumption, are paramount.

Essentially, *Martin* holds that, when Complainant has introduced *substantial* evidence of abnormal, bilateral sensitivity, thereby raising the statutory presumption under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)), but Respondent has produced *credible* evidence of a natural cause for the soreness, thus rebutting the presumption, Complainant must then produce *specific* evidence that the horse was sored by artificial means. *Martin v. United States Dep't of Agric.*, *supra*, slip op. at 12-13.

The *Martin* court defined "substantial" evidence, which definition is excerpted, just below; but, it did not define "credible" evidence. For purposes of this discussion, I will use definitions from Black's Law Dictionary:

Credible. Worthy of belief; entitled to credit. *See Competency; Character; Reputation.*

Credible evidence. Evidence to be worthy of credit must not only proceed from a credible source but must, in addition, be "credible" in itself, by which is meant that it shall be so natural, reasonable and

⁶Section 6(b)(2) of the Horse Protection Act, in relevant part, provides that: "Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] . . . may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. . . ." (15 U.S.C. § 1825(b)(2).) Section 6(c) of the Horse Protection Act, in relevant part, provides that: "The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under [15 U.S.C. § 1825(c)]." (15 U.S.C. § 1825(c).) The record establishes that Respondents reside in and have their place of business in Dawson, Georgia. Therefore, appeal of the instant proceeding would be to the United States Court of Appeals for the District of Columbia or the United States Court of Appeals for the Eleventh Circuit.

probable in view of the transaction which it describes or to which it relates as to make it easy to believe it, and credible testimony is that which meets the test of plausibility. *Indiana Metal Products v. N.L.R.B., C.A.Ind.* 442 F.2d 46, 52.

Black's Law Dictionary 366-67 (6th ed. 1990).

In *Martin*, the court carefully set forth the substantial evidence standard (actually citing *Fleming*), as follows:

This court reviews a USDA decision under the Horse Protection Act to determine whether the proper legal standards were employed and whether substantial evidence supports the decision. 15 U.S.C. § 1825(b)(2). Substantial evidence consists of evidence adequate for a reasonable fact finder to reach the conclusion. *Fleming*, 713 F.2d at 188. Substantial evidence:

[I]s more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantiality of the evidence must be based upon the record taken as a whole. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Murphy v. Secretary of HHS, 801 F.2d 182, 184 (6th Cir. 1986) (citations omitted).

Martin v. United States Dep't of Agric., *supra*, slip op. at 10.

(1) Respondents' Evidence of "Stumbling" Is Not Credible Evidence to Rebut Presumption Under *Martin*.

As has been shown, "stumbling" is not credible evidence for an alternative explanation for the type of bilateral, sore condition detected in the horse in the Sixth Circuit's *Fleming* case, and I do not find that stumbling explains Rare Coin's condition either. Moreover, with Rare Coin, it is actually rearing and bucking, which is even a less plausible explanation for bilateral sensitivity than the actual stumble in *Fleming*, where one of the horse's forelegs hit the track.

Thus, Respondents fail under *Martin* to rebut the presumption, because the facts herein do not fulfill the *credible* evidence standard required by *Martin*. In weighing the evidence, the *Martin* court specifically recognized the Judicial Officer's authority to draw his own inferences, not encumbered by the contrary determinations of the ALJ, as long as substantial evidence supports the Judicial Officer's conclusion, as follows:

The JO is not bound by the ALJ's determination, and is free to draw his own inferences, so long as substantial evidence supports the JO's conclusion. *Rowland v. USDA*, 43 F.3d 1112, 1114 (6th Cir. 1995).

Martin v. United States Dep't of Agric., *supra*, slip op. at 10-11.

I find that there is substantial evidence that Rare Coin's rearing and bucking form no alternative explanation for the VMOs' subsequent post-show determination of extreme bilateral sensitivity. Therefore, I find that Rare Coin did not stumble, but did rear and moderately buck, and was not injured thereby.

The Eleventh Circuit has held that, once the Department's position is supported by substantial evidence, the role of the reviewing court is limited, and the court must affirm the Secretary's findings:

Our role as a reviewing court is limited. We must affirm the findings of the Secretary of Agriculture if they are supported by substantial evidence. 15 U.S.C. § 1825(b)(2); *see also Fleming v. USDA*, 713 F.2d 179, 188 (6th Cir. 1983). Substantial evidence is:

something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966). If the ultimate findings and conclusions could reasonably have been drawn from the primary evidentiary facts we, as a reviewing court, may not "displace the . . . [Secretary's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).

Thornton v. United States Dep't of Agric., 715 F.2d 1508, 1510 (11th Cir. 1983), reprinted in 51 Agric. Dec. 295, 297 (1992).

It cannot be fairly held on this record that the Secretary may not reasonably choose to conclude that Rare Coin's abnormal, bilateral extreme soreness was caused artificially by Respondents' actions, rather than to conclude that Rare Coin's rearing and bucking somehow "naturally" caused "very extreme pain responses" on his right pastern, front and back, and "extreme pain responses" on his left pastern, front and back, and in the very places where chains were placed to strike on the sore spots. For these reasons, even under *Martin*, I conclude that Rare Coin was sored by artificial means, because rearing and bucking during the show form no credible evidence that the horse was sore from natural causes.

(2) If Merely Plausible Evidence, and Not Actual Evidence, Which Is Also Credible, Is Allowed to Rebut Under *Martin*, USDA Will Disregard *Martin*.

To continue the analysis of *Martin*, *vis-a-vis* the case, *sub judice*, I note that both proceedings feature the ALJ finding that Respondents had rebutted the presumption. In *Martin*, the ALJ had found that the abnormal, bilateral sensitivity was caused by a recurring fungal infection, rather than by artificial means. When the Judicial Officer reversed, based upon the testimony of USDA VMOs, the Sixth Circuit found that the Judicial Officer erred, as follows:

However, the issue of whether the presumption was rebutted by Petitioners is more difficult. The ALJ found that Petitioners had rebutted the presumption, by providing evidence that the sensitivity was caused by a recurring fungal infection, rather than by artificial means. The JO rejected this inference, noting that the USDA's doctors found no evidence of fungus and had opined that the soreness was caused by artificial means. We believe that the *JO failed to credit adequately the evidence* that the horse's fungus was recurring, and had in fact visibly erupted again about nine days after the show at issue in this case, after the trainer stopped applying medication. We find that Petitioners rebutted the presumption that soreness was a result of artificial means, by producing testimony that Pride's Dixie Queen suffered from a recurring fungus, and expert testimony that this fungus could cause sensitivity without being visible.

Martin v. United States Dep't of Agric., *supra*, slip op. at 12 (emphasis added).

This passage is somewhat supportive of the Department's position, because it recognizes that the Judicial Officer has the responsibility to determine the credit Respondents' "natural cause" evidence deserves. However, the *Martin* court is patently (and I believe erroneously) concerned with "credible" evidence of a natural cause for the soreness, rather than substantial evidence, to determine if the presumption is rebutted, because the *Martin* court so held, as follows:

We hold that, once the party accused of soring the horse has produced credible evidence of a natural cause for the soreness, the agency must produce evidence that the horse was made sore by artificial means.

Martin v. United States Dep't of Agric., *supra*, slip op. at 13).

The *Martin* court's finding--that once Respondents have produced any "credible" evidence of a natural cause and expert testimony that the natural cause could cause (not even "did cause") the sensitivity, the presumption is (seemingly) automatically rebutted--could make enforcement of the Horse Protection Act extremely difficult.

This difficulty follows because the *Martin* court went on to place an almost insurmountable burden on the Department in cases where the presumption is rebutted. To wit, the *Martin* court recognized that USDA veterinarians found the soreness to be caused by artificial means, but the court found no specific record evidence of chemical or physical injury to the horse, as follows:

We recognize that the USDA veterinarians stated that the horse's soreness was from artificial means. The record does not demonstrate any evidence or reasoning to support the examining doctors' belief that the soreness was caused artificially. It appears from the testimony that they reached their conclusion without observing any specific evidence of chemical or physical injury to the horse. For example, they did not record observing scars, *see Rowland v. USDA*, 43 F.3d 1112 (6th Cir. 1995) or irritation, inflammation, or evidence of use of caustic chemicals. *See Elliott v. Administrator, APHIS*, 990 F.2d 140, 146 (4th Cir.), *cert. denied*, 114 S.Ct. 191 (1993); *Thornton v. USDA*, 715 F.2d 1508 (11th Cir. 1993). Their only specific observation was that the horse "showed excessive movement of the forelimbs along with tightening of the abdominal muscles" when palpated by Dr. Riggins, and

a "mild pain response" in her left foot and a "moderate pain response" in her right foot when palpated by Dr. Knowles. Dr. Riggins speculated at the hearing that such a response would not be due to a fungal infection that was not visible, but admitted he had no basis for this belief.

Martin v. United States Dep't of Agric., *supra*, slip op. at 13.

Thus, if Respondents introduce "credible natural cause evidence" combined with "expert supporting testimony," which combination automatically results in the rebutting of the soring presumption, the *Martin* court requires specific evidence of an artificial cause. The Department has never before been required to determine the exact methods used to sore a horse. This lack of a requirement to show specific evidence of soring was addressed in *Billy Gray*, where the Judicial Officer relied on the Eleventh Circuit's reasoning to reject an argument for such specific evidence, as follows:

Thus, Complainant's evidence is sufficient to raise the presumption of soreness under the Act; as both VMO's signed their affidavits on November 6, 1987, the day of the event, and the Summary of Alleged Violations form was completed on November 9, 1987, the third day after the event. Respondent's criticism of the methodology, length of time, and thoroughness of the USDA veterinarians' examinations--which Respondent condemns as *conclusory*--is not persuasive that the bilateral abnormal sensitivity found by both VMO's cannot support a finding of soreness. (Respondent's Appeal Brief at 22-25.)

In fact, the ALJ properly addressed this argument in her discussion of the kinds and amounts of "specific factual data" accumulated by the VMO's and recorded contemporaneously with their decision on *soreness* (Initial Decision at 18-19). Respondent argues that USDA did not allege and prove a specific cause of "sore," but, rather, formulated "indicia of pain" (this is the ALJ's term (*Id.*)) leading to a *conclusory* determination of a violation.

This argument is completely without merit. *The Department does not have to prove the specific cause of injury.* This has already been set forth, *supra*, in the excerpt from my decision in *Edwards* (citing *Gray* and *Holcomb*), which was recently *affirmed per curiam* by the Eleventh Circuit, whereupon the Supreme Court denied *certiorari*. Thus,

Respondent's derivative argument--that no *prima facie* case was made--also fails.

In re Billy Gray, 52 Agric. Dec. 1044, 1076 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994) (emphasis added).

This issue is of sufficient importance to the enforcement of the Horse Protection Act that the referenced language from *Gray* is reproduced below. In *Gray*, the Sixth Circuit affirmed the Department's reasoning based on *In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992). The language concerning *Edwards*, as set forth in *Gray*, is as follows:

The evidence that "Pride's Night Prowler" was sore relates in part on the observations by two USDA veterinarians and the Show's Designated Qualified Person of the reaction of "Pride's Night Prowler" to their palpation of the horse's front pasterns. Frequently, the evidence relates solely to observations based on palpation. As stated in *In re Edwards*, 49 Agric. Dec. 919, 919 (1990) (Order Denying Petition for Reconsideration of *In re Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 946 F.2d 1549 (11th Cir. 1991) (unpublished), *cert. denied*, 112 S.Ct. 1475 (1992)), "[i]n many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns." In the original decision in *Edwards*, in affirming the finding of the ALJ that the horses involved in the case were sore, based solely on evidence of the horses' reaction to palpation, the Judicial Officer stated (49 Agric. Dec. at 204-06):

Respondents contend, in particular, that no thermovision was used here, but thermovision has not been used by the Department at a horse show since about 1981 (Tr. 485-86). Ample precedent exists for finding that a horse was sore, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. See, e.g., *In re Purvis*, 38 Agric. Dec. 1271, 1274-79 (1979); *In re Whaley*, 35 Agric. Dec. 1519, 1523 (1976). As stated in *Purvis*, *supra*, 38 Agric. Dec. at 1273-74:

Both veterinarians determined that the horse was sored primarily because mild or light palpation of the pastern area of each front foot revealed a sensitive spot about the size of a dime on the medial surface of the bulb of the heel on the rear portion of each front foot. The sensitive spots were almost identically located on each foot, and were in the exact spot where the collar worn on the feet during the Show would "bang" as the feet moved up and down.

In *re Whaley, supra*, 35 Agric. Dec. at 1523, it is stated:

Respondent Groover testified that the horse was not sored. In addition, the respondents argued that complainant did not use a swab test, photographs or thermographs. . . .⁵

⁵As held in *In re A.S. Holcomb*, HPA Doc. No. 18, 35 Agr Dec [1165, 1167] (decided July 26, 1976), the professional opinion of a Department veterinarian based on his physical examination of a horse is sufficient to support a finding that a horse was sored.

In *In re Gray*, 41 Agric. Dec. 253, 254-55 (1982), it is stated:

Experience in many Horse Protection Act cases over the years demonstrates that many horses which have been sored show evidence of pain only on the anterior portion of the legs or only on the posterior portion of the legs. This is not unusual and does not discredit evidence that the horse was sore. *It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore.* [Footnote omitted.] Moreover, the statute raises a presumption that a horse is sore "if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs" (15 U.S.C. § 1825(d)(5)). There is no requirement that the

horse manifest abnormal sensitivity on both the anterior and posterior surfaces of its forelimbs or hindlimbs.

In *In re Holcomb*, 35 Agric. Dec. 1165, 1167 (1976), it is stated:

It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait. *It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.*

In re Billy Gray, *supra*, 52 Agric. Dec. at 1069-71 (emphasis added).

The preceding analysis should convince a reviewing panel that substantial evidence supports the Judicial Officer's determination that the alleged stumbling forms no explanation for the peculiar sored condition of Rare Coin.

Regarding the *Martin* analysis, the court's holding is that the Judicial Officer has the authority and responsibility to credit adequately the "natural cause" evidence, regardless of Respondents' expert testimony evidence. *Martin v. United States Dep't of Agric.*, *supra*, slip op. at 12. To wit, the Judicial Officer may find the presumption not rebutted if Respondents' natural cause evidence is not creditable (the court probably meant "plausible"), even if the Respondents' expert witness declares that such a natural cause *theoretically* could cause the detected soreness.

The future may hold the unhappy event that a reviewing panel decides to implement the following flawed *Martin* reasoning: thence forth the presumption of soreness is automatically rebutted once a Respondent puts on any credible/plausible evidence of a natural cause for a sored horse, combined with expert testimony that such natural cause is a plausible explanation for the soreness. If so, the Judicial Officer will nonetheless not acquiesce to *Martin's* mandate for specific evidence of the artificial means of soring the horse. Such a requirement is unprecedented in the case law, appears nowhere in the

statute, contravenes the intent of Congress, and, ultimately, could make it impossible to enforce the Horse Protection Act.

(3) **Regardless of the Rebuttable Presumption Requirements in *Martin*, Respondents Herein Are Subjected to the Exception in *Martin* for a Certain Pattern and Severity of Bilateral Sensitivity.**

Having said all this about *Martin*, Respondents herein are still not helped by *Martin*. This result follows from the particular language used by the VMOs to describe the pain suffered by Rare Coin. As set forth above, Rare Coin had "very extreme pain response" on both the front and back of the right pastern; and "extreme pain response" on the front and back of the left pastern. The sore spots were specifically described by the VMOs to be just where the chains would hit during a show, making it extremely likely that the horse would experience pain while moving. Dr. Riggins testified that he knew of no other way for Rare Coin to be sore than by caustic agents and chains. It could not happen by slipping or falling down in the show ring. (Tr. 144; see also Tr. 132, 142, 159.)

Under these circumstances, *Martin* has an exception to the specific evidence requirement, as follows:

Unlike other cases in which we have found "soring" that meets the requirements of the statute, the doctors here did not find that the horse's soreness was in such a pattern or so severe that there could be "no other means of producing this pattern of inflammation," *Gray*, 39 F.3d at 677, nor did the doctors find scars and lesions that indicate use of chemical agents and mechanical devices, *Fleming v. USDA*, 713 F.2d at 188.

Martin v. United States Dep't of Agric., *supra*, slip op. at 16-17.

I find that the particular pattern of bilateral, abnormal sensitivity and the severity of soreness exhibited by Rare Coin, as documented by the VMOs, are such that there could be no other means of producing this pattern of inflammation than by artificial means. Both USDA veterinarians testified that their professional opinion was that Rare Coin's pain had been caused by artificial means, and they excluded other possible causes of it. (Tr. 132, 142, 144, 159; and see Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief; and Memorandum of Points and Authorities in Support

of Complainant's Motion to Amend, pp. 14-18 (May 7, 1992).) Consequently, even if Respondents are allowed to rebut the presumption of soreness under section 6(d)(5) of the Horse Protection Act, (15 U.S.C. § 1825(d)(5)), and the Department has no specific evidence of soreness by artificial means, the *Martin* decision still allows Respondents to be held liable for soring Rare Coin because the pattern and the severity of the bilateral, abnormal sensitivity are such that there exists no other means of causing such a sores condition than by artificial means.

(4) *Prima Facie Case.*

As pointed out in section 3.a., *supra*, Complainant has put on evidence much more than sufficient to make out a *prima facie* case. In fact, Gary R. Edwards admits that the horse did not pass the USDA examination, and that the horse moved when palpated. (CX 5A.)

I find that there is a great deal of very accurate detail in support of the *prima facie* case in Complainant's Appeal of Third IDO, Part II, "The Respondents Did Not Rebut the Government's Evidence," pp. 27-42 (Nov. 20, 1995). I agree with Complainant's explication of the facts and evidence from the record, which support the *prima facie* case. Rather than increase the size of this already lengthy Decision and Order, I adopt pages 27-42 of Complainant's Appeal of Third IDO as my own and attach the pertinent part as Appendix B.

**c. Respondents' Remaining Arguments
Have No Merit.**

Respondents' remaining arguments are either without merit, or if meritorious, do not obviate Respondent Gary R. Edwards' violation. Respondents are correct that Gary R. Edwards and only Gary R. Edwards trained Rare Coin. I accept all of Respondents' arguments to the effect that Gary R. Edwards is solely responsible for any violation herein, and that Larry E. Edwards, Etta Edwards, and Carl Edwards & Sons Stables did not violate the Horse Protection Act.

(1) Only Gary R. Edwards Is Properly Found to Have Exhibited Rare Coin.

Specifically, Complainant's Appeal of Third IDO, pp. 47-49, cites the State of Georgia law of partnerships and various record exhibits and testimony to make the argument that general partners of a stable, and the stable, itself, must be held jointly liable for Horse Protection Act violations, such as the one here. However, Complainant cites neither a section of the Horse Protection Act, nor any pertinent case law, to support this argument. A finding that the general partners in Carl Edwards & Sons Stables and that Carl Edwards & Sons Stables violated the Horse Protection Act is not supported by the evidence in this record. Only Gary R. Edwards has been shown liable for the violation herein. This conclusion is based upon the wording of the Horse Protection Act and the case law, because the Horse Protection Act does not mention "trainers," but does mention owners, as follows:

The ALJ concluded that Complainant had wrongfully gone against Erma as trainer, when the evidence was that Jack actually trained the horse (Initial Decision at 5 (Findings 3, 4), 12 (Discussion)). However, it is irrelevant who trained the horse. What is important concerning the statute is whether *someone* "entered" the horse, which comes under section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B))—"entering . . . in any horse show . . . any horse which is sore," or whether an owner allowed the entry of a horse which is sore (15 U.S.C. § 1824(2)(D)). The Act says nothing about *trainers*, but does prohibit *owners* specifically from *allowing* the prohibited activities (15 U.S.C. § 1824(2)(D)). Realistically, it is usually the trainer who enters the horse, but it does not have to be, under the Act. I find that both Jack Kelly and Erma Kelly were each more than sufficiently involved in the *entry process* for both to have violated section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), by entering "Jo Jack's Pride" in the horse show, while the horse was sore, for the additional reasons below.

"'Entering,' within the meaning of the Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians." *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (1992), *aff'd*, 990 F.2d 140 (4th Cir. 1993), *cert. denied*, 114 S.Ct 191 (1993). "[T]he entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited." (*Id.* at 342). In affirming *Elliott*, the court stated (*Elliott v. Administrator, supra*, 990 F.2d at 145):

Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a show would seem to encompass all the requirements—including inspection—and the time necessary to complete those requirements.

Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. . . . We conclude that the USDA's interpretation of "entering" is reasonable and not contrary to Congressional intent and thus we are bound to give it effect. *Chevron U.S.A.*, 467 U.S. at 842.

In *In re [Billy] Gray*, 52 Agric. Dec. [1044, 1055, 1081 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994)], it is stated:

[E]ntry is a process which includes a variety of actions such as the paying of the entry fee, the preparation of the horse for exhibition, and the pre-show presentation of the horse for inspection to the Designated Qualified Person ("DQP") and to the Department's representatives.

Accord In re [Linda] Wagner (Decision as to Roy E. Wagner and Judith E. Ruzio), 52 Agric. Dec. 298, 314-16 (1993), [*aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)]; *In re [John Allan] Callaway*, 52 Agric. Dec. 272, 292-94 (1993).

From the foregoing, it is clear that *both* Respondents were very involved in entering the horse, all during the entry process. Thus, I find that both Respondents, as owners, allowed the entry of the horse—a fact

to which Respondents stipulated. Moreover, the Respondents both conducted actions which were integral parts of *entering* the horse (Findings 4 and 5), and both are found to have entered "Jo Jack's Pride."

In re Jack Kelly, 52 Agric. Dec. 1278, 1297-99 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994).

Here, the question is who "exhibited" Rare Coin. The Summary of Alleged Violations, VOWS Form 19-7, (CX 4), lists Gary R. Edwards as custodian (item no. 8), the person who transported Rare Coin (item no. 9), and the person who entered the horse (item no. 10). Respondents argue that only Gary R. Edwards entered and exhibited Rare Coin. I conclude that Gary R. Edwards unquestionably exhibited Rare Coin, but the evidence does not establish that Larry E. Edwards or Carl Edwards & Sons Stables entered or exhibited Rare Coin.

**(2) Pre-show Passage by DQP Meaningless to Post-show
USDA Inspection.**

I reject Respondents' next argument, to wit, that Rare Coin was proven to be not sore before the show, because the two attending USDA VMOs observed DQP Charles Thomas pass the horse for entry. There are a number of reasons why pre-show passage of a horse by a DQP is of no particular significance to the Department in determining post-show a sore horse, but, I make no attempt to list them all.

First, DQPs use a different methodology and terminology than USDA VMOs. Although from a medical standpoint "sensitivity" is not the equivalent of "sore," the DQP system uses it as synonymous with sore, as explained in *Young*, as follows:

9. Mr. Young presented the horse to the Designated Qualified Person (DQP),⁸ Harold White, for pre-show inspection. (CX 7; Tr. 295)

⁸The Department's regulations (9 C.F.R. § 11.7 (1993)) provide for the certification and licensing of Designated Qualified Persons pursuant to the Act at 15 U.S.C.A. § 1823(c) (West 1982 & Supp. 1993).

10. At the pre-show inspection, DQP White rejected "A Mark For Me" because the horse was sensitive in both front feet. (CX 2, 3; Tr. 385) [From a medical viewpoint,] "[s]ensitivity" is not the equivalent of "sore." ([Tr. 90,] CX 2) ["[B]ut the DQP system uses it as synonymous" with sore. (Tr. 90.) However, DQP White did not personally use the term "sensitive" as equivalent to the term "sore." (Tr. 385-390)]

In re Bill Young, 53 Agric. Dec. 1232, 1240 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision).

Moreover, "sore" is a legal term defined in section 2 of the Horse Protection Act; while "sensitivity" is important in determining the raising of the presumption under section 6(d)(5) of the Horse Protection Act. However, only a "fact-finder" makes the determination as to whether or not a horse was "sore." *Elliott, supra*, 990 F.2d at 146. A fact-finder is the ALJ or the Judicial Officer in these proceedings.

This proceeding's DQP, Charles Thomas, testified in the *Bobo* case, and it is clear from his testimony that just 4 days prior to the May 30, 1990, Money Tree Classic at issue herein, Mr. Thomas defined "sensitivity" to mean only that a horse repeatedly moved his feet in reaction to palpation of specific areas of both pasterns, even though the DQP official rule book defines "sensitive" in essentially the same language used to define "sore" in the Horse Protection Act, as follows:

6. "Ultimate Beam," a stallion, was examined by the Designated Qualified Person ("DQP") Charles Thomas at approximately 9 p.m., on May 26, 1990, prior to the scheduled competition. DQP Thomas excused the horse from competition after he found that "Ultimate Beam" was sensitive in both front feet. (CX 2) *Mr. Thomas testified that his finding of "sensitive" meant only that the horse repeatedly moved his feet in reaction to palpation of specific areas of both pasterns.* (Tr. 381-384)

7. A DQP is employed by the National Horse Show Commission, whose official rule book defines "sensitive" in essentially the same language used to define "sore" in the Act. Rule VIII, at page 96 of the rule book, defines "sensitive" in relevant part as follows:

Any other substance or a device that has been used by the person or on any limb of the horse or a person has engaged in

practice involving a horse as a result of such application, infliction], injection or 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. . . . (Tr. 371-372)

In re William Earl Bobo, 53 Agric. Dec. 176, 179 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995) (emphasis added).

Section 5 of the Horse Protection Act and USDA regulations specifically state that the DQP system is in place to prevent liability from exhibiting a sore horse to descend upon show management, (*see* 9 C.F.R. § 11.20(1990); and *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 48 n.3 (D.C. Cir.), *cert. denied*, 116 S.Ct. 88 (1995)), as follows:

The DQP is typically a person employed by the horse show to inspect horses and determine if the horses are sore. DQPs are utilized to protect the show management from liability under the Act. See 15 U.S.C. § 1824(3). The DQP here, Charles Thomas, was employed through the National Horse Show Commission.

This information shows that the ALJ's dictum is erroneous, when the ALJ states: "the 1976 amendments to the Act . . . brought the DQP program to the service of the Department. . . ." (Footnote omitted.) (Third IDO, p. 10.) In actuality, the DQP program serves the horse industry, not the Department, as noted above.

Moreover, passage of a horse pre-show by a DQP is of little importance to a post-show determination of soreness. The United States Court of Appeals for the Sixth Circuit has excellent reasoning in *Fleming, supra*, 713 F.2d at 187 n.11, which is particularly appropriate here, because the court lists the reasons why pre-show examinations are superseded by the post-show examination: (1) the chains may cause soreness, (2) anesthetics can mask pre-show pain until the show, (3) when all horses must go through pre-show examination, sheer numbers may make such examinations cursory, and (4) pre-show examinations are often conducted by local, non-veterinarian personnel, whose motivations can be very different from USDA's VMOs, as follows:

The appellants also argue as a part of their reliability argument, that only pre-show examinations should be used in determining

soreness. This is part and parcel of their contention that post-show evidence is so unreliable as to violate due process but further asserts that the pre-show exam is of such greater reliability that due process requires reliance on it alone. We are not convinced that due process requires such a result unless it is first shown that the post-show exam is in fact inherently unreliable in ways that cannot be measured by the ALJ in evaluating the evidence. There are a number of variables which literally demand the use of the post-show examination procedure. First, the use of action devices such as chains may cause the prohibited soreness during performance. Such injury, prohibited by the Act, cannot be uncovered in a pre-show exam. Second, use of a quick acting anesthetic prior to the pre-show exam may mask otherwise existing soreness until the horse is ready for actual showing. While there is no evidence that this practice was employed in the present case, its potential use is justification for utilizing post as well as pre-show examination. Third, the present regulations require that all horses to be shown must go through the pre-show screening. Because of the number of horses involved the pre-show exam is necessarily short and cursory. There are obvious cost advantages to everyone involved in selecting only horses that exhibit signs of pain during performance for a thorough post-show examination. Moreover, the pre-show exam is not always conducted by a veterinarian and always involves local personnel who must deal with the interested parties on a daily basis. Such personnel may be reluctant to disqualify a horse from being shown—especially since their decision is virtually unreviewable. For these reasons we find unpersuasive the appellants' suggestion that the pre-show examination must, as a matter of due process, be determinative on the USDA.

Fleming, supra, 713 F.2d at 187 n.11.

(3) Dr. Jay Humburg's Testimony Entitled to Little Weight.

Respondents cite Dr. Jay Humburg's testimony as a basis for finding that Rare Coin injured both front pasterns by stumbling during the show. I accord Dr. Humburg's testimony little weight. Dr. Humburg did not personally examine Rare Coin. Moreover, any viewer can observe the videotape, (RX 3), and determine whether the horse stumbled and thereby injured the front and back of both front pasterns. This situation is not one where the expert

was there, saw the event, and immediately examined the horse. We are able to see what Dr. Humburg saw, no more and no less. Therefore, Dr. Humburg's testimony contains very little persuasive content.

Of course, under the *Martin* decision, discussed, *supra*, even Dr. Humburg's expert opinion, that the videotape shows that the horse stumbled and that it is possible that Rare Coin thereby injured both front pasterns, (Tr. 448, 458), could be crucial, because *Martin* requires expert opinion endorsing a credible, natural cause to rebut the presumption of soreness. Respondents herein have two experts, Drs. Humburg and Baker, to fulfill that requirement. However, Dr. Baker's testimony for this analysis does not mention stumbling, as explained, *infra*. Further, Dr. Humburg's expert opinion is based solely upon a videotape; thus, his expert opinion is unpersuasive and entitled to little weight.

(4) Both USDA VMOs Evaluated Way of Going, Used Proper Palpation Technique, and Used Other Diagnostics.

Respondents' next argument is that USDA VMOs relied solely upon digital palpation and "barely saw the horse led up to them." This argument is rejected, for a number of reasons.

Both USDA veterinarians state in their affidavits that they watched the horse lead. (Dr. Riggins: "I watched the horse as it was being led and the horse did not lead completely normal." (CX 2, p. 3.) Dr. Knowles: "We watched this horse to check his way-of-going as he was led away. The horse moved freely with only a slightly tight rein." (CX 3.))

Dr. Riggins testified that watching the horse walk is part of his examination:

[BY MS. CARROLL:]

Q. Do you also look at the way a horse walks when you're not palpating it?

[BY DR. RIGGINS:]

A. I try to observe the horse when he's walking up to me. And I observe horses other -- when somebody else is going to examine them, I observe how they walk.

Q. And what kind of things are you looking for in the horse's way of walking?

A. Well, a free, easy kind of a gait and not pulling or he's walking like he's not kind of sore-footed or something. It's just a free and easy gait is one we like to see.

Tr. 88.

And, specifically, Dr. Riggins testified that he observed Rare Coin to walk with a "tight rein":

[BY MS. CARROLL:]

Q. Okay. This examination was post-show. Can you describe how the horse was walking?

[BY DR. RIGGINS:]

A. When he was being led away, the horse didn't walk -- he walked with a slight, tight rein and it wasn't completely normal with an easy-going gait. He led a little reluctant.

Q. And now when you say a "tight rein" what does that mean?

A. Well, they kind of have to -- kind of pulling the horse along there. He's not leading with a loose rein and easy-going, shifting motion or walking motion. He was a little bit tight walking.

Q. Could that be a result of his having been exhibited right before the examination?

A. Not normally, no. If the horse hadn't been exhibited, he'd still walk with -- walk normal.

Q. Is that a sign of soreness?

A. It could be a sign of soreness.

Q. Was that reluctance to lead pronounced or mild?

A. Mild.

Tr. 115.

Dr. Knowles similarly testified that his normal procedure for examining a horse is to "see the horse move either as he's coming up or going away from us." (Tr. 174.) Dr. Knowles also similarly described Rare Coin as "leading a little stiff, the rein slightly tight." (Tr. 208.)

In the Discussion, *supra*, entitled "Complainant's Case," I detail the basis for the USDA VMOs' determination that Rare Coin was sore; *e.g.*, reluctance to lead normally, walking with a slightly tight rein, not showing a free and easy gait, action devices (chains) banging precisely upon the sore spots causing pain while moving, and, upon palpation, excessive movement of the forelimbs, raising of the head, jerking of the feet, tucking of the abdominal muscles, withdrawing of the feet, and shifting weight to the rear legs. Significantly, the horse showed extreme take-away response and extreme pain response when the forelimbs were palpated. Thus, I find that the VMOs used other diagnostics and observed the horse walk and did not rely solely upon palpation to determine that Rare Coin was sore. The United States Court of Appeals for the Sixth Circuit has specifically reviewed the type of VMO examinations described and has stated that such examinations entail more than digital palpation, as follows:

Furthermore, a review of the Summary of Alleged Violation forms, J.A. 95, 102, shows that VMOs are required to do more than digital palpation when examining a horse. The forms call for an evaluation of factors such as "way of going," "general appearance, attitude and stance," "respiration," "perspiration," and "compliance with the 'scar rule.'" Drs. Clawson and Riggins indicated on the form which they filled out that Ultimate Beam's perspiration, respiration, general appearance, attitude, and stance were "ok," that the horse "move[d] out good (sic)," and that the horse was in compliance with the scar rule. J.A. 95. On the form filled out by Drs. Dienhart and Wood, they indicated that Ultimate Beam's way of going was "normal -- led freely on loose rein," and that the horse's general appearance, attitude and stance were "normal." J.A. 102. Thus, the examination by the VMOs in this case did consist of more than digital palpation.

Bobo v. United States Dep't of Agric., 52 F.3d 1406, 1413 n.2 (1995).

However, even if the examination did consist solely of digital palpation, the Judicial Officer has consistently relied upon the sufficiency of palpation evidence alone as a highly reliable method of determining whether a horse is sore. In the Second Remand Order in this proceeding, *sub judice*, the Judicial Officer used *Bobo, supra*, to make this point, as follows:

The courts have recognized that the palpation technique used by USDA's veterinarians is designed to distinguish between consistent and localized pain responses and responses because the horse did not want to be touched. For example, in *Bobo v. USDA*, [52] F.3d [1406, 1409, 1412, 1415 (6th Cir. 1995)], the court stated [Bracketed material in original, but happens to be true here, as well]:

In addition, both Drs. Clawson and Riggins [(Dr. Riggins is one of the two USDA veterinarians in the present case)] testified that in palpating a horse's pastern, they employ examination methods that would distinguish consistent and localized pain response to palpation from the reaction of a nervous or skittish horse, which generally would react to touching anywhere on its foot.

....

It is the Secretary's interpretation of his own regulations that evidence based on palpation alone may serve as the basis for a finding of "soreness" under the HPA. Brief of Respondent at 37. *See also In re Tuck*, 53 Agric. Dec. 261, 1994 WL 271821 at *21, *23 (1994) ("Frequently, in [HPA] cases, the evidence relates solely to observations based on palpation. [P]alpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the [HPA].").

....

Finally, although petitioners Bobo and Mitchell both testified that Ultimate Beam's responses which were observed by Drs. Clawson and Riggins at the Shelbyville show were the result of Ultimate Beam's nervousness or high strung nature,

both Drs. Clawson and Riggins testified that they use methods, such as coming back and repalpating a spot at which they obtained a response to palpation to see if the horse responds consistently, in order to distinguish a pain reaction from a reaction due to a horse that is nervous, high strung, or silly about its feet.

In re Gary R. Edwards, 54 Agric. Dec. 348, 365 (1995).

(5) **Gary R. Edwards' Rapid Presentation of Rare Coin to Post-show USDA Inspection and His Alleged Warning to Medical Staff of Stumbling Are of No Consequence--VMOs' Post-show Exam of Rare Coin Adequate.**

Respondents' next argument is that immediately after exhibiting Rare Coin, Gary R. Edwards took Rare Coin through post-show inspection, telling the DQP and both VMOs that the horse stumbled badly and hurt himself, but that the VMOs did not adequately examine Rare Coin post-show for injuries.

Respondents' argument lacks merit. Rare Coin was not examined because of injury or observed lameness; but, rather, because he tied for second place. Thus, Gary R. Edwards' self-described expeditious presentation of Rare Coin for examination and his information about stumbling is not significant.

Moreover, the trainer of a horse has no authority to instruct USDA VMOs on the proper method of examination for abnormal, bilateral sensitivity under the Horse Protection Act. I have already set forth in detail the thoughtful, methodical, and detailed examination process used by USDA VMOs in general, and, specifically, what was done in Rare Coin's examination. There is no significant or convincing evidence in this record that any injury to Rare Coin (I have already determined that Rare Coin did not stumble and was not injured) would have escaped the detailed physical examination of Rare Coin by two very experienced and expert USDA VMOs.

However, even if I were to find that Rare Coin had sprained his shoulders when the horse reared and bucked, it still would not exculpate Respondents. The pattern of the sore spots located on both the front and back of both front pasterns precisely located where the chains would hit during the show, and the severity of the pain responses by the horse when these areas were palpated, cannot be explained by sore tendons or sprains to the shoulders of Rare Coin. Both VMOs are very experienced and have examined thousands of Tennessee

Walking Horses, and both VMOs testified that such shoulder injuries, if they happened, would not explain the pain they found. (Dr. Riggins: Tr. 132; Dr. Knowles: Tr. 293-94, 314-15, 324-26.) (Also, see CX 4, item no. 36(6), which indicates that Drs. Riggins and Knowles found both of Rare Coin's forelegs' tendons "normal.")

(6) Dr. Randall Baker's Examination Is Remote in Time, Yet Is Very Consistent with USDA VMOs' Findings, Except Dr. Baker Unpersuasively Rules Out Chemical Soring.

Respondents' next argument is that Dr. Randall Baker's post-show examinations (May 30 and 31, 1990) revealed no heat, redness, swelling, scurf, or other inflammation, and that Dr. Baker testified that he did not believe Rare Coin was chemically sored.

Other than Dr. Baker's later opinion at the hearing about Rare Coin not being chemically sored, the USDA VMOs' examinations found the same thing as Dr. Baker: a lack of heat, redness, swelling, inflammation, or scurf. A careful reading of Dr. Baker's testimony, which is essentially past-recollection-recorded evidence ([By Judge Kane]: "It's apparent that the witness [Dr. Baker] must rely on the document to refresh his recollection" (Tr. 223)), and based upon RX 1 and RX 2 (the two "to-whom-it-may-concern" letters dated May 30 and 31, 1990), reveals that Dr. Baker thought it "impossible to perform a reliable examination of the pasterns by digital palpation," because Rare Coin "would almost continuously try to take his leg away from you anytime he was touched below the knee." (RX 1.) This observation is consistent with the USDA VMOs' description of Rare Coin's pronounced take-away response.

Moreover, in Dr. Baker's letters, conspicuous by its absence is any statement that the horse was injured by stumbling. In fact, no mention is made of stumbling at all, and Dr. Baker could not recall Respondents' mentioning a stumble before his examination of Rare Coin. ([By Dr. Baker]: "I don't recall that an injury was discussed or not discussed." (Tr. 219.))

I accord Dr. Baker's testimony and letters credibility, but little weight on the issues, for a number of reasons. Dr. Baker's letters mention neither stumbling nor chemical soring. But, Dr. Baker testified about both issues, as follows:

[BY MR. PRIAMOS:]

Q. What significance is the last sentence, "The pastern skin was clean and free of scurf or other evidence of inflammation"?

[BY DR. BAKER:]

A. In most cases, when an animal is sores chemically, so to speak, within 24 to 48 hours, you will have scurfing or flaking of the skin where this has occurred, a dandruff like condition where the skin flakes up.

Q. And there was none of that on this horse?

A. No, sir, there was not.

Q. And if the horse had injured himself in the ring in the canter by falling to its fetlock position, could the horse have been exhibiting these symptoms that you've described and not have the redness, heat or swelling of the tissues?

A. Yes, sir, that could be possible.

Q. Did Gary Edwards tell you that the horse injured himself in the ring?

A. Yes, sir, he did at some point in the examination. I'm not sure at what point, but he did.

Q. What did he tell you?

A. He told me the horse had stumbled and rocked back when he was cantering or attempting to canter.

Tr. 225.

Just a few moments later, at the hearing, Dr. Baker then testified that not knowing of the (alleged) injury to Rare Coin would not be necessary to differentiating between an injury and a chemically sores horse; and that there were enough other signs to use, as follows:

Q. (By Mr. Priamos) Right. So if you were going to determine, by digital palpation, if a horse were sore under the Horse

Protection Act, would you want to first know whether or not the horse was injured in the ring?

[BY DR. BAKER:]

A. That information could be helpful, but usually, there are enough signs, other than that information, to differentiate between an injury and a chemically sore horse.

Q. Let me ask it a different way. In your experience, what symptoms would a chemically sore horse exhibit?

A. A chemically sored horse would walk with an altered gait, they'll put more weight on their rear legs than they will their front legs, often will have their ears back, they're not alert. A chemically sored horse will usually have some swelling of the pastern tissues, may or may not see redness, sometimes can feel heat in the tissues, will respond to digital palpation usually in a uniform manner on both of the front pasterns, rectal temperature may be elevated one to two degrees and you may have a moderate elevation of respiration rate and heart rate on a chemically sored horse.

Tr. 228.

I note that Dr. Baker's belief that knowledge of an alleged injury is not necessary to a proper diagnosis is in agreement with Drs. Riggins' and Knowles' testimony that they did not have to be informed of a "stumble" and possible injury to be able to properly examine Rare Coin. (Tr. 131-33, 289-93.) Moreover, I have examined Dr. Baker's list of symptoms for a chemically sored horse, *supra*, and I find that Dr. Baker's list of symptoms is much too superficial, general, and vague to supersede the opinions of very qualified USDA VMOs who actually examined the horse at the end of the show. The Judicial Officer has consistently held that examinations by private veterinarians conducted after the USDA examination will not likely outweigh the disinterested USDA VMOs' conclusions, for many reasons. Usually, the main reason is the possibility of a quick-acting anesthetic, as follows:

Finally, Dr. Carver was not present when the horse was turned down by the DQP or found sore by the USDA veterinarians. I discount her findings to some extent because of the possibility that a

quick-acting anesthetic could have been applied to the horse's legs to mask the pain symptoms. The ALJ's statement that "no evidence of tampering was submitted" (Initial Decision at 26) misses the point. The possibility of tampering causes me to discount, to some extent, a later examination. As stated in *In re Bill Young*, 53 Agric. Dec. [1232, 1292 (1994), *rev'd on other grounds*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)]:

I. Possibility of Anesthetic Masking Pain for Subsequent Examinations.

In addition, I customarily discount to some extent the results of examinations conducted after the USDA veterinarians have determined that a horse is sore because of the possibility that a quick-acting anesthetic can be applied to a horse's legs to mask the pain symptoms. Congress recognized that "sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H.R. REP. NO. 1174, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1700). Although Respondents' experts expressed the view that they would have been able to detect such a practice, Dr. Knowles expressed the professional opinion that you might not be able to tell whether an anesthetic substance had been used, depending on the process (Tr. 120-21, 131-32; see also Dr. Crichfield's testimony, Tr. 225). Similarly, "Respondent's expert, Dr. Miller, agreed [at a hearing held in another case in November 1992] that a topical anesthesia might not, or probably would not, be detected (Tr. 417-18)." *In re McConnell*, 52 Agric. Dec. 1156, 1168 (1993), *aff'd*, 23 F.3d 407 (Table) (6th Cir. 1994) (text in WESTLAW). In the present case, the opportunity to apply an anesthetic substance was limited, since the horse was in public view during the brief period before it was examined by Respondents' experts. But even though other persons could possibly have seen Respondents or someone acting on their behalf take a few seconds to rub a cream or spray a product on the horse's pasterns, whether such persons would have made an issue out of the matter, if it happened, is problematical. [Footnote omitted.] But even without this possibility, I regard the views

of the two financially disinterested USDA veterinarians as more weighty than the views of the private veterinarians in view of the profit-motive discussed above, as well as the fact that the USDA veterinarians are more experienced than the private veterinarians in detecting soreness under the Horse Protection Act.

....

The Sixth Circuit recognized in *Fleming v. USDA*, 713 F.2d 179, 187 n.11 (6th Cir. 1983), that "use of a quick acting anesthetic prior to the pre-show exam may mask otherwise existing soreness until the horse is ready for actual showing." The same type of anesthetic can be applied immediately after the USDA examination to mask the pain during an examination by a private veterinarian.

In re C.M. Oppenheimer, 54 Agric. Dec. 221, 315-17 (1995).

This case, *sub judice*, presents a little different situation, however, because Dr. Baker found the horse's pasterns too difficult to examine. Rare Coin's obvious continued extreme sensitivity in his pasterns sometime after the show is consistent with the USDA VMOs' findings of a very sore horse. Thus, rather than evidence of the use of a numbing agent, we have Dr. Baker complaining of an inability to even touch Rare Coin below the knee. (RX 1.) Dr. Baker did not observe the horse from the time of the post-show examination until the horse was presented to him in the side area. The period of time elapsed appears to be about 30 minutes, (Tr. 452).

The Judicial Officer has, as long ago as 1985, stated that non-contemporaneous examinations by private veterinarians will not likely outweigh the USDA examinations, unless certain safeguards are followed:

In *In re Jackie McConnell*, 44 Agric. Dec. 712, 726 (1985), *vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order), *printed in* 51 Agric. Dec. 313 (1992), I stated that it is not likely that any single examination conducted after the USDA examination will ever outweigh the Department's examination unless certain safeguards are followed, *viz.*:

He [Dr. O'Brien] further candidly conceded that after the horse was examined by the Department's veterinarians, an

anti-inflammatory drug could have been given orally or by injection, and that he would not have been able to detect such a drug (Tr. 549).

Considering all of the circumstances, here, as in *In re Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983), in which a later examination was also conducted by Dr. O'Brien, Dr. O'Brien's subsequent examination is not given as much weight as the more immediate examination by two USDA veterinarians. In *Thornton*, the Judicial Officer suggested (41 Agric. Dec. at 894 n.11):

If horse owners and trainers are interested in having an examination by private veterinarians of horses found sore by the Department, I would suggest that their associations have two or more private veterinarians present at horse shows to examine horses *immediately* after the USDA examinations. If this is done, the Department should provide a Department employee to keep continuous watch over the horses to see that they are not tampered with. Perhaps the Department could immediately reexamine any horse not found sore by the private veterinarians, in the presence of the private veterinarians. Possibly, one or more private veterinarians could observe the initial USDA examinations (that would depend on whether their presence would interfere too much with the examinations). The Department should make every reasonable effort to accommodate a responsible effort to afford horse owners and exhibitors the right to have a meaningful independent examination.

Unless some such procedure is followed by horse owners and trainers, it is not likely that testimony by a single veterinarian [as to an examination] conducted at some later time will outweigh testimony by two or more disinterested USDA veterinarians as to their examinations conducted shortly after a show.

In re C.M. Oppenheimer, *supra*, 54 Agric. Dec. at 317-18.

To summarize, Dr. Baker's testimony was based upon past-recollection-recorded evidence. The letters relied upon mention neither stumbling nor chemical soring. Dr. Baker's testimony on the facts is consistent with those facts found by the USDA VMOs. Dr. Baker opined that Rare Coin's sensitivity was not caused by chemical soring; but, that a stumble *could* cause the soreness found by USDA. Although I find Dr. Baker a credible witness, his testimony deserves little weight, due to the remoteness in time of his examinations, and the speculative nature of his views based, as they were, not on actual evidence, but, on opinion only.

(7) The Argument That There Is a Lack of Scientific Studies to Support Palpation Is Without Merit.

Respondents' next argument is that no scientific studies support digital palpation as a means to detect soreness under the Horse Protection Act. This argument is rejected for a number of reasons. (*See also* section III.B.1.b., *infra*, which more fully analyzes this point.)

First, this argument was included by the ALJ, *sua sponte*, and was not one originally briefed and argued by the parties. Respondents' counsel did question Dr. Riggins about scientific studies, but Dr. Riggins responded that digital palpation has been used for over 20 years to detect soreness with excellent results, whether one calls that scientific studies or not. (Tr. 133-37.)

Moreover, Complainant's Appeal of Third IDO, pp. 21-25, addresses this issue by noting that "[n]othing in the Act, the Rules of Practice, or the case law requires that the USDA's inspection procedure must meet 'generally accepted scientific methods' and the ALJ cites no authority for such a requirement." I agree with Complainant, and adopt the reasoning at pages 21-25 of Complainant's Appeal of Third IDO.

Furthermore, the requirement of "scientific evidence" by an ALJ has been rejected by the Judicial Officer, as follows:

In the Initial Decision, pp. 27-32, Judge Baker apparently gave weight to the fact that there was no "scientific" or "objective" evidence to substantiate the professional opinions by complainant's experts that the horse was sore when it was shown on November 12, 1976. Specifically, the complainant's experts detected no odor of oil of mustard, took no swab of the horse's pasterns and did not remove any tissue for biopsy. If Judge Baker gave any weight to those matters, that

was error. It is to be expected that a person who sores a horse will wash the chemical away before the horse is exhibited so that no trace of the chemical will remain to be detected. As stated in *In re A. S. Holcomb*, 35 Agr Dec 1165, 1167 (1976); see, also denial of petition for reconsideration, 35 Agr Dec 1347, 1349 (1976):

It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sores by the use of some chemical or mechanical agent, for the purpose of affecting its gait. It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.

In re Richard L. Thornton, 38 Agric. Dec. 1425, 1428 (1979) (Order Remanding Case).

Finally, I note that, throughout the testimony, Respondents' expert veterinarians testified that they, themselves, use digital palpation in their practices. Ironically, Respondents' counsel complains that USDA VMOs did not *palpate* Rare Coin's shoulder to detect the alleged injury. (Tr. 133-34, 141-42, 391.)

(8) USDA and Its Witnesses Are Not Biased Against Tennessee Walking Horses' Owners, Exhibitors, or Trainers.

Respondents' final argument is that USDA and its government witnesses are biased against the owners, exhibitors, and trainers of Tennessee Walking Horses, and that USDA VMOs do not check the other breeds of horses at multi-breed shows. Respondents argue that this negative attitude results in a bias, which just assumes that Tennessee Walking Horses, like Rare Coin, are sore. (Tr. 140-41.) This argument is totally devoid of merit and is rejected for the reasons below.

I have very recently issued a Decision and Order regarding the soring of a pleasure horse, and, while I dismissed the case for reasons not pertinent here, this prosecution refutes Respondents' argument. (*In re Jim Singleton*, 55 Agric. Dec. ___ (July 23, 1996.)

Moreover, Dr. Riggins testified herein at length that the other breeds are examined, if they are in a show, and they place first or second:

Q. (By Mr. Priamos) In 1990, how many horses, other than Tennessee Walking Horses and Racking Horses, did you examine using the palpation test at a horse show?

[BY DR. RIGGINS]:

A. Well, I examine all horses, including colts, that show in a show. Now, if they had any other horses there, I examine them just like I do the Tennessee Walking Horse.

....

Q. And you're telling this Court you have no idea if you checked one horse or a million horses that were other than Tennessee Walking Horses and Racking Horses in 1990 at horse shows?

A. Of all the shows I went to, I don't know what kind of horses they had at all these shows, but I examined all the horses for the winning in all the classes of all the classes. So I don't know what other horses were there besides Tennessee Walking Horses.

Q. Are you saying you can't determine if a horse is other than a Tennessee Walking Horse?

A. Yes, we have examined gaited horses and a lot of gaited horses we've examined in the show.

Q. What horse show in 1990 did you examine one gaited horse?

A. Whatever -- if there's any gaited horses in the show, I examined them.

....

Q. Did you have a preconceived notion that this horse [Rare Coin] was sore and not injured before you examined it?

A. No, sir.

Tr. 138-41.

Having established that USDA examines various breeds of horses at these shows, it must be stated that Tennessee Walking Horses are the Department's focus. The Tennessee Walking Horse is prized for its high-stepping, showy gait called the "biglick," and reviewing courts have established that this should be the focus of USDA's enforcement efforts under the Horse Protection Act:

Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made "sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal "sore" gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse "sore" is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

Elliott v. Administrator, Animal & Plant Health Inspection Service, 990 F.2d 140, 144 (6th Cir.), *cert. denied*, 114 S.Ct. 191 (1993). *Accord Baird v. United States Dep't of Agric.*, 39 F.3d 131, 132 n.1 (6th Cir. 1994.)

Similarly, the Judicial Officer has considered this bias argument, as follows:

Respondents' brief advances an argument that appears wholly misplaced. They point out that the Department's enforcement efforts

are primarily directed against the soring of Tennessee Walking Horses and argue that because no case has ever been pressed involving any other kind of horse, the Department is discriminating against owners of Tennessee Walking Horses in violation of the fifth and fourteenth amendments to the United States Constitution.

This unusual argument is simply answered by the fact that the soring techniques proscribed by the Horse Protection Act are used primarily on Tennessee Walking Horses. The legislative history of the Act pertains exclusively to the soring of this breed and indicates that the Act was designed specifically to protect this type of horse. H.R. Rep. No. 1597, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4870-4872. Tennessee Walking Horses are judged on the basis of their performance of the "big lick," a stride that, unfortunately, can be improved by inflicting so much pain in a horse's forefeet that it prefers to hold them high rather than let them touch the ground. The reliable testimony of Dr. Cook, a former head of the APHIS Horse Protection Program, indicates that performance standards based upon gait--and the corresponding training techniques--are generally associated with Tennessee Walking Horses and racking horses. The testimony further indicates that the Department's enforcement resources are limited and are directed at Tennessee Walking Horses and racking horses because soring of other breeds of horses is not a significant problem. Tr. 171. APHIS has therefore properly focused on Tennessee Walking Horses and racking horses in its enforcement of the Act.

In re Pat Sparkman, 50 Agric. Dec. 602, 611 (1991).

III. THE THIRD INITIAL DECISION AND ORDER IS REVERSED AND VACATED.

The Third IDO is reversed and vacated for the reasons below.

A. Introduction.

This proceeding has been twice remanded to the ALJ. The ALJ has issued three Initial Decisions and Orders, and the Judicial Officer has issued two Remand Orders, as follows:

- | | |
|--|-----------------|
| 1. First Initial Decision and Order
(First IDO) | June 26, 1992 |
| 2. First Remand Order (JO FRO) | August 24, 1993 |
| 3. Second Initial Decision and Order
(Second IDO) | June 30, 1994 |
| 4. Second Remand Order (JO SRO) | June 9, 1995 |
| 5. Third Initial Decision and Order
(Third IDO) | August 11, 1995 |

The Judicial Officer's August 24, 1993, First Remand Order (hereinafter JO FRO) was predicated upon the ALJ's refusal in the First Initial Decision and Order (hereinafter First IDO) of June 26, 1992, to allow Complainant to amend the Complaint to conform to the proof. My review of this exchange reveals that the Judicial Officer was correct, in all respects, to reverse, vacate, and remand the First IDO.

The Judicial Officer's Second Remand Order (hereinafter JO SRO) of June 9, 1995, catalogued the errors in the ALJ's Second Initial Decision and Order (hereinafter Second IDO) of June 30, 1994. My approach herein is to determine just where the ALJ failed in the Third IDO of August 11, 1995, to follow the Judicial Officer's specific guidance in the JO SRO. This method obviates the explication of the ALJ's Second IDO, which, after all, was reversed and vacated in the JO SRO. Thus, the ALJ's Third IDO is reversed and vacated for the following reasons (all of the points in the Third IDO have been considered, and are hereby reversed and vacated, even if an individual point is not separately discussed herein).

B. Third IDO Fails to Correct Errors As Listed in JO SRO, and Commits More Errors.

Generally, the Third IDO capitulates on some of the items reversed by the Judicial Officer in JO SRO; continues to proffer some erroneous items; invents new erroneous items; removes most of the Discussion from the Third IDO, which supported the Second IDO's Findings of Fact; adds new language to Findings of Fact Nos. 9 and 14; and adds new Finding of Fact No. 15. The Third IDO offers the appearance of responding to and perhaps acquiescing to the mandates of the JO SRO, but does not really respond or acquiesce.

1. Two New Palpation Theories Advanced in Third IDO Are Rejected.

The Third IDO advances two new palpation evidence theories, which were not advanced in either the First IDO or Second IDO: digital palpation is a "rule" which was not properly implemented according to the Administrative Procedure Act's rule making process, and palpation evidence has no "scientific" basis or clinical experience to support it. Both of these newly advanced theories are without merit and are hereby rejected, for the reasons below.

a. Digital Palpation Need Not Be Subjected to APA Rule Making.

The ALJ's new attack on palpation evidence is based upon his finding that a rule making must be undertaken and completed: "notice and rule making have never been followed to address the reliability of palpation as the sole method to detect soiling." (Third IDO, p. 13). However, in a recent case in which this issue was raised, I found that rule making was not necessary:

4. Respondent contends that, in relying on palpation, USDA has created a substantive rule without following the required notice-and-comment rule making process. Palpation, however, is [a procedure used to examine horses to determine compliance with the Act and regulations issued under the Act. A "rule" under the Administrative Procedure Act is defined as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. § 551(4).

Rule making is defined as the "agency process for formulating, amending, or repealing a rule." (5 U.S.C. § 551(5).)

The Attorney General's Manual on the Administrative Procedure Act describes rule making, as follows:

Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.

Attorney General's Manual on the Administrative Procedure Act 14 (1947).

The use of palpation to determine whether a horse manifests abnormal bilateral sensitivity in its forelimbs or hindlimbs is not an agency statement of future effect designed to implement, interpret, or prescribe law or policy, nor does palpation describe the organization, procedure, or practice requirements of USDA. Palpation does not relate to policy-making, nor does it regulate conduct. Rather, palpation is a method of examination, or investigation, for the narrow purpose of determining sensitivity in the limbs of horses. The Department's use of palpation is not a "rule" under the Administrative Procedure Act. Therefore, the use of palpation need not be preceded by rule making in accordance with the notice-and-comment procedures in the Administrative Procedure Act, (5 U.S.C. § 553).

Nonetheless, USDA did engage in a rule making proceeding in which it proposed the amendment of the definition of the word "inspection" as used in the regulations issued under the Act, (9 C.F.R. pt. 11), to include a reference to "palpating," as follows:

"Inspection" means the examination of any horse or horses and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary to determine whether any horse and any records pertaining to any horse are in compliance with the Act and regulations. An inspection of a horse may include, but is not limited to, visual examination of the horse and its records, actual physical examination including touching, rubbing, palpating and observation of the signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection for purposes of ascertaining compliance with the Act and regulations.

43 Fed. Reg. 18,514,18,525(1978).

The public was given 32 days in which to comment on the notice of proposed rule making. Forty-seven comments were received, none of which related to the inclusion of palpation as a method of inspecting a horse to determine whether it is in compliance with the Act and the regulations issued under the Act. Except for minor editorial changes, the definition of the word "inspection," as proposed, was adopted as a final rule effective January 5, 1979, and continues to read, as follows:

"Inspection" means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

44 Fed. Reg. 1558, 1562 (1979) (codified at 9 C.F.R. § 11.1.)]

Respondent argues that even though the regulations refer to palpation, they do not define the "protocol" [to be used to palpate horses,] except for [the protocol to be used by the] DQPs. (9 C.F.R. § 11.21[(a)](2).) The record in this case shows that palpation is a diagnostic procedure taught in veterinary medical school and is used not only by doctors of veterinary medicine and DQPs, but also by laypersons. Horse trainers [Mr.] Jimmy Acree and [Mr.] Jamie Hankins indicated that they knew the "protocol" for palpating horses, [(Tr. 192-93, 228, 241-43, 258-59),] while Respondent . . . said he knew the pain signs to look for when a horse is palpated. (Tr. 324.) Respondent's wife also apparently knew how to palpate. (Tr. 243.) Therefore, as palpation is a commonly known, accepted, and used diagnostic tool, there appears no need to spell out a "protocol" with which persons in the horse exhibition industry are already familiar.

This "protocol," as described at the hearing (and as described by the court in *Young, supra*, [53 F.3d] at 729-30), [consists of] pressure applied with the ball of the thumb to the horse's pastern areas while looking to see if there are any objective reactions or signs of pain by the horse, such as withdrawing its foot or tightening of its stomach muscles.

If there is a reaction, the examiner, as Drs. Bourgeois, Price, and Miller all emphasized, returns to the area causing the reaction to determine if the horse displays a consistent or repeatable bilateral "abnormal sensitivity." If the reaction is consistent, it is evidence of pain, and, [in accordance with section 6(d)(5) of the Act, (15 U.S.C. § 1825(d)(5)),] raises the presumption that the horse is sore. The presumption may, of course, be rebutted. . . .

In short, neither palpation nor the "protocol" [for conducting palpation] is a substantive rule that has to undergo the . . . rule making process. . . .

In re Mike Thomas, 55 Agric. Dec. ____, slip op. at 16-19 (July 15, 1996).

Palpation evidence is not a "rule," and the ALJ's requirement of a rule making is in error and is rejected.

b. Palpation Need Not Have a Scientific Basis.

The ALJ's other new palpation theory in the Third IDO is that one of Respondents' expert witnesses, Dr. Humburg, based his opinion that "palpation alone is not sufficient to detect soring," (Finding of Fact No. 15), on "scientific evidence." (Third IDO, p. 21.) Moreover, the ALJ also adds to the Third IDO's Finding of Fact No. 9 the sentence: "Drs. Riggins and Knowles did not advance any scientific grounds to support their opinion," (*id.* at 7). In order to respond properly to this new and erroneous conclusion, both the completely new Finding of Fact No. 15 and the characterization of Dr. Humburg's testimony should be displayed:

15. The testimony of Dr. Humburg, Professor of Animal Surgery and Medicine, Auburn University, a certified member of the American Board of Veterinary Practitioners in Equine Practice, (Tr. 444) and an author of the Auburn Study, reveals there are no scientific studies to support the conclusion that palpation alone is a protocol sufficient to detect the practice of soring prohibited by the Horse Protection Act. (Tr. 446-447)

Third IDO, p. 8.

Dr. Humburg testified that palpation alone is not sufficient to detect soring. (Finding #15) As has been found, his qualifications are unique,⁹ and significant weight is assigned to his testimony. The finding permitted by Dr. Humburg's conclusion is based on scientific evidence, in contradistinction to the Department's policy which appears to be based on the execution of predetermined goals. The Department's insistence that "... there is no debate as to the sufficiency of palpation evidence alone. . ." *Gary Edwards, et al.*, (second remand) slip op. at 18, does not recognize that such a proclamation has no stature from scientific principles, and no standing under the Administrative Procedure Act, as has been herein noted. . . .

⁹The study Dr. Humburg co-authored is identified in *Kim Bennett, et al.*, H.P.A. Dkt. No. 93-6, Initial Decision at n. 25.

Third IDO, p. 21.

The ALJ's Finding of Fact No. 15, *supra*, states that Dr. Humburg is "a certified member of the American Board of Veterinary Practitioners in Equine Practice," but, Dr. Humburg's testimony actually only claims that he is "*certified by the American Board of Veterinary Practitioners in Equine Practice.*" (Tr. 444.) If being certified by this Board means that one is actually on the Board, it is not evident in this record. The ALJ invests Dr. Humburg with expertise and stature, neither supported by the record nor even claimed by Dr. Humburg.

Similarly, the study referenced in footnote 25 of the ALJ's Initial Decision and Order in *Bennett*, HPA Docket No. 93-6 (Feb. 28, 1995), to which the ALJ refers in footnote 9 of his Third IDO (*Edwards*), merely states:

25/ Purohit, Ram C. "Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors (Summary of the Research from September, 1978 to December, 1982)." School of Veterinary Medicine, Auburn University. 53 Fed. Reg. 14,779 (April 26, 1988).

Dr. Humburg is not even listed as a co-author of this study. Dr. Humburg testified that he became Board certified in Equine Practice in 1981, (Tr. 444). The study referenced in footnote 25 is stated to be a summary of research conducted between September 1978 and December 1982, (Tr. 444). Moreover, the purposes, principles, and outcome of this study are not explained in this record, and I am at a loss to understand how the ALJ could consider this information persuasive regarding the issue of Dr. Humburg's expertise.

When Dr. Humburg is asked about the Auburn Study, his answer is anything but an expert opinion, as follows:

Q. For how long have you dealt with Tennessee Walking Horses?

A. Well, I've had a considerable association with them for the last 18 years during the time that I have returned to the staff at Auburn University.

Q. Are you one of the co-authors of the Auburn study?

A. I worked with Dr. Perolak [sic] on that study. I was --

Q. Who was this study prepared for?

A. The study was prepared for the United States -- for the
USDA.

Q. And what was the purpose of that study?

A. Initially it was to validate the use of thermovision as a
means of determining pain in the lower legs of deeded [sic] horses.

Tr. 445. The reader has no indication of Dr. Humburg's actual expertise.

In any event, as the ALJ wrote in his Initial Decision and Order in *Bennett*, he was aware that the Judicial Officer has determined the Auburn and Ames studies to be "outdated, irrelevant and no longer valid" (the ALJ's words) (Initial Decision and Order, HPA Docket No. 93-6 (Feb. 28, 1995), at 23-24).

The ALJ apparently based this *Bennett* reasoning on *In re Bill Young*, *supra*. In *Young*, the Judicial Officer explains why the Ames and Auburn Studies are obsolete:

[T]he Ames study . . . and a similar study done a few years later at Auburn University, both of which are relied on by Respondents' experts . . . , are no longer relevant to today's soring practices because both studies were done before the Scar Rule was promulgated in 1979 The Scar Rule creates an irrebuttable presumption of law that a horse born on or after October 1, 1975, having specified lesions, is a sore horse, in violation of the Act. [Footnote omitted.] As a result of the Scar Rule, the soring that is seen today is completely different from the soring seen in the mid-1970's, which formed the basis for the Ames and Auburn studies. The present soring is far more subtle, "mainly of the skin and the immediate underlying tissues, the subcutaneous tissues there, not involving the deeper tissues of muscle or bone or tendons" . . . , which were involved during the 1970's. . . . [Footnote omitted.]

In re Bill Young, *supra*, 53 Agric. Dec. at 1270.

Although the United States Court of Appeals for the Fifth Circuit reversed the Judicial Officer's decision in *Young* (on other grounds), the court did not address the Ames and Auburn Studies. Moreover, since the Fifth Circuit's

decision in *Young*, the two Judicial Officer decisions discussed below (*Bennett* and *Thomas*) have addressed the Department's position *vis-a-vis Young*.

Before his retirement in January 1996, former Judicial Officer Donald A. Campbell wrote, in affirming this ALJ's dismissal of the Complaint in the *Bennett* Initial Decision and Order, that *Young* would not be followed by the Department. *In re Kim Bennett*, 55 Agric. Dec. 176, 205, 218-19 (1996). The *Bennett* decision is also notable because Judicial Officer Campbell disagreed "with practically everything stated in [Judge Kane's] 47-page Initial Decision" and wrote a Decision and Order refuting Judge Kane's *Bennett* Initial Decision. *Id.*, 55 Agric. Dec. at 177.

More recently, I decided in the *Thomas* case that, even if the appeal were to the Fifth Circuit, the *Young* case would not be followed:

c. *Young* Was Erroneously Decided

Even if appeal herein went to the United States Court of Appeals for the Fifth Circuit, and the record herein was indistinguishable from that in *Young*, the split decision (2-1) that a reaction to digital palpation alone is not a reliable indicator that a horse is "sore" within the meaning of the Act is erroneous and would not be followed by this Department. *See In re Kim Bennett, supra*, [55 Agric. Dec. at 185]. The Department's many other reasons for rejecting *Young* are fully articulated in *In re Kim Bennett*, which is attached hereto as an Appendix.

In re Mike Thomas, supra, slip op. at 50. (Both *Bennett* decisions, the ALJ's Initial Decision and Order (Feb. 28, 1995), and the Judicial Officer's Decision and Order (Jan. 3, 1996), are attached as Appendices C and D, respectively.)

Therefore, on this record, I must disagree with the significant weight the ALJ erroneously assigns to Dr. Humburg's testimony. Moreover, I reject the ALJ's characterization of Dr. Humburg's testimony that Dr. Humburg "reveals that there are no scientific studies to support" palpation alone as a means to detect soring. (Third IDO, Finding of Fact No. 15.)

Dr. Humburg did not testify as declaimed by the ALJ. Rather, Dr. Humburg's testimony was in response to a question, and this is the extent of it, as follows:

[BY MR. PRIAMOS:]

Q. And are there any scientific studies to show whether the digital palpation tests can determine if a horse is sore under the Horse Protection Act?

[BY DR. HUMBURG:]

A. I don't believe there are.

Tr. 446.

It was error for the ALJ to conclude that no scientific studies exist to support palpation alone as a means to detect soring on the basis of this one-sentence question and one-sentence "belief" statement.

The ALJ also committed error by stating that "[t]he finding permitted by Dr. Humburg's conclusion is based on scientific evidence in contradistinction to the Department's policy which appears to be based on the execution of predetermined goals." (Third IDO, p. 21.) There is no support in the record for this statement that Dr. Humburg's one-sentence answer to a "scientific studies" question somehow becomes a conclusion upon which a "scientific-evidence-based" finding is made by the ALJ.

Finally, on this point, the ALJ attempts to infuse Dr. Humburg with some expertise or ability beyond USDA VMOs. The ALJ's statement, *supra*, which implies that Dr. Humburg's conclusions are based upon "scientific evidence," while USDA VMOs' conclusions are not, is completely erroneous, for at least two reasons. First, Dr. Humburg did not physically examine Rare Coin on the night of May 30, 1990; in fact, Dr. Humburg never examined Rare Coin in person. The fact is that Dr. Humburg's testimony is based totally upon watching the autoptic evidence videotape, (RX 3). I must observe how unscientific any hard and fast opinions on a particular horse's soreness must necessarily be when based solely on videotape. In fact, I have made my own determinations based upon RX 3, but they are not scientific.

Moreover, had Dr. Humburg examined Rare Coin, the record reveals that Dr. Humburg would have used the same diagnostic techniques used by USDA VMOs, as follows:

[BY MR. PRIAMOS:]

Q. What else would you use besides the palpation test?

[BY DR. HUMBURG:]

A. I'd watch the horse move. I would, of course, palpate the animal. If I had it available, I would use thermovision to get some idea as to the amount of heat in the area. I'd try to make sure that the animal wasn't sore from -- or lame -- from some other reason.

....

Q. Now, if -- presume that Mr. Edwards told these government vets before their palpation exam that the horse stumbled twice and might've injured itself in the ring. What kind of tests should the vets have used to determine whether or not the horse was injured in the ring?

A. If I were -- had been in their shoes, I believe I would have asked to have the horse moved so that I could observe the manner in which he moved.

I, of course, would've done the normal routine of palpation of the pastern area. But then in addition to that, I would have palpated the entire limb, flexing and extending the joints so that I could have an appreciation for whether he had injured some other area.

Tr. 447, 451.

The examination described by Dr. Humburg differs in no significant way from the examination conducted by USDA VMOs.

2. The Four Major Errors From the Second IDO Are Not Corrected.

The JO SRO addresses four major errors in the Second IDO: (1) the ALJ gave slight or no credibility to USDA VMOs, (JO SRO, 54 Agric. Dec. 348, 351-63 (1995)); (2) the ALJ inferred that testimony of additional USDA experts, if called, would be adverse to Complainant, (JO SRO, *supra*, 54 Agric. Dec. at 363-65); (3) the ALJ expressed a number of erroneous views as to palpation evidence, (JO SRO, *supra*, 54 Agric. Dec. at 365-68); and (4) the ALJ assigned great credibility to Respondents' witnesses, (JO SRO, *supra*, 54 Agric. Dec. at 368-69).

a. Slight or No Credibility to USDA Witnesses.

The JO SRO states that "[i]t was reversible error for the ALJ to assign slight or no credibility to [USDA VMOs'] testimony solely because of their lack of present recollection at the time of the hearing" (JO SRO, *supra*, 54 Agric. Dec. at 351). Nevertheless, proper scrutiny of the Third IDO reveals the ALJ's finding that USDA VMOs' testimony and affidavits are not "substantial evidence to . . . reach the conclusion . . . of soring . . . because both Dr. Knowles and Dr. Riggins had no, or scant, recollection, of what they saw and heard." (Third IDO, pp. 25-26.) Moreover, the ALJ not only retains the language of Finding of Fact No. 14 appearing in the Second IDO, which was specifically reversed by the Judicial Officer's language in the JO SRO, but the ALJ makes additional erroneous findings in Finding of Fact No. 14 in the Third IDO. The ALJ's erroneous findings in Finding of Fact No. 14 in the Third IDO is reversible error. I totally agree with the Judicial Officer's detailed explication of this issue in JO SRO, showing the ALJ's error. (JO SRO, *supra*, 54 Agric. Dec. at 351-63.) Since that in-depth analysis is part of the record, it need not be replicated here.

b. ALJ's Inference That Testimony of Additional USDA Experts, If Called, Would Have Been Adverse to Complainant.

The Judicial Officer also found reversible error when the ALJ drew an inference (see the ALJ's language in Second IDO, pp. 13-14) that the testimony of additional USDA experts, if called, would have been adverse to Complainant, (JO SRO, *supra*, 54 Agric. Dec. at 363). Since both USDA VMOs who examined Rare Coin testified at the hearing, there is no basis for drawing an adverse inference. However, the ALJ again makes the very same adverse inference against Complainant, merely changing the wording slightly. (Third IDO, p. 29.) The ALJ's adverse inference is reversible error.

c. Palpation Evidence and ALJ's Erroneous or Incomplete Views.

The ALJ renews his attack on palpation evidence in the Third IDO, based this time on the recent *Young* case, *supra*. (Third IDO, pp. 21-23.) I conclude that the ALJ's palpation analysis is devoid of merit, because it is based upon both a number of false premises and bad case law. (The *Young* case.)

As detailed above, Dr. Humburg's conclusions were not based upon "scientific" evidence. (See III.B.1.b., *supra*.) The Ames and Auburn Studies are obsolete, as explained above. Dr. Humburg saw the videotape, (RX 3), but never actually examined Rare Coin. The ALJ's "great credibility" accorded Dr. Humburg's testimony, (see Finding of Fact No. 14 in Second IDO and Third IDO), was questioned by the former Judicial Officer in the JO SRO, *supra*, 54 Agric. Dec. at 369-71. I find that the great credibility accorded this witness is misplaced.

The ALJ's language about the Department's "policy" being based upon "predetermined goals," (Third IDO, p. 21), is obviously a reaction to the dicta in *Young*. The ALJ uses the *Young* (5th Circuit) language to attack both the *Crawford* (D.C. Circuit) and the *Bobo* (6th Circuit) decisions. Both *Crawford* and *Bobo* correctly decided the palpation issue. In the Fourth Circuit, the *Elliott* decision correctly decides the palpation issue; while in the Eleventh Circuit, the *Thornton* and *Edwards* decisions are correct. The other circuits, which have a palpation decision, are also compatible with the Department's position. However, an aberrational case like *Young*, if not corrected, would make it extremely difficult to enforce the Horse Protection Act in those jurisdictions in which *Young* is followed.

Young's effect on enforcement of the Horse Protection Act is one of the primary reasons for the former Judicial Officer's position in *Bennett*, that *Young* would not be followed by this Department, even in the Fifth Circuit. The former Judicial Officer anticipated that *Young* might be cited in an attempt to destroy the Department's Horse Protection Act enforcement efforts. Consequently, Judicial Officer Campbell responded to *Young*, as it turns out, in almost precisely the way that this ALJ has used *Young* herein. I have carefully reviewed *Bennett*, and find myself in complete agreement with all of Judicial Officer Campbell's views expressed therein and I have excerpted portions of *Bennett* to respond to the Third IDO's attack on the reliability of digital palpation as the sole means of detecting soreness.

However, before *Bennett* is displayed, I hasten to point out that the proceeding, *sub judice*, differs substantially from *Young*. Unlike in *Young*, Respondents herein did not offer a written protocol (like the Atlanta Protocol for training DQPs), signed by a group of prominent veterinarians, concluding that digital palpation alone is not a reliable indicator of a sore horse. Both private veterinarians, Dr. Humburg and Dr. Baker, qualified as experts, admitted to using palpation in their diagnoses.

Returning to *Bennett*, in which the *Young* decision is refuted, only those parts of *Bennett* concerning issues not already addressed herein, will be included:

Turning to another issue, the ALJ challenges the reliability of palpation alone to prove soreness under the Act. In addition, the majority decision in *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), discussed at great length below, also questions the reliability of palpation evidence alone to prove a soring violation. But it has been held by the Judicial Officer in every case in which the issue was relevant that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act. See, e.g., *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994) ("Based upon my examination of the record in this case, in addition to my examination of the records in 57 other Horse Protection Act cases, I am convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act" (*Ibid.*)), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994). As shown below, my view is not based simply on "the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. USDA* (53 F.3d at 731), but, rather, on the accumulated knowledge gained from reading the testimony of a large number of veterinarians, many of whom had 10 to 20 years of experience in examining many thousands of horses for soreness under the Horse Protection Act. That view has been accepted by both circuits to which an appeal would lie in this case. *Bobo v. USDA*, 52 F.3d 1406, 1411-13 (6th Cir. 1995); *Crawford v. USDA*, 50 F.3d 46, 49-50 (D.C. Cir. 1995)[, *cert. denied*, 116 S.Ct. 88 (1995)]. Moreover, in *Bobo*, the Sixth Circuit rejected the same type of evidence (including evidence as to the Atlanta Protocol, discussed below) presented by two of the same expert witnesses relied on by Respondents in the present case, stating (52 F.3d at 1412):

The witnesses presented by petitioners, particularly Drs. Proctor and Johnson, testified that other factors, in addition to palpation, should be considered when determining whether a horse is "sore." These witnesses expressed the view that other signs, such as lameness or inflammation, must be present in addition to a reaction to digital palpation, before a

horse can be found to be "sore." However, pursuant to 15 U.S.C. § 1821(3), a horse need only "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness," to be considered "sore" within the meaning of the HPA. Thus, pursuant to the statute, the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is "sore" under the HPA.

Just as in criminal cases, where there is a small group of expert witnesses with excellent credentials who testify repeatedly that DNA evidence is not a reliable means of determining the identity of a person who left blood at a murder scene, in Horse Protection Act cases, there is a small group of expert witnesses (including Drs. D.L. Proctor, Jr., Jerry H. Johnson, and Raymond C. Miller) with excellent credentials who testify repeatedly that palpation alone is not a reliable method of determining soreness under the Horse Protection Act. The primary additional indicator they demand is lameness, i.e., a gait dysfunction. But as explained by the Sixth Circuit in *Bobo, supra*, their view is squarely contrary to the explicit language of the Horse Protection Act.

The small group of experts, who misread the Horse Protection Act and who erroneously believe that gait dysfunction is a necessary element of soreness, met in Atlanta in 1991 and developed a "Recommended Protocol for DQP Examinations" . . . , which is referred to in HPA hearings as the Atlanta Protocol. That is the "written protocol" relied on by the majority opinion in *Young v. USDA* (53 F.3d at 731). The Atlanta Protocol states, *inter alia*, "It should be further noted that digital palpation, in and of itself, is not a reliable diagnosis of soring" Dr. Raymond C. Miller, one of the members of the group who developed the Atlanta Protocol, testified in this case that he and the other experts who wrote the Atlanta Protocol believe that gait dysfunction is a necessary element of soreness, [Dr. Miller's testimony omitted].

. . . .

My reasons for rejecting the views of the "Atlanta Protocol" experts were set forth at length in *In re Bill Young*, 53 Agric. Dec. 1232, 1267-

83 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision), as follows:⁵
[material from *Young* omitted]

⁵The Department's decision in *Bill Young* sets forth the views that will be followed by this Department in all future cases, including cases in which an appeal would lie to the Fifth Circuit, for the reasons set forth below. As shown in this lengthy quotation, my basis for rejecting the views of the Respondents' experts who testified in *Bill Young*, and who were part of the small group that developed the Atlanta Protocol, were not "simply that [their views are] contrary to the agency's policies and the agency's prior decisions," as suggested by the Court in *Young v. USDA* (53 F.3d at 731).

....

Two of the participants at the [Atlanta Protocol] meeting, Dr. Vaughan and Dr. Purohit, had done basic research in the mid-1970's for the (outdated) Auburn study, discussed above . . . , which is similar to the (outdated) Ames study in 1975 . . . , discussed above. At least Dr. Proctor, if not all of the private veterinarian participants, agreed with the (outdated) 1975 Ames study. . . .

The July 24, 1991, consensus, just quoted . . . , is squarely contrary to the Horse Protection Act, which requires no more than that a horse can reasonably be expected to suffer pain (produced by man) when moving (15 U.S.C. § 1821(3)(D)). There is no requirement in the Act that the horse exhibit redness, swelling, heat or interference with function. The general consensus of the July 24, 1991, meeting . . . is, in effect, a prescription for repealing the Horse Protection Act, while leaving in its place a facade to give lip-service to the purposes of the Horse Protection Act. If the Department were to accede to the principles set forth in [the Atlanta Protocol], soring, as it exists today, could be practiced virtually with impunity. To be sure, a few cases could still be brought, e.g., if someone abused a horse to the extent that it violated

the Scar Rule, or if the soring was so inept that it caused a gait deficit. Considering all of the Horse Protection Act cases decided by the Judicial Officer from June 29, 1990, to the present²⁸ (not involving the irrebuttable presumption

²⁸No Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990.

created by the Scar Rule), [in which the horses were found to be sore by the Judicial Officer,] the evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation.²⁹ Even as to the other six horses in which there was some evidence of a slight gait deficit (usually failing to lead freely with a loose rein, and sometimes tucked under),³⁰ the primary evidence in each case was the palpation evidence. There can be no doubt about the fact that under the . . . consensus of the 1991 Atlanta meeting (RX 4), the sophisticated, subtle practice of soring practiced today to improve the gait of Tennessee Walking Horses would be untouchable.

²⁹*In re Burks*, 53 Agric. Dec. [322, 328-29, 339-42 (1994)]; *In re Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. [261, 269-78, 283-84, 286-94 (1994) (two horses), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994)]; *In re Martin*, 53 Agric. Dec. [212, 223-24 (1994), *rev'd per curiam*, 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24)]; *In re Bobo*, 53 Agric. Dec. [176, 198-201 (1994) (same horse, two shows), *aff'd*, 52 F.3d 1406 (6th Cir. 1995)]; *In re Kelly*, 52 Agric. Dec. 1278, 1288-95 (1993), [*appeal dismissed*, 38 F.3d 999 (8th Cir. 1994)]; *In re Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-62 (1993); *In re Watlington*, 52 Agric. Dec. 1172, 1187-92 (1993) (one of two horses); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993), [*rev'd*, 39

F.3d 131 (6th Cir. 1994)]; *In re Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 308-13 (1993), *aff'd*, [28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994)]; *In re Callaway*, 52 Agric. Dec. 272, 284-89 (1993); *In re Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 262-66 (1993); *In re Holt* (Decision as to Richard Polch & Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, [32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24)]; *In re Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, [510 U.S. 867] (1993); *In re Smith*, 51 Agric. Dec. 327, 328-31 (1992); *In re Sparkman*, 50 Agric. Dec. 602, 612-14 (1991); *In re Holt*, 49 Agric. Dec. 853, 856-57 (1991); *In re Edwards*, 49 Agric. Dec. 188, 195-97, 204-06 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, [503 U.S. 937 (1992)].

³⁰*In re Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1229, 1235 (1993), [*aff'd*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 88 (1995)]; *In re Watlington*, 52 Agric. Dec. 1172, 1192 (1993) (one of two horses); *In re McConnell*, 52 Agric. Dec. 1156, 1160 (1993), *aff'd*, 23 F.3d 407, [1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994)]; *In re Crowe*, 52 Agric. Dec. 1132, 1152 (1993); *In re Roach* (Decision as to Calvin L. Baird, Sr.), 52 Agric. Dec. 1092, 1101-02 (1993) (one of two horses), [*rev'd*, 39 F.3d 131 (6th Cir. 1994)]; *In re Gray*, 52 Agric. Dec. 1044, 1073-74 (1993), [*aff'd*, 39 F.3d 670 (6th Cir. 1994)].

....

Footnotes 29 and 30 quoted above list all the cases decided by the Judicial Officer from September 12, 1985, to August 31, 1994, under the Horse Protection Act (not involving the irrebuttable presumption created by the Scar Rule) in which the horses were found by the Judicial Officer to be sore, and the accompanying text explains that the

evidence as to 19 of the 25 horses, or 76%, consisted entirely of the reaction of the horses to palpation. To bring those statistics up to date, there have been six subsequent cases, and in all six cases, the evidence that the horses were sore consisted entirely of the horses' reactions to palpation.⁶ Hence, as to 25 of the 31 horses found sore by the Judicial Officer from September 12, 1985, to the present, or 80.6%, the sole evidence was the horses' reaction to palpation.

⁶*In re Keith Becknell*, 54 Agric. Dec. 335, 337-38, 339-40, 344-45 (1995); *In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 287 (1995); *In re Tracy Renee Hampton*, 53 Agric. Dec. 1357, 1363-65, 1367-70 (1994); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1337-42, 1345-46 (1994), [*aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996)]; *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1305-06 (1994), *appeal docketed*, No. 94-9202 (11th Cir. Oct. 26, 1994); *In re Bill Young*, 53 Agric. Dec. 1232, 1253-67 (1994), *rev'd*, 53 F.3d 728 (5th Cir. 1995) (2-1 decision).

To require additional evidence, e.g., a gait deficit (lameness) would totally defeat the purpose of the Act. As the court noted in *Elliott v. Administrator, Animal & Plant Health Inspection Service*, 990 F.2d 140, 144 (6th Cir.), *cert. denied*, [510 U.S. 867] (1993):

Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made "sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N.4870, 4871. [Bracketed material by the court.]

If horses had to be sore enough to cause a gait deficit, that would totally defeat the congressional purpose to prevent the soring of horses done to improve their gait.

Although the horses' reaction to palpation constituted the only evidence that the horses were sore in 80.6% of the cases since September 12, 1985, that is not to suggest that in any of those cases, digital palpation was the only diagnostic test employed by the APHIS veterinarians to determine whether or not the horses were sore. As stated in my decision in *Bill Young, supra* (53 Agric. Dec. at 1286):

USDA veterinarians never conduct an examination based solely on digital palpation, without also looking at the general appearance of the horse, and its way of going, etc. (Findings 14, 30). However, after considering various diagnostic tests, including the general appearance and way of going of the horse, it will frequently be the case that palpation will be the only diagnostic test actually used to prove a case under the Act. That is, even though the horse's general appearance, etc., and way of going was normal, if digital palpation demonstrated that the horse could reasonably be expected to suffer pain when moving, that would be enough under the express terms of the Act to bring a case for soring.

This same view was stated in a letter dated May 29, 1991, from Dr. Joan M. Arnoldi, Deputy Administrator, APHIS, to Dr. Raymond C. Miller, as follows (RX 14, p. 1):

All APHIS veterinarians involved in horse protection are carefully instructed on the clinical signs exhibited by a sore horse. The use of palpation is only one means of making a determination. Several clinical considerations are reviewed in taking action on an alleged sore horse.

The views quoted above from my decision in *Bill Young* will be followed by this Department notwithstanding the split decision by the Court of Appeals reversing *Bill Young*. The "expert testimony and a written protocol [i.e., the Atlanta Protocol]" relied on by the Court in *Young v. USDA* (53 F.3d at 731) is devoid of merit, for the reasons quoted above. One Circuit Judge dissented in *Young v. USDA* (53 F.3d at 732), and only one Circuit Judge reversed, since a District Judge sitting by designation was the third Judge on the panel. Hence the case

is not a strong precedent even in the Fifth Circuit. Moreover, the Court explained (53 F.3d at 732):

In cases where the Secretary of an agency does not accept the findings of the ALJ, this court "has an obligation to examine the evidence and findings of the [JO] more critically than it would if the [JO] and the ALJ were in agreement." *Pinkston-Hollar Const. Services, Inc.*, 954 F.2d at 309-10 (citation omitted); *Garcia v. Secretary of Labor*, 10 F.3d 276, 280 (5th Cir. 1993) (stating that "[a]lthough this heightened scrutiny does not alter the substantial evidence standard of review, it does require us to apply it with a particularly keen eye, especially when credibility determinations are in issue. . . .).

....

... We hold that in light of the significant evidence calling into question the probative value and reliability of that documentary evidence where we are required to apply stricter scrutiny to the JO's conclusions which contradict the ALJ and in light of the substantial counter-evidence indicating that the horse was not sore, the JO's determination was not supported by substantial evidence and his decision should be reversed and judgment should be rendered in favor of Young and Sherman. (Footnote omitted.)

Since an important basis for the Court's reversal in *Young v. USDA* was the ALJ's adverse findings of fact, the Court's decision in *Young v. USDA* would not be in point if the ALJ in a future case finds the facts against the Respondent.

In re Kim Bennett, supra, 55 Agric. Dec. at 180-82, 185, 201-05 (meaningless transcript and exhibit citations are omitted).

d. ALJ Erroneously Assigned Great Credibility to Respondents' Witnesses.

The final point from the JO SRO is that the ALJ erroneously assigned great credibility to Respondents' expert witnesses. I have already discounted Dr. Humburg's testimony, and I have also indicated that examinations like Dr. Baker's, which are remote in time and place from the post-show examination by the USDA VMOs, are inherently less reliable than examinations conducted immediately after and in close proximity to the USDA VMOs' examinations. I am persuaded by the following text from the JO SRO that Dr. Baker's testimony can be reliably expected to support any Respondents' innocence; nevertheless, I consider Dr. Baker's testimony credible and give it appropriate weight based upon the facts and the record, as follows:

14. Based upon the appearance, demeanor and qualifications, the testimony of Drs. Baker and Humburg concerning their observations is assigned great credibility.

Several months earlier, the same ALJ stated with respect to the same two witnesses (*In re Ernest Upton*, 53 Agric. Dec. 239, 251 (1994)):

The testimony of Dr. Randall Baker reveals that he made no record of his examination of Mr. Upton's horse. Neither he nor Mr. Upton established how much time had elapsed following the examinations of "Flipping Gold" by Drs. Riggins and Knowles before Dr. Baker examined the horse. Under Departmental precedent, examinations conducted after the horse has left the inspection area do not generally warrant the same probative value as the Government examinations because of the opportunity for tampering. *Pat Sparkman, et al.*, 50 Agric. Dec. 602, 610 (H.P.A. Dkt. No. 88-58) (January 24, 1991). *Richard L. Thornton et al.*, 41 Agric. Dec. 870, 878 (H.P.A. Dkt. No. 125) (May 19, 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). Further, Dr. Baker testified that when conducting a palpation examination he applies just enough pressure to slightly pit the skin. Dr. Crichfield's testimony revealed that lightly touching the skin in this manner is not a meaningful examination. (Tr. 215) While Dr. Baker based his conclusion that "Flipping Gold" was not sore on his physical examination, Dr. Baker would describe the presence of "soreness," a legal conclusion, to exist only if it resulted in a

display of gait deficiency in both forelegs. While respondent's other expert witness, Dr. Humburg, expressed caution about relying on evidence derived from palpation under some circumstances, he agreed that evidence of repeatable, localized, responses to palpation, such as those displayed by "Flipping Gold," were an indication of noxious stimuli, rather than incidental reaction to pressure, being handled, or reacting to distraction.

In *In re William Earl Bobo*, 53 Agric. Dec. 176, 185 (1994), *aff'd*, [52 F.3d 1406 (6th Cir. 1995)], I adopted the decision of another ALJ who stated:

Dr. Baker's testimony impressed me as highly professional and forthright. However, he has only limited experience in examining horses for compliance with the Act. (Tr. 399) However, both he and Dr. O'Brien revealed their misunderstanding of the examination criteria by expressing the erroneous view that a horse must exhibit an abnormal gait to be sore as defined by the Act. (Tr. 399, 404, 414-415, 443)

In *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994), I found:

16. Dr. Randall Baker, a veterinarian, and a recognized expert [in the "field of veterinary medicine in equine practice (Tr. 375),"] has specialized in equine practice of fifteen years, including the diagnoses of diseases and afflictions of Tennessee Walking Horses. (Tr. 373-375) [However, unlike the APHIS VMOs, Dr. Baker is not qualified as an expert in detecting artificially-induced soreness in these horses. Dr. Baker admits that a significant portion of his income is derived from employment by owners and trainers of Tennessee Walking Horses. (Tr. 392) Complainant made an offer of proof at the hearing, which I accept as evidence (7 C.F.R. § 1.141(g)(7)), that Dr. Baker has "repeatedly been called upon by members of the industry to examine their horses after those horses have been found sore by the United States Department of

Agriculture, and that he has, in every case, testified that he has not found the horse to be sore." (Tr 389)]⁴

⁴For examples of Dr. Baker's testimony, see *In re Bill Young*, 53 Agric. Dec. 1232, 1287 n.32 (1994), [rev'd, 53 F.3d 728 (5th Cir. 1995) (2-1 decision)]; *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 272-73, 303-04 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Judy Martin*, 53 Agric. Dec. 212, 220, 225-28, 231 (1994), *rev'd per curiam*, [57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995)] (citation limited under 6th Circuit Rule 24); *In re Ernest Upton*, 53 Agric. Dec. 239, 245, 251 (1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 180, 184-86 (1994), *aff'd*, [52 F.3d 1406 (6th Cir. 1995)]; *In re Elizabeth Marie Hestle*, 52 Agric. Dec. 1270, 1274, 1276 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 277, 282 (1993); *In re A.P. "Sonny" Holt*, 49 Agric. Dec. 853, 857 (1990).

JO SRO, *supra*, 54 Agric. Dec. at 369-71.

Finally, the JO SRO states that "[n]o Horse Protection Act cases were decided by the Judicial Officer from September 12, 1985, through June 28, 1990," (JO SRO, *supra*, 54 Agric. Dec. at 367 n.28). Based upon this language, the ALJ says that "[t]his Act has not been consistently enforced." (Third IDO, p. 9.) Actually, the industry was given an opportunity to regulate itself during this time period. See *Sparkman*, as follows:

In 1985, it was APHIS policy not to cite anyone proceeded against by horse show operators under the authority granted them pursuant to the DQP program. After the DQP program had been professionalized to permit the industry to police itself, APHIS had largely refrained from direct enforcement of the Horse Protection Act. Subsequently, these self-policing activities were re-evaluated and found insufficient.

In re Pat Sparkman, *supra*, 50 Agric. Dec. at 611-12.

However, during this period, the Department continued to process cases. Ironically, the same Respondents (not counting the owners), were charged with similar Horse Protection Act violations, as herein, on May 22, 1986, and April 9, 1987; the Complaint was filed on December 3, 1987; and the Judicial Officer issued his Decision and Order imposing sanctions on June 29, 1990.

In re Larry E. Edwards, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

IV. SANCTION.

The evidence in the instant case supports the conclusion that Respondent Gary R. Edwards violated section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), by exhibiting a horse known as "Rare Coin" at the Money Tree Classic Horse Show at Columbia, Tennessee, on May 30, 1990, while the horse was sore. A \$2,000 civil penalty will be assessed against Respondent Gary R. Edwards and a 5-year disqualification period will also be imposed, for the reasons below. These sanctions are reasonable, supported by the evidence, consistent with the Horse Protection Act and this Department's sanction policy, and designed to achieve the remedial purposes of the Horse Protection Act.

The seriousness of soring horses has been recognized by Congress. The legislative history of the Horse Protection Act Amendments of 1976 reveals the cruel and inhumane nature of soring horses, the unfair competitive aspects of soring, and the destructive effect of soring on the horse industry, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the postern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs

are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.

Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696, 1698-99.

The Department's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50

Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 W.L. 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(b)(1) of the Horse Protection Act requires that the Secretary consider the following factors to determine the amount of the civil penalty:

[T]he 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 1825(b)(1).

Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), provides, in relevant part, that "[a]ny person who violates [15 U.S.C. § 1824] . . . shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation." In most cases, the maximum civil penalty of \$2,000 per violation is warranted. *In re John T. Gray*, 55 Agric. Dec. ____, slip op. at 42 (Aug. 19, 1996); *In re Mike Thomas*, *supra*, slip op. at 53; *In re C.M. Oppenheimer*, *supra*, 54 Agric. Dec. at 319; *In re Kathy Armstrong*, *supra*, 53 Agric. Dec. at 1323; *In re Linda Wagner*, *supra*, 52 Agric. Dec. at 317; *In re William Dwaine Elliott*, *supra*, 51 Agric. Dec. at 350-51; *In re Eldon Stamper*, *supra*, 42 Agric. Dec. 62.

Respondent violated section 5(2)(A) of the Horse Protection Act, (15 U.S.C. § 1824(2)(A)), by exhibiting Rare Coin while the horse was sore. The nature, extent, and gravity of the violation are revealed by Dr. Riggins' and Dr. Knowles' description of Rare Coin's responses to palpation which they described variously as "very extreme pain response"; "extreme pain response"; "extreme withdrawal response"; "tighten abdominal muscles"; "change stance"; and "jerk foot back." (CX 4.) Dr. Riggins testified that on a soreness scale of 1 to 10, with 1 not sore, and 10 the maximum soreness,

Rare Coin was an 8 or 9. (Tr. 119.) Dr. Riggins also testified that he was aware of no other way than artificial means for a horse to have this type of soreness. (Tr. 132, 142, 144, 159.) Dr. Knowles testified that this type of soreness could not be explained by a sprain or shoulder/tendon injury, and Dr. Knowles had watched the videotape. (Tr. 315, 323-24.) I find that, under these circumstances, the nature, extent, and gravity of Respondent Gary R. Edwards' violation of the Horse Protection Act are sufficient to warrant the assessment of a civil penalty of \$2,000.

The record also establishes Respondent Gary R. Edwards' culpability. Both VMOs testified, and their affidavits state, that Rare Coin was sore by the use of caustic chemicals, mechanical devices, or both. (CX 2, 3.) Respondent most likely used action devices (chains) on Rare Coin's legs during training. Gary R. Edwards, who was the trainer of Rare Coin, then exhibited him in chains in the horse show. (RX 3 at 9:59; CX 4, item no. 25.) Respondent Gary R. Edwards admitted Rare Coin was sore after the show. (CX 5A, p. 1.) Persons who exhibit horses in a horse show or horse exhibition and owners who allow such activity are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when exhibited. See *In re John T. Gray*, *supra*, slip op. at 44 (Owners who allow entry of horses for the purpose of showing or exhibiting those horses in a horse show or horse exhibition are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act, when entered); *In re Mike Thomas*, *supra*, slip op. at 54 (Respondent is an absolute guarantor that his use of action devices during training will not cause the horse to be sore); *In re Keith Becknell*, 54 Agric. Dec. 335, 340 (1995) (Respondent is an absolute guarantor that his use of action devices during a workout prior to bringing the horse to the inspection area will not cause the horse to be sore).

Although Respondent may not have intended to "sore" Rare Coin by using chains during training or at the show, intent is of no consequence under the Horse Protection Act and regulations issued under the Act. The Horse Protection Act provides that a horse is "sore" if any device has been used by a person on any limb of a horse that causes, or can reasonably be expected to cause, the horse to suffer "physical pain or distress" when "walking, trotting, or otherwise moving," irrespective of intent or knowledge by the owner or exhibitor, (15 U.S.C. § 1821(3)). The current definition of the term "sore" was changed significantly with the enactment of the Horse Protection Act Amendments of 1976. When first enacted in 1970 until the enactment of the Horse Protection Act Amendments of 1976, a horse was considered "sored" only if the device was used on a horse "for the purpose of affecting its gait,"

and the device "may reasonably be expected . . . to result in physical pain." (15 U.S.C. § 1821(a) (1970).)

The legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 418, 94th Cong., 1st Sess. 3, 4 (1975). As specifically stated in H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2:

The legislation makes the following substantive modifications in the existing law governing this program:

1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

H.R. Rep. No. 1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* 1976 U.S.C.C.A.N.1696.

Respondent Gary R. Edwards, at the time of the hearing, had been training and exhibiting Tennessee Walking Horses his entire adult life as a full-time occupation, since 1964. (CX 5A; Tr. 374.) Despite Gary R. Edwards' experience as a trainer of Tennessee Walking Horses, he exhibited Rare Coin while the horse was sore and breached his guaranty that Rare Coin would not be sore when he exhibited him in the Money Tree Classic. I find that, under these circumstances, Gary R. Edwards' degree of culpability is sufficient to warrant the assessment of a civil penalty of \$2,000.

Further, the record establishes that Respondent Gary R. Edwards has the ability to pay a civil penalty of \$2,000 and that the assessment of a \$2,000 civil penalty would not affect his ability to continue to do business. Respondent Gary R. Edwards testified at the hearing that he was then training approximately 18-20 horses. (Tr. 412.) Gary R. Edwards also testified that he is a general partner in Carl Edwards & Sons Stables, with brother Larry E. Edwards, and mother Etta Edwards, and that they have exhibited well over 13,000 horses, and have had "well over 100" world champion walking horses. (Tr. 374.) Respondent Gary R. Edwards has been party to a Horse Protection Act Consent Decision, which, however, plays no part in this sanction. However, Respondent Gary R. Edwards has prior violations for entering horses while sore, for which he was assessed a \$2,000 civil penalty and disqualified for 2 years and which did not prevent him from continuing

in business. *In re Larry E. Edwards*, 49 Agric. Dec. 188 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

The administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act recommend a \$2,000 civil penalty against Respondent Gary R. Edwards. An examination of the record in the instant case does not lead me to believe that an exception to the Department's policy of imposing the maximum civil penalty of \$2,000 per violation is warranted.

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), provides that anyone assessed a civil penalty under the Horse Protection Act may be disqualified from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than 1 year for the first violation of the Horse Protection Act or the regulations issued under the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act or the regulations issued under the Horse Protection Act. Respondent Gary R. Edwards is subject to the 5-year disqualification, based upon his prior violations of the Horse Protection Act. (*See In re Larry E. Edwards, supra.*)

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who had the economic means to pay civil penalties as a cost of doing business. *See H.R. Rep. No. 1174, 94th Cong., 2d Sess. 11 (1976), reprinted in 1976 U.S.C.C.A.N.1696, 1706.*

Section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)), specifically provides that disqualification is in addition to any pertinent civil penalty. Section 6(b)(1) of the Horse Protection Act, (15 U.S.C. § 1825(b)(1)), requires that the Secretary consider 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, and any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require in determining the amount of the civil penalty to be assessed, but the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period. (15 U.S.C. § 1825(c).) *See In re John T. Gray, supra*, slip op. at 47; *In re Mike Thomas, supra*, slip op. at 57; *In re Joe Fleming*, 41 Agric. Dec. 38, 46 (1982),

aff'd, 713 F.2d 179 (6th Cir. 1983) (financial effect of a disqualification order on Respondent is not a relevant factor in determining whether to issue a disqualification order under the Horse Protection Act).

While disqualification is discretionary with the Secretary, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which the Respondent is found to have violated the Horse Protection Act for the first time. *In re John T. Gray, supra*, (Respondent Gary Edward Cole assessed a \$2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Mike Thomas, supra* (Respondent assessed a civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Tracy Renee Hampton, supra* (Respondent assessed a \$2,000 civil penalty and disqualified for 1 year for first violation of the Horse Protection Act); *In re Cecil Jordan, supra* (Respondent Crawford assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Linda Wagner, supra* (Respondents assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re John Allan Callaway*, 52 Agric. Dec. 272 (1993) (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act); *In re Preach Fleming*, 40 Agric. Dec. 1521 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983) (Respondent assessed a civil penalty of \$2,000 and disqualified for 1 year for first violation of the Horse Protection Act). However, Respondent Gary R. Edwards is a repeat offender.

Congress has provided the Department with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but they must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

There is a possibility that the circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record in the

instant proceeding does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for a second violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Section 6(c) of the Act provides, in relevant part, that:

[A]ny person who . . . is subject to a final order under [15 U.S.C. § 1825(b)] 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

15 U.S.C. § 1825(c).

The Complainant, one of the administrative officials charged with the responsibility for achieving the congressional purpose of the Horse Protection Act, requested that the Order issued in this proceeding include a provision disqualifying Respondent Gary R. Edwards from:

(1) showing, exhibiting or entering any horse, or otherwise participating in any horse show or exhibition, and (2) judging or managing any horse show, horse exhibition, horse sale or auction.

Complaint, p. 4.

For the foregoing reasons the following Order should be issued.

V. ORDER.

1. Respondent Gary R. Edwards is assessed a civil penalty of \$2,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to: Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1417, within 30 days from the date of service of this Order on Respondent.

2. Respondent Gary R. Edwards is disqualified for 5 years from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondent.

APPENDIX A

Martin v. United States Dep't of Agric., 57 F.3d 1070 (Table), 1995 WL 329255 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24), *printed in* 54 Agric. Dec. 198 (1995).

[Not published herein.--Editor.]

APPENDIX B

Complainant's Appeal of the Third Initial Decision; and Memorandum of Points and Authorities in Support of Appeal, pp. 27-42 (Nov. 20, 1995).

[Not published herein.--Editor.]

APPENDIX C

ALJ's Kim Bennett Initial Decision and Order (Feb. 28, 1995).

[Not published herein.--Editor.]

APPENDIX D

In re Kim Bennett, 55 Agric. Dec. 176 (1996).

[Not published herein.--Editor.]

NONPROCUREMENT DEBARMENT AND SUSPENSION

DEPARTMENTAL DECISION

**In re: MMI INTERNATIONAL CORPORATION, MILK MAID, INC.,
AND HARJIT SINGH.**

DNS Docket No. CCC-96-0001.

Decision and Order, filed November 8, 1996.

**Nonprocurement suspension - Decision of suspending official affirmed - Time limitations -
Harmless error - Mitigating factors need not be considered.**

Chief Judge Victor Palmer affirmed the temporary suspension of the respondents which was based on respondents' fraudulent acquisition of government funds. It was error for the suspending official to issue a decision more than 45 days after respondents initial submission in opposition without issuing an extension for good cause. However, because the untimeliness was caused by the respondents' own untimely submissions the harmless error doctrine applies. There was sufficient evidence of fraud, which is a proper cause for suspension under the regulations, and there was an immediate need to protect the public. Mitigating factors need not be considered in suspension proceedings. The suspension was, therefore, not arbitrary and capricious and an abuse of discretion, or not in accordance with the law, and should be affirmed.

August Schumacher, Jr., Suspending Official.

Maureen T. Maher, for Complainant.

William W. Taylor, III, Stephen J. Bronis, Deborah J. Jeffrey, and Eleanor H. Smith, for Respondent.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This Decision and Order is issued pursuant to 7 C.F.R. § 3017.515, which governs appeals of debarment and suspension actions under 7 C.F.R. §§ 3017.100-.515; the regulations that implement a government wide system for nonprocurement debarment and suspension (Regulations).¹

On August 29, 1996 respondents, MMI International, Milk Maid, and Harjit Singh filed a timely appeal of the decision of the suspending official,

¹The Regulations implement Exec. Order No. 12549, 51 Fed. Reg. 6370 (1986), which requires, to the extent permitted by law, executive departments and agencies to participate in a government wide system for nonprocurement debarment and suspension. The Order further provides that a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.

August Schumacher, Jr., Administrator of the Foreign Agricultural Service, United States Department of Agriculture, which suspended the respondents from participating in government programs for a temporary period pending completion of an investigation by the Department of Justice, or ensuing legal debarment, or Program Fraud Civil Remedies Act proceedings. The suspension is based on evidence of fraud and false statements made in connection with eight contracts awarded to MMI under the Dairy Export Incentive Program (DEIP) in 1993.

The Commodity Credit Corporation (CCC) issued the suspension on August 17, 1996 pursuant to 7 C.F.R. § 3017.400 which allows for suspension when: (1) There exists adequate evidence of one or more of the causes set out in § 3017.405, and (2) Immediate action is necessary to protect the public interest. The Notice of Suspension informed MMI that the causes relied upon under § 3017.405 were as follows:

- (1) There is adequate evidence to suspect the commission of: (a) fraud in connection with obtaining or performing a public agreement, and making false statements; and
- (2) There is adequate evidence of the violation of the terms of a public agreement so serious as to affect the integrity of an agency program, such as (a) a willful failure to perform in accordance with the terms of one or more public agreements, and (b) a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement.

Administrative Record, exhibit A.

The respondents had thirty days from the issuance of the Notice of Suspension in which to submit information and argument in opposition. 7 C.F.R. § 3017.412. Respondents sought and obtained an extension of time in which to file its response, and then timely filed it June 4, 1996. Thereafter, respondents made five additional submissions for consideration by the suspending official on June 19, July 3, July 8, July 10, and July 26. The suspending official issued a decision on July 26, 1996 which affirmed the suspension.

Pursuant to 7 C.F.R. § 3017.515, suspension decisions may be appealed to the Office of Administrative Law Judges. The administrative law judge may vacate the suspension if the implementing decision is not in accordance with law; not based on the applicable standard of evidence; or is arbitrary, capricious and an abuse of discretion. Respondents filed a timely appeal on

August 29, 1996. The appeal contained a request for a hearing which is denied as the regulations make it clear that the decision by the administrative law judge is based solely on the administrative record. 7 C.F.R. § 3017.515(b).

On September 4, 1996, I entered a ruling respecting procedural requirements governing this proceeding. Pursuant to that ruling, the suspending official submitted a Response in Opposition to the Appeal, and filed the Administrative Record on September 13, 1996. Respondents were granted a three-day extension for good cause shown and filed a Reply to the Response on September 26, 1996.

Findings

MMI International is a small, minority-owned company based in Fort Lauderdale, Florida which packages and sells powdered milk. Milk Maid was the predecessor to MMI and has now been phased out. Harjit Singh is currently, and was at all times relevant to this proceeding, the exclusive owner and operator of both companies. All three are named as respondents in this action. MMI has participated in two USDA programs, the Food for Progress Program and the Dairy Export Incentives Program (DEIP). Both programs promote the export of powdered milk and are administered by the Foreign Agricultural Service (FAS), on behalf of the CCC. The DEIP program invites bids from dairy exporters to sell milk to specified countries where prices are below the cost of production in the United States. Qualified bids are accepted and bonuses are awarded to subsidize the price differential.

In 1992, respondents contracted to sell 1,000 metric tons of powdered milk to General Milling, a company in the Philippines, for well below cost, in the mistaken belief that the Philippines was an eligible destination for DEIP bonuses. When MMI learned of the mistake, it lobbied to have the Philippines added to the program, and in the alternative, attempted to obtain milk from a less expensive European source. When its attempts to legally perform the contract failed, MMI devised a scheme whereby it created a company called Marhar in the United Arab Emirates, an eligible country for DEIP. Between June 28 and December 21, 1993, the respondents submitted and the CCC accepted eight bids to sell powdered milk to Marhar, in the

U.A.E.² Following the milk shipments, MMI submitted documentation to the CCC indicating that the milk had been received in Dubai, U.A.E. In fact, the milk had been removed from the shipping vessels in Singapore and diverted to General Milling in the Philippines. In addition, the actual ports of departure were different from those MMI specified in the bids. If MMI had reported the port changes, the bonus amounts would have been decreased. As a result of these contracts, MMI received \$1,018,679.50 in bonus money which it retains to this date.

Conclusion

There is sufficient evidence in the administrative record to support the suspending official's decision to impose a temporary suspension pending further government action. Although the suspending official did not file the decision within forty-five days as required by the Regulations, the doctrine of harmless error applies because the delay was caused by the respondents' own untimely submissions. Accordingly, the decision of the suspending official is affirmed.

Discussion

A. Timeliness and manner of review

Respondents first appeal on the ground that the suspension must be vacated as untimely and therefore not in accordance with the law. The regulations set a forty-five day time limit, but also provide that the suspending official may extend the deadline for good cause. 7 C.F.R. § 3017.413. Respondents' first submission was made on June 4, 1996. Respondents then made additional submissions on June 19, July 3, July 8, July 10, and July 26. The suspending official rendered his decision on July 26, without issuing a notice of extension. Respondents contend that the decision should have been rendered on July 19, forty-five days after the initial submission. Complainant maintains that the decision was not due until forty-five days after respondents' final submission. Language in prior cases suggests the conclusion that

²These bids resulted in contracts GSM-511A-8-PGU-NDM-2CA; GSM-511A-8-PGU-NDM-3CA; GSM-511A-8-PGU-NDM-4CA; GSM-511A-8-PGU-NDM-5CA; GSM-511A-8-PGU-NDM-6CA; GSM-511A-8-PGU-NDM-7CA; GSM-511A-8-PGU-NDM-8CA; and GSM-511A-8-PGU-NDM-9CA.

the deadline must be measured from the first submission; and if more time is needed after additional submissions are made, an extension must be filed. *In re: William E. Johnston*, 51 Agric. Dec. 1103, 1111 (Dec. 23, 1992), held that there was good cause for an extension when the respondent submitted additional materials for consideration. In *Johnston*, however, the suspending official properly filed a notice of extension. *In re: Young's Food Stores, Inc.*, 53 Agric. Dec. 1403 (Dec. 1, 1994), vacated a debarment as untimely where the debarring official did not issue an extension. That case differs from the present one in that the decision was rendered more than forty-five days after the final submission by the respondent; still, the importance of giving the respondent notice was stressed.

In its Response [complainant] now seeks to justify the delay after the fact by explaining that extra time had been devoted to careful consideration of . . . complicated issues' in the decision. This explanation is belied by the fact that there is no mention of such an extensive review and deliberation by the debarring official in the Notice of Debarment, where it would have been most appropriate. If the debarring official were allowed to extend the decision-making period without providing any justification to the Respondent, then the rule would, in effect, be nullified.

Id., at 1406.

In *In re: Lewis Eugene McCravy*, 55 Agric. Dec. 254 (Feb. 8, 1996), the complainant argued that since it is possible for the respondent to submit information and argument for up to thirty days after the notice of appeal, the deadline for issuing a decision should not be measured from the respondent's initial submission, but rather from the end of the thirty day response period. It urged that any other interpretation would force the debarring official to either wait until the end of the thirty day period and then write a rushed decision, or issue a decision and then have further timely information submitted. *Id.*, at 257-58. That argument was rejected in favor of respondent's argument that if the debarring official needs more time he can simply issue an extension.

Even if respondent makes his only submission on the first day of the 30-day response period, should the debarring official wait until the end of such response period to assure that no further submissions are made, he still has 15 days from the end of such period within which to issue

his decision or extend his time by means of a one-paragraph form letter and comply with the Regulations.

Id., at 258. Although *McCravy* does not address what should be done if further submissions are actually made, the same logic applies. If the suspending official receives further submissions he can still issue the decision within the original time limits; or, if he needs more time he has fifteen days to provide notice of an extension.

The CCC received the respondents' first submission on June 4, 1996, thus setting the decision deadline for July 19, 1996. After the respondents made an additional submission on June 19, the suspending official should have issued an extension if he felt that it was needed. In fact, all but respondents' final submission were made within the forty-five day period. The suspending official could have timely extended the deadline after any of them. Instead, he issued a decision, without explanation, on July 26, one week after the deadline.

The untimely issuance of the decision was, however, harmless error since it was caused by respondents' own improper actions. Only respondents' first submission was timely. All of the additional submissions were filed beyond the appeal period, and could have been refused by the suspending official, but were instead accepted and considered. The respondents willingly submitted additional materials and asked that the suspending official consider them. They cannot now claim that they were harmed by delay resulting from the acceptance and consideration of their own untimely submissions.

This conclusion is consistent with prior cases which held that it is not harmless error to issue an untimely decision. The previous cases reasoned that because time is of the essence in these proceedings, time limits must be enforced against all parties with equal consistency. Not doing so would result in an unfair advantage to the government, and therefore the error would not be harmless. See *In re: Eugene McCravy*, 55 Agric. Dec. 254, 259 (Feb. 8, 1996); *In re: Robert M. Miller*, 53 Agric. Dec. 1411, 1414 (Dec. 28, 1994); *In re: Young's Food Stores*, 53 Agric. Dec. 1403, 1406 (Dec. 1, 1996). The time limits were not enforced against the respondents, and it was respondents' untimely submissions that caused the agency delay. Therefore, no inconsistency or unfair advantage to the government will arise from treating the delay as harmless error.

Respondents also cite as error the agency's failure to immediately turn over the Notice of Opposition materials to the suspending official. There is evidence that instead of handing over each submission individually, the agency

collected the documents and turned them over as a compiled administrative record along with a decision memorandum on July 26, 1996. The Regulations provide that the "USDA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 3017.411 through § 3017.413" 7 C.F.R. § 3017.410(b). The suspending official had the record before him, and rendered an institutional decision based upon the evidence in the record and all of respondents submissions. The internal procedures used by CCC and FAS were not inconsistent with the regulations or principles of fundamental fairness. Therefore, they cannot be found to be not in accordance with law, not based upon the applicable standards of evidence, or arbitrary, capricious or an abuse of discretion.

B. Immediate action necessary to protect the public interest

Respondents next contend that the suspending official failed to show that there was an immediate need for the suspension. The CCC allowed more than two years to pass between the initial discovery of possible wrongdoing by MMI and the notice of suspension. In the interim, CCC continued to do business with MMI. Specifically, between December 1, 1993 and April 17, 1996, CCC granted, and MMI successfully performed, fifteen contracts. Respondents maintain that CCC cannot claim there is an immediate need to protect the public from MMI after continuing to do business with them with knowledge of the prior acts. Furthermore, MMI claims that the completed contracts show that it is presently responsible, and that the suspension is therefore punishment for past acts, and not protection from future acts as intended by the regulations. *See David K. Alberta*, 94 WL 16893 (Ag. B.C.A. Apr. 25, 1994).

CCC responds that there was no more delay than necessary to obtain sufficient evidence of wrongdoing, and that it continued to do business with MMI only because it did not have enough evidence to suspend. There is sufficient evidence in the record to support this contention. Although the Office of the Inspector General (OIG) began its investigation in December of 1993, it did not provide its investigation report to CCC until February of 1996. Although CCC became aware of the allegations in 1994, without the results of OIG's investigation it did not have sufficient evidence to take action. As soon as CCC received the report, it asked MMI to voluntarily exclude itself from the programs. When MMI then submitted a DIEP bid, CCC issued the suspension.

Respondents' claims that they were prejudiced by the two year time lapse are unfounded. They argue that they took out loans and purchased new equipment with the belief that a suspension was not forthcoming. Respondents, however, were aware that they had committed fraudulent acts, and were under investigation. There is no statute of limitations on suspension proceedings. The regulations merely provide that "[i]nformation concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration." 7 C.F.R. § 3017.410. The agency followed these requirements. Respondents cannot claim to be prejudiced simply because they thought their conduct was being overlooked, when in fact the investigation was still pending.

Respondents further maintain that the public would not be protected, but would actually be harmed by the suspension. Its employees will lose their jobs. Dairy producers will lose it as an outlet. Humanitarian relief organizations will lose an important milk supply. The Small Business Administration will lose money on a guaranteed loan. Even though the suspension shall have adverse effects, USDA's need to protect the integrity of its programs, and to protect the public from further dishonest dealings, sufficiently outweighs them and makes the suspension necessary. The government cannot be required to conduct business with dishonest individuals because some individuals, or even the government, might profit from the dealings. For example, *Joseph Construction Company v. Veterans Administration of the United States*, 595 F. Supp. 448, 452 (N.D. Ill. 1984) found that: "[t]he contracting agency must consider all relevant factors, such as the low bidder's reliability and honesty, in addition to the amount of the bid in order to determine whether a contract would be advantageous to the government."

Due process concerns require that a person not be suspended without a hearing unless there is an immediate need to protect the public. It is, however, immediately necessary to protect the public from a company that cannot be trusted to do business with the government in a responsible and honest way. Section 3017.115 states that:

In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

There is sufficient evidence that MMI is not presently responsible and cannot be trusted. It submitted falsified documents in order to obtain more than one million dollars to which it was not entitled, and it retains that money today. MMI has betrayed the public trust, and suspension is needed to ensure that it does not have access to public funds while further legal proceedings are pending. *William E. Johnston*, 51 Agric. Dec. 1103 (Dec. 23, 1992), held that, "absent suspension, [the respondent] was poised to become the beneficiary of additional government commitments on new projects during the period of deliberation on his proposed debarment. These circumstances clearly called for suspension to protect the public interest." *Id.*, at 1111. Similar circumstances exist here and the suspension is, therefore, equally necessary.

C. Adequate cause

Respondents next contend that there is legally insufficient evidence of cause because the CCC continued to do business with MMI after learning of the fraudulent contracts. Respondents rely on *David K. Alberta*, 94 WL 161893 (Ag. B.C.A., April 25, 1994) and *Silverman v. United States Department of Defense*, 817 F. Supp. 846 (S.D. Cal. 1993), which both vacated debarments that were based on past misconduct alone. Those cases, however, are not persuasive. First, both vacated debarments, not suspensions. Second, the government continued to do business with the respondents in those cases after the criminal convictions that constituted the bases for the debarments. Since convictions constitute a presumption of misconduct there was no reason for the delay in those cases. In the instant case, the CCC simply continued to do business with MMI until it had sufficient evidence to justify the suspension. Furthermore, the complainant is persuasive in its argument that respondents have been suspended not only for past misconduct, but also for their continuing failure to return the fraudulently obtained funds. Respondents have not shown themselves to be presently responsible by making any effort to forgo the benefits of their past misconduct.

Respondents also argue that the suspending official should have considered mitigating factors when issuing his decision. The standard for suspension, however, does not require consideration of mitigating factors. The standards for debarment and suspension are different. Debarment requires that "the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision." 7 C.F.R. § 3017.300. Suspension, instead, only requires consideration of whether there is adequate evidence of one or more of the causes for suspension set forth in the

regulations, and whether there is an immediate need for the suspension. 7 C.F.R. § 3017.400.

Likewise, it is not necessary for the suspending official to articulate his decisionmaking process as fully as in a debarment proceeding. Section 3017.413(c) merely requires the notice of the suspending official's decision to include the following:

- (i) Reference to the previously issued notice of suspension;
- (ii) The reason(s) for the action taken in this notice.
- (iii) The effective date(s) of the suspension taken in this notice and, where appropriate, the period of the suspension;
- (iv) Advice that the suspension is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or designee authorized by an agency head makes a determination referred to in § 3017.215.

The letter Mr. Shumacher sent to Harjit Singh on July 26, 1996 contained all of the required information and is therefore sufficient in form.

A lower standard is appropriate for suspension because of its temporary nature. Legal or administrative proceedings must be initiated within twelve months after the date of the suspension notice. There is the possibility of a six month extension, but the period may not in any event exceed eighteen months. If additional proceedings are not initiated within the applicable period, the suspension is terminated. 7 C.F.R. § 3017.415(b). A debarment on the other hand can be imposed for as many as five years. 7 C.F.R. § 3017.320. The harshness of debarment necessitates the more detailed analysis and consideration of mitigating factors that the respondents requested here.

The respondents also claim that the suspending official erroneously considered evidence which should have been treated as confidential. Respondents sent a memorandum containing admissions to the United States Attorney's Office as part of confidential settlement negotiations. Subsequently, respondents waived any confidentiality when it forwarded multiple copies of the memorandum to the USDA and invited OGC attorney Maureen Meher to share the document with interested parties. The copies were not supplied in the context of settlement negotiations, and the USDA had no reason to treat the document volunteered by the respondents as confidential. The references to confidentiality and offers of settlement in the memorandum were directed to the U.S. Attorneys Office, not USDA. Respondents cite a D.C. Bar Ethics Opinion which states that a recipient of confidential information is obligated to consult the sender to determine if a

waiver was intended. The opinion, however, is meant to address a situation where confidential information is accidentally transmitted to opposing counsel, and therefore does not apply to this situation where respondents knowingly sent copies of the document to the USDA.

It is noted, however, that even if the memorandum were to be excluded, there is sufficient evidence in the record of fraud and false statements without the admissions. This evidence includes bills of lading, container tracking records from the shipping vessels, and correspondence between Mr. Singh and General Milling. In sum, there is sufficient evidence to support the suspending official's decision, and it therefore cannot be considered arbitrary and capricious and an abuse of discretion, or not based on the applicable standard of evidence, or not in accordance with the law. Consequently, the decision of the suspending official shall be affirmed.

Order

The decision of the suspending official is hereby affirmed. The effective date of the suspension is April 17, 1996. This order is final and not appealable within the Department.

Copies of this Decision and Order shall be served upon the parties.
[This Decision and Order became final November 8, 1996.-Editor]

PLANT QUARANTINE ACT
DEPARTMENTAL DECISIONS

In re: SANDRA L. REID.
P.Q. Docket No. 95-0047.
Decision and Order filed July 17, 1996.

Default — Bringing prohibited fruit into United States from Jamaica — Failure to file timely answer — Civil penalty — Notice and opportunity for hearing.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of \$375 against Respondent for importing a mango into the United States in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c). The Rules of Practice, 7 C.F.R. § 1.145(a), provide that appeal to the Judicial Officer must be filed within 30 days after service of the decision. Respondent's appeal to the Judicial Officer filed 32 days after service of the Default Decision could have been denied as being late-filed. However, in accordance with the Rules of Practice, 7 C.F.R. § 1.139, a Default Decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision allows the Judicial Officer to grant up to a 4-day extension of time for filing an appeal, and Respondent was granted a 2-day extension. Under the Rules of Practice, Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The Department is not required to hold a hearing; therefore, under *Kaplinsky*, the civil penalty requested in the Complaint is reduced by one-half.

James A. Booth, for Complainant.

Respondent, Pro se.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

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

This case is an administrative proceeding for the assessment of a civil penalty for a violation of the Federal Plant Pest Act, as amended, (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended, (7 U.S.C. §§ 151-154, 156-165, 167) (Acts), and a regulation promulgated under the Acts, (7 C.F.R. § 319.56(c)). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151)(hereinafter the Rules of Practice), by a Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on June 29, 1995. The Complaint, which alleges that on or about August 7, 1994, Sandra L. Reid

(hereinafter Respondent) imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), was served on Respondent on October 26, 1995. Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice, (7 C.F.R. § 1.136), and on March 22, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W. Palmer (hereinafter Chief ALJ) issued a Default Decision and Order (hereinafter Default Decision) in which the Chief ALJ found that, on or about August 7, 1994, Respondent imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States, and assessed a civil penalty of \$375 against Respondent.

On June 4, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ On June 28, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Default Decision and Order, and on July 3, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

....

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

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

the Rules of Practice, (7 C.F.R. § 1.136(c)), provides that the failure to file an Answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an Answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139.)

Findings of Fact

1. Sandra L. Reid is an individual whose mailing address is (b) (6) (b) (6)
2. On or about August 7, 1994, Respondent imported a fresh mango from Jamaica into the United States at JFK International Airport, in violation of 7 C.F.R. § 319.56(c), which prohibits entry of such fruit into the United States.

Conclusion

By reason of the Findings of Fact set forth above, Respondent has violated the Acts and a regulation issued under the Acts, (7 C.F.R. § 319.56(c)). . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

00 Respondent was served with the Default Decision on May 3, 1996, and on June 4, 1996, 32 days after service, Respondent filed an appeal. (Letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated May 13, 1996, and filed June 4, 1996 (hereinafter Appeal Petition).) Section 1.145(a) of the Rules of Practice provides:

§ 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).

Respondent's late-filed appeal could be denied. However, section 1.139 of the Rules of Practice provides:

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

Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145[(7 C.F.R. § 1.145)]...

7 C.F.R. § 1.139.

Thus, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), a default decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision was placed in the Rules of Practice so that if an appeal is inadvertently filed up to 4 days late, e.g., because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal. *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-301 (1985), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Company, Inc.*, 43 Agric. Dec. 1106, 1108 (1984). The Default Decision had not become final on June 4, 1996, when Respondent filed the Appeal Petition and the postmark on the envelope containing Respondent's Appeal Petition indicates that Respondent mailed the Appeal Petition from Brooklyn, New York, on May 22, 1996. (Envelope containing Respondent's Appeal Petition.) Under these circumstances, I am granting a 2-day extension of time to Respondent for filing her appeal.² Thus,

²Had the Default Decision become final prior to Respondent's filing an appeal, the Judicial Officer would not have had jurisdiction to consider Respondent's appeal. *In re Field Market Produce, Inc.*, 55 Agric. Dec. ___, slip op. at 10 (July 10, 1996); *In re Ow Duk Kwon*, 55 Agric. Dec. ___, slip op. at 6-7 (June 6, 1996); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994); *In re K. Lester*, 52 Agric. Dec. 332 (1993); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986);

Respondent's Appeal Petition filed June 4, 1996, is deemed to have been timely filed.

Respondent contends in the Appeal Petition that she was not provided with an opportunity for a hearing. (Respondent's Appeal Petition.) I disagree and find that Respondent was provided with an opportunity for a hearing and that Respondent waived the hearing by failing to file a timely Answer.

On June 29, 1995, the Office of the Hearing Clerk sent a letter dated June 29, 1995, and one copy each of the Complaint and the Rules of Practice to Respondent at Respondent's last known address, (b) (6) (b) (6) ³by certified mail. The envelope containing the June 29, 1995, letter from the Office of the Hearing Clerk and one copy each of the Complaint and the Rules of Practice was returned to the Office of the Hearing Clerk by the postal service marked "No such street ___ number _x -."

Section 1.147(c)(1) of the Rules of Practice provides:

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

....

In re William T. Powell, 44 Agric. Dec. 1220 (1985); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978); *In re Willie Cook*, 39 Agric. Dec. 116 (1978).

³Prior to the institution of this proceeding, Respondent sent a letter dated January 3, 1995, to Mr. Christian, Regulatory Enforcement, United States Department of Agriculture, Animal and Plant Health Inspection Service, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782, concerning the violation which is the subject of this proceeding. Respondent states in her January 3, 1995, letter that her return address is (b) (6) (b) (6). (See attachment to letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated November 27, 1995, and filed December 8, 1995.) This January 3, 1995, letter is the latest correspondence in the record from Respondent prior to the issuance of the Complaint. Respondent's filings in this proceeding variously identify her address as (b) (6) (b) (6) and (b) (6) and Respondent has responded intermittently to documents served on her in this proceeding at 149 (b) (6) and (b) (6). Therefore, for the purposes of this proceeding, I find that service in accordance with the Rules of Practice at either (b) (6) or (b) (6) (b) (6), constitutes proper service on Respondent.

(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 know[n] 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).

On October 26, 1995, the Office of the Hearing Clerk served Respondent, at 149-53 255th Street, Rosedale, New York 11422, by ordinary mail, in accordance with 7 C.F.R. § 1.147(c)(1), with one copy each of the Complaint, the Rules of Practice, and the June 29, 1995, letter from the Office of the Hearing Clerk.

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

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

allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 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. § 1.139.

§ 1.141 Procedure for Hearing.

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

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on October 26, 1995, states: The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136(a)). The admission by the answer of all the material allegations of fact contained in the complaint constitutes

a waiver of a hearing. Failure to deny or otherwise respond to any allegation in this complaint constitutes an admission of the allegation. Failure to file an answer within the prescribed time constitutes an admission of the allegations in this complaint and a waiver of a hearing.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely Answer. Moreover, the accompanying June 29, 1995, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

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.

Letter from Joyce A. Dawson, Hearing Clerk, to Ms. Sandra L. Reid, dated June 29, 1995, p. 1. (Emphasis in original.)

Respondent's Answer was due November 15, 1995, and Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. § 1.139). On November 16, 1995, the Office of the Hearing Clerk sent a letter to Respondent at 149-53 255th Street, Rosedale, New York 11422, stating, "Your answer to the Complaint has not been received within the allotted time. You will be informed of any future action taken in this matter."

On December 8, 1995, Respondent filed a response⁴ to the November 16, 1995, letter from the Office of the Hearing Clerk stating that she had previously answered the Complaint filed in the instant proceeding, as follows:

RE: Letter Dated 11/16/95

Dear Ms. Dawson:

Your letter stated that an "...answer to the Complaint has not been received within the allotted time.". This statement [sic] is false. I was made aware of the problem in a letter (dated 09/29/94) which I received on 10/03/94 from Alan Christian. I promptly responded in two letters 11/94 and 1/95. A copy of the 1/95 letter is attached for your review. The letter was sent within the allotted time of 20 days.

Letter from Respondent to Joyce A. Dawson, Hearing Clerk, dated November 27, 1995, and filed December 8, 1995.

Attached to Respondent's December 8, 1995, filing is a copy of a letter dated January 3, 1995, from Respondent⁵ to Mr. Christian, Regulatory Enforcement (NY94169), USDA, APHIS, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782. Respondent attached the November 1994 letter, referenced in her December 8, 1995, filing, to her filing of March 19, 1996. Respondent's November 15, 1994, letter is addressed to Mr. Christian, Regulatory Enforcement (NY94169), USDA, APHIS, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782.⁶ Respondent contends in her December 8, 1995, filing that her letters of November 15, 1994, and January 3, 1995, were prompt responses to a letter dated September 29, 1994, from Alan Christian.

⁴Respondent's December 8, 1995, filing identifies her return address both in the filing and on the envelope containing the filing as: "Sandra L. Reid, (b) (6) (b) (6) "

⁵Respondent's letter of January 3, 1995, identifies her return address as: "Sandra L. Reid, (b) (6) "

⁶Respondent's letter of November 15, 1994, identifies her return address as: "Sandra L. Reid, (b) (6) "

Section 1.136(a) of the Rules of Practice, (7 U.S.C. § 1.136(a)), provides that "[w]ithin 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . ." The Complaint instituting this proceeding was not issued until June 26, 1995, and was not filed until June 29, 1995. Respondent's letters dated November 15, 1994, and January 3, 1995, which Respondent contends were in prompt response to a letter dated September 29, 1994, from Alan Christian could not have operated as a timely Answer to the Complaint because they were not filed with the *Hearing Clerk within 20 days after service of the Complaint on Respondent*. Rather, Respondent's letters of November 15, 1994, and January 3, 1995, were sent to Regulatory Enforcement, United States Department of Agriculture, Animal and Plant Health Inspection Service, REAC, Federal Building, Room 564, 6505 Belcrest Road, Hyattsville, Maryland 20782, 7 months and 5 months respectively *before* the Complaint was filed. The record clearly establishes that Respondent did not file the January 3, 1995, letter with the Hearing Clerk until December 8, 1995, 43 days after service of the Complaint on Respondent, and did not file the November 15, 1994, letter with the Hearing Clerk until March 19, 1996, 145 days after service of the Complaint on Respondent.

On December 8, 1995, in accordance with 7 C.F.R. § 1.139, Complainant filed a Motion for Adoption of Proposed Default Decision and Order (hereinafter Motion for Proposed Default Decision) and a Proposed Default Decision and Order (hereinafter Proposed Default Decision) based upon Respondent's failure to file an Answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). Respondent was served with the Motion for Proposed Default Decision and Proposed Default Decision on March 7, 1996. On March 19, 1996, Respondent filed a response to the Complainant's Motion for Proposed Default Decision and Proposed Default Decision in which she contends that she had responded to the Complaint in a timely fashion, as follows:

This letter is the third attempt to resolve this matter. A letter dated 12/8/95 was received yesterday 3/11/96. This escalated beyond belief. The incident occurred [sic] in 1994, two(2) years ago. I have responded in a timely fashion to all notices sent.

I am again requesting a hearing to resolve this matter. . . . This is a rather one-sided process. I have not been allowed to represent myself. . . .

Letter from Respondent to Regina A. Paris, Legal Technician, Office of the Hearing Clerk, dated March 12, 1996, and filed March 19, 1996.

Respondent attached the letters dated November 15, 1994, and January 3, 1995, which she had sent to Mr. Christian and her filing of December 8, 1995, to her March 19, 1996, response to Complainant's Motion for Proposed Decision and Proposed Decision.

On March 22, 1996, the Chief ALJ filed the Default Decision. Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,⁷ Respondent has shown no basis for setting aside the Default Decision here.⁸

⁷*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁸*See In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed); Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer

proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁹ If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

However, had Respondent been permitted to present any affirmative defenses out of time, it is still extraordinarily unlikely that Respondent could prevail. Excuses for illegally importing fruit that presents a significant risk of introducing plant pests into the United States are routinely rejected by the Judicial Officer. One piece of fruit bearing a plant pest could cause, *inter alia*, hundreds of millions of dollars in damaged fruit, eradication expense, and quarantine of United States produce. The Animal and Plant Health Inspection Service, the agency charged with responsibility for administering the Federal Plant Pest Act and the Plant Quarantine Act, is committed to protecting American agriculture from the introduction of plant pests into the United States; and the Secretary, in turn, is committed to vigorous enforcement of the Acts and regulations issued under the Acts to support the Animal and Plant Health Inspection Service's efforts.

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

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the due process clause of the Fifth Amendment to the United States Constitution. See *United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

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

Order

Respondent, Sandra L. Reid, is assessed a civil penalty of \$375.¹⁰ Respondent shall send a certified check or money order for \$375, payable to the "Treasurer of the United States," to:

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

within 30 days after service of this Order on Respondent.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-47.

¹⁰Respondent has failed to file a timely Answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the \$750 civil penalty requested in the Complaint is reduced by one-half. See *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 633-34 (1988); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201, 2210-11 (1985).

In re: BIBI UDDIN.

P.Q. Docket No. 95-0055.

Decision and Order filed August 23, 1996.

Notice and opportunity for hearing — Failure to file an answer — Default — Bringing prohibited fruit into United States from Guyana — Intent as an element of the violation — Civil penalty.

The Judicial Officer affirmed the Default Decision by Chief Administrative Law Judge Victor W. Palmer (Chief ALJ) assessing a civil penalty of \$250 against Respondent for importing approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas), in violation of 7 C.F.R. § 319.56. Respondent was served with the Complaint and Complainant's Motion for Default Decision in accordance with 7 C.F.R. § 1.147(c)(1). Under the Rules of Practice, (7 C.F.R. §§ 1.136(c), .139), Respondent's failure to file a timely Answer constitutes an admission of the allegations in the Complaint and a waiver of hearing. Respondent's denial of the material allegations of the Complaint, filed more than 9 months after service of the Complaint on Respondent, is too late. Intent is not relevant to an administrative proceeding for the assessment of a civil penalty for a violation of a regulation issued under the Plant Quarantine Act. The civil penalty assessed against Respondent is warranted and consistent with civil penalties requested and assessed in similar circumstances.

Susan C. Golabek, for Complainant.

Respondent, Pro se.

Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Decision and Order issued by William G. Jensen, Judicial Officer.

This case is an administrative proceeding for the assessment of a civil penalty for a violation of the Act of August 20, 1912, as amended, (7 U.S.C. §§ 151-154, 156-165, 167) (hereinafter the Plant Quarantine Act), and the regulations promulgated under the Plant Quarantine Act, (7 C.F.R. §§ 319.56-.56-8). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151), and the Rules of Practice Governing Proceedings Under Certain Acts, (7 C.F.R. §§ 380.1-.10) (hereinafter the Rules of Practice), by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on August 21, 1995. The Complaint, which alleges that on or about August 31, 1994, Bibi Uddin (hereinafter Respondent) imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, was served on Respondent on October 5, 1995. Respondent failed to answer the Complaint within 20 days, as required by section 1.136 of the Rules of Practice, (7 C.F.R. § 1.136). On July 3, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), Chief Administrative Law Judge Victor W.

Palmer (hereinafter Chief ALJ) issued a Default Decision and Order (hereinafter Default Decision) in which the Chief ALJ found that, on or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, and assessed a civil penalty of \$250 against Respondent.

On July 22, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R. § 2.35.)¹ On August 12, 1996, Complainant filed Complainant's Response to Respondent's Appeal of the Default Decision and Order to the Judicial Officer (hereinafter Complainant's Response), and on August 15, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion.

CHIEF ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

....

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, the failure to file an Answer constitutes a waiver of hearing. (7 C.F.R. § 1.139.) Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139.)

Findings of Fact

1. Bibi Uddin, Respondent herein, is an individual whose mailing address is (b) (6)

2. On or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of bitter melons and sapodillas from Guyana into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact, Respondent has violated 7 C.F.R. § 319.56. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter, dated July 12, 1996, addressed to Complainant's counsel, Ms. Susan C. Golabek, which was filed on July 22, 1996 (hereinafter Respondent's Appeal Petition), appears to be and is treated herein as Respondent's appeal of the Default Decision.² Respondent raises three issues in Respondent's Appeal Petition.

First, Respondent contends that she did not receive "past correspondence" regarding the instant proceeding, as follows:

[T]he complaint also alleges that I failed to answer within the time "prescribed and that such failure [was] deemed an admission of the allegations . . . and constitute[d] a waiver of hearing." As I was in the process of moving to a new apartment, I did not receive past correspondence from your department. In several telephone conversations, departmental employees have verified that they indeed

²The record contains an almost identical letter, dated July 11, 1996, from Respondent, addressed to Complainant's counsel, Ms. Susan C. Golabek, which was filed on July 19, 1996. The issues raised in Respondent's July 19, 1996, filing are identical to the issues raised in Respondent's Appeal Petition.

received returned mail. As such, my silence on the matter does not indicate consent to the allegations but rather reveals that I was not apprised of the matter. Had I known of the complaint, I would have responded as I am doing now.

Respondent's Appeal Petition.³

On August 22, 1995, the Office of the Hearing Clerk sent a letter dated August 22, 1995, and one copy each of the Complaint and the Rules of Practice to Respondent at Respondent's last known address, (b) (6), by certified mail. The envelope containing the August 22, 1995, letter from the Office of the Hearing Clerk and one copy each of the Complaint and the Rules of Practice was returned to the Office of the Hearing Clerk by the postal service marked "UNCLAIMED." The envelope also bears the crossed-out notation (b) (6).

Section 1.147(c)(1) of the Rules of Practice provides:

§ 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

³Contrary to Respondent's contention, the Complaint does not allege that Respondent "failed to answer within the time 'prescribed and that such failure [was] deemed an admission of the allegations . . . and constitute[d] a waiver of hearing.'" Statements regarding the effect of Respondent's failure to file an Answer are contained in Complainant's Motion for Adoption of Proposed Default Decision and Order (hereinafter Complainant's Motion for Default Decision), Complainant's Proposed Default Decision and Order (hereinafter Complainant's Proposed Default Decision), and the Default Decision.

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).

On October 5, 1995, the Office of the Hearing Clerk served Respondent at (b) (6), by ordinary mail, in accordance with 7 C.F.R. § 1.147(c)(1), with one copy each of the Complaint, the Rules of Practice, and the August 22, 1995, letter from the Office of the Hearing Clerk. (October 5, 1995, Memorandum to the File from Regina A. Paris, Hearing Clerk's Office.)

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 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. § 1.139.

§ 1.141 Procedure for Hearing.

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

7 C.F.R. § 1.141(a).

The Complaint served on Respondent on October 5, 1995, states:

The respondent shall have twenty (20) days after service of this Complaint in which to file an Answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the applicable Rules of Practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an Answer within the prescribed time shall constitute an admission of the allegations in this Complaint and a waiver of a hearing.

Complaint, p. 2.

The Complaint clearly informs Respondent of the consequences of failure to file a timely Answer. Moreover, the accompanying August 22, 1995, letter

from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

August 22, 1995, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Bibi Uddin, p. 1. (Emphasis in original.)

The Complaint, the Rules of Practice, and the August 22, 1995, letter from the Office of the Hearing Clerk sent to Respondent by ordinary mail on October 5, 1995, were not returned to the Office of the Hearing Clerk. (Complainant's Response, p. 1.) Respondent's Answer was due October 25, 1995. Respondent's first filing in this proceeding is dated July 11, 1996, and was filed July 19, 1996. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)).

On February 15, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On February 16, 1996, the Office of the Hearing Clerk sent a letter dated February 16, 1996, and one copy each of the Complainant's Motion for Default Decision and Complainant's Proposed Default Decision to Respondent at Respondent's last known address, (b) (6), (b) (6), by certified mail. The envelope containing the February 16, 1996, letter from the Office of the Hearing Clerk and one copy each of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision was returned to the Office of the Hearing Clerk by the postal service marked "RETURNED TO SENDER." The envelope also bears the notation "(b) (6)."

On April 10, 1996, the Office of the Hearing Clerk sent one copy each of Complainant's Motion for Default Decision and the February 16, 1996, letter

from the Office of the Hearing Clerk to Respondent at (b) (6), (b) (6), by certified mail. The return receipt card was returned to the Office of the Hearing Clerk, but it did not bear any signature or the date of delivery. (May 2, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Postmaster, Ozone Park, New York.) On June 4, 1996, the Office of the Hearing Clerk served Respondent by ordinary mail, at (b) (6) (b) (6) with one copy each of Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk. (June 4, 1996, note from RAParis.) The June 4, 1996, mailing was not returned to the Office of the Hearing Clerk. (Complainant's Response, p. 2.) The February 16, 1996, letter from the Office of the Hearing Clerk informs Respondent that she has 20 days from the date of service of the letter in which to file objections to Complainant's Proposed Default Decision. (February 16, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Ms. Bibi Uddin.)

Respondent failed to file objections to Complainant's Motion for Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and, on July 3, 1996, the Chief ALJ filed the Default Decision. The Office of the Hearing Clerk sent the Default Decision, which Respondent received, by certified mail, to Respondent at (b) (6).

The record clearly establishes that: (1) on October 5, 1995, the Office of the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the August 22, 1995, letter from the Office of the Hearing Clerk, in accordance with 7 C.F.R. § 1.147(c)(1); (2) on June 4, 1996, the Office of the Hearing Clerk served Respondent with Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk, in accordance with 7 C.F.R. § 1.147(c)(1); and (3) Respondent received the Default Decision, which was mailed on July 5, 1996, by the Office of the Hearing Clerk, by certified mail, to Respondent at (b) (6) (b) (6), the same address to which the Office of the Hearing Clerk sent Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk.

Respondent does not explain the apparent conflict between her assertion that she did not have actual notice of this proceeding until she received the Default Decision and the fact that the Complainant's Motion for Default Decision and the February 16, 1996, letter from the Office of the Hearing Clerk were mailed to Respondent at the same address as the Default Decision, which she received. Nonetheless, Respondent's actual notice of this proceeding and the documents sent to Respondent are not required under the

Rules of Practice or under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Service in accordance with the Rules of Practice afforded Respondent due process. 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 Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See *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).

The Rules of Practice, which provide for service by regular mail to Respondent's last known residence after a certified mailing is returned marked by the postal service as unclaimed or refused, which procedure was followed here, meet 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.]

Accordingly, Respondent was properly served with the Complaint, Complainant's Motion for Default Decision, and the Default Decision. Respondent failed to file a timely Answer to the Complaint; therefore, the Default Decision was properly issued in this proceeding.

Second, Respondent contends that the Findings of Fact in the Default Decision are inaccurate, as follows:

Because the facts stated in the Default Decision and Order were glaringly inaccurate, I am submitting this appeal in order to address the false allegations concerning my importation of foreign produce. Officials distorted or erroneously documented the quantity and type of fruit which I had on my person when I returned from my vacation. The complaint states that on August 31, 1994, I imported "seven (7) cucurbits (bitter melons) and twenty (20) Manilkara zapota (sapodillas)" from Guyana into the U.S. Suffice it to say, I have neither heard of cucurbits nor sapodillas. Furthermore, I would not be inclined to transport 27 of them along with my luggage in tow. In truth, I actually was in possession of five (5) mangos upon my return to the United States, which I promptly relinquished to U.S. Customs Officials when they informed me that the practice was prohibited.

Respondent's Appeal Petition.

Respondent's denial of the allegations in the Complaint comes too late. Section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), requires that within 20 days after service of the Complaint, Respondent shall file an answer with the Hearing Clerk. Respondent was served with the Complaint on October 5, 1995. Respondent's July 19, 1996, filing and Respondent's Appeal Petition, denying the allegations in the Complaint, were filed more than 9 months after the Complaint was served on Respondent. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in

the Complaint, (7 C.F.R. § 1.136(a), (c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)). Further, Respondent was served with Complainant's Motion for Default Decision on June 4, 1996, which states that Respondent, by her failure to file an Answer, is deemed to have admitted that on or about August 31, 1994, Respondent imported approximately 7 cucurbits (bitter melons) and 20 *Manilkara zapota* (sapodillas) from Guyana into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56. Section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), provides that Respondent may file objections to Complainant's Motion for Default Decision within 20 days after service of the motion on Respondent. Respondent's first filing in this proceeding was filed July 19, 1996, and Respondent's Appeal Petition was filed July 22, 1996, 45 and 48 days respectively after Complainant's Motion for Default Decision was served on Respondent.

Third, Respondent contends that:

[D]ue to the misrepresentation of the facts, my unawareness that the importation of fruit was prohibited, and my lack of knowledge of the motion levied against me, the contention that a civil penalty of \$250 is "warranted and appropriate" as a deterrent is specious at best. The imposition of such a fine is utterly egregious.

Respondent's Appeal Petition.

Section 10 of the Plant Quarantine Act provides:

§ 163. Violations; forgery, alterations, etc., of certificates; punishment; civil penalty

Any person who knowingly violates any provision of this chapter or any rule or regulation promulgated by the Secretary of Agriculture under this chapter, or who knowingly forges or counterfeits any certificate provided for in this chapter or in any such rule or regulation, or who, knowingly and without the authority of the Secretary, uses, alters, defaces, or destroys any such certificate shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding \$5,000, by imprisonment not exceeding one year, or both. Any person who violates any such provision, rule, or regulation, or who forges or counterfeits any such certificate, or who, without the authority of the Secretary, uses, alters, defaces, or destroys

any such certificate, may be assessed a civil penalty by the Secretary not exceeding \$1,000. . . .

7 U.S.C. § 163.

Respondent's contention that she was not aware that "the importation of fruit was prohibited" is not relevant to this administrative proceeding for the assessment of a civil penalty for a violation of a regulation issued under the Plant Quarantine Act. In order to achieve the congressional purpose of the Plant Quarantine Act and to prevent the importation into the United States of items that could be disastrous to United States agriculture, it is necessary to hold violators responsible, irrespective of lack of evil motive or intent to violate the Plant Quarantine Act and the regulations issued under the Plant Quarantine Act. *See, e.g., In re Francisco Escobar, Jr.*, 54 Agric. Dec. 392, 418 (1995), *aff'd per curiam*, No. 95-60081 (5th Cir. Aug. 23, 1995) (unpublished) (it is irrelevant to the assessment of a civil penalty under the Federal Plant Pest Act, the Plant Quarantine Act, and the Act of February 2, 1903, that Respondent had no intention of bringing items into the United States); *In re Robert N. Watts, Jr.*, 53 Agric. Dec. 1419, 1428 (1994) (under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty); *In re Unique Nursery & Garden Center* (Decision as to Valkering, U.S.A., Inc.), 53 Agric. Dec. 377, 421-22 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995) (under the Federal Plant Pest Act and the Plant Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty); *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 636 (1988) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of approximately 4 peaches and approximately 5 plums placed in Respondent's baggage without her knowledge); *In re Kathleen D. Warner*, 46 Agric. Dec. 763 (1987) (Ruling on Certified Question) (Judicial Officer found that Respondent could be assessed a civil penalty for an inadvertent or unintentional violation of the plant quarantine laws caused by a misunderstanding or failure of communication between Respondent and an Oriental inspector); *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of plantains placed in Respondent's luggage without her knowledge); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986) (Respondent assessed civil penalty under the Plant Quarantine Act for unlawful importation of a cacao seed pod placed in Respondent's luggage without his knowledge); *In re Richard Duran Lopez*, 44 Agric. Dec. 2201, 2209 (1985) (under the Plant

Quarantine Act, intent is not an element of a violation in a disciplinary administrative proceeding for the assessment of a civil penalty).

Even if Respondent were permitted to present affirmative defenses out of time, it is still extraordinarily unlikely that Respondent could prevail. Excuses, for illegally importing fruit that presents a significant risk of introducing plant pests into the United States, are routinely rejected by the Judicial Officer. One piece of fruit bearing a plant pest could cause, *inter alia*, hundreds of millions of dollars in damaged fruit, eradication expense, and quarantine of United States produce. The Animal and Plant Health Inspection Service, the agency charged with responsibility for administering the Plant Quarantine Act, is committed to protecting American agriculture from the introduction of plant pests into the United States; and the Secretary, in turn, is committed to vigorous enforcement of the Plant Quarantine Act and regulations issued under the Plant Quarantine Act to support the Animal and Plant Health Inspection Service's efforts.

Under these circumstances, the assessment of a civil penalty of \$250 against Respondent is not "utterly egregious," as Respondent contends, but rather, is warranted and appropriate and consistent with civil penalties requested and assessed in similar circumstances. *See, e.g., In re Sandra L. Reid*, 55 Agric. Dec. ___ (July 17, 1996) (\$375 civil penalty assessed for the importation of a fresh mango into the United States from Jamaica, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56(c)); *In re Christian King*, 52 Agric. Dec. 1333 (1993) (\$750 civil penalty assessed for the importation of approximately 5 to 8 pounds of fresh okra into the United States from Sierra Leone, in violation of 7 C.F.R. § 319.56); *In re Carol F. Hines*, 52 Agric. Dec. 336 (1993) (\$375 civil penalty assessed for the importation of mangoes and pomegranates into the United States from Guyana, in violation of the Federal Plant Pest Act, the Plant Quarantine Act, and 7 C.F.R. § 319.56); *In re Alicia Piedad Valero*, 52 Agric. Dec. 328 (1993) (\$375 civil penalty assessed for the importation of fresh mango fruits into the United States from Ecuador, in violation of 7 C.F.R. § 319.56); *In re Vanessa Hopkins*, 51 Agric. Dec. 1212 (1992) (\$375 civil penalty assessed for the importation of approximately 2 mangoes into the United States from Trinidad, in violation of 7 C.F.R. § 319.56); *In re Rousseline Claude*, 51 Agric. Dec. 1209 (1992) (\$375 civil penalty assessed for the importation of mangoes into the United States from Haiti, in violation of 7 C.F.R. § 319.56); *In re Shulamis Kaplinsky, supra* (\$250 civil penalty assessed for the importation of approximately 4 peaches and approximately 5 plums into the United States from Israel, in violation of 7 C.F.R. § 319.56(c)); *In re Sotirios Foundas*, 47

Agric. Dec. 611 (1988) (\$125 civil penalty assessed for the importation of 10 pounds of chestnuts into the United States from Greece, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Lawrence Craig*, 47 Agric. Dec. 606 (1988) (\$375 civil penalty assessed for the importation of approximately 3 avocados into the United States from Mexico, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56-2(e)); *In re Mercedes Capistrano, supra* (\$250 civil penalty assessed for the importation of plantains into the United States from the Philippines, in violation of 7 C.F.R. § 319.56(c)); *In re Rene Vallalta, supra* (\$250 civil penalty assessed for the importation of approximately 1 cacao seed pod into the United States from El Salvador, in violation of the Plant Quarantine Act and 7 C.F.R. § 319.56).

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived her right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of her rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980). Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,⁴ Respondent has shown no basis for setting aside the Default Decision here.⁵

⁴*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

⁵*See In re Billy Jacobs, Sr.*, 55 Agric. Dec. ___ (Aug. 15, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid, supra* (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. ___ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425

(1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charton*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In re Joe L. Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"⁶ If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

⁶*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). See *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

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

Order

Respondent, Bibi Uddin, is assessed a civil penalty of \$250.⁷ Respondent shall send a certified check or money order for \$250, payable to the "Treasurer of the United States," to:

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

within 30 days after service of this Order on Respondent.

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 95-55.

⁷Respondent has failed to file a timely Answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the \$500 civil penalty requested in the Complaint is reduced by one-half. See *In re Shulamis Kaplinsky, supra*, 47 Agric. Dec. at 633-34 (1988); *In re Richard Duran Lopez, supra*, 44 Agric. Dec. at 2210-11 (1985).

MISCELLANEOUS ORDERS

**In re: GERAWAN FARMING, INC., a CALIFORNIA CORPORATION.
95 AMA Docket Nos. F&V 916-1 & 917-1.
Order Dismissing Petition filed August 29, 1996.**

Donald Tracy, for Complainant.
Brian Leighton, Clovis, CA, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

Petitioner's August 28, 1996, motion to withdraw its petition is granted. Respondent has no objection to said withdrawal.

It is ordered that the petition filed herein on July 13, 1995, be withdrawn without prejudice pursuant to 7 C.F.R. § 900.53.

**In re: CAL-ALMOND, A DIVISION OF MORVEN PARTNERS L.P., A
DELAWARE LIMITED PARTNERSHIP.
96 AMA Docket No. F&V 97-0001.
Order Denying Interim Relief filed December 24, 1996.**

The Judicial Officer denied an application for interim relief. Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Moreover, even if Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's application for interim relief would be denied based upon established precedent.

Garrett B. Stevens, for Respondent.
Brian C. Leighton, Clovis, California, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On November 26, 1996, CAL-ALMOND, a Division of Morven Partners L.P., a Delaware Limited Partnership (hereinafter Petitioner), instituted a proceeding under the section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (hereinafter AMAA), (7 U.S.C. § 608c(15)(A)), regulations issued under the AMAA entitled *Almonds Grown in California*, (7 C.F.R. §§ 981.1-.474, .481), and the Rules of Practice Governing Proceedings on Petitions to Modify or to be Exempted from Marketing Orders (hereinafter Rules of Practice), (7 C.F.R. §§ 900.50-.71), seeking, *inter alia*, interim relief, as follows:

V

INTERIM RELIEF

21. Petitioner is entitled to interim relief pursuant to 7 C.F.R. § 900.70 permitting Petitioner to escrow "speech-related" assessments into an interest bearing account, and without penalty, pending a final decision on the merits.

Petitioner's Petition at 7, ¶ V(21).

On November 27, 1996, Respondent was served with Petitioner's Petition. Respondent did not file an answer to Petitioner's application for interim relief, and, on December 23, 1996, the case was referred to the Judicial Officer for a decision regarding Petitioner's application for interim relief.

Petitioner's application for interim relief is denied for the following reasons.

First, Petitioner's application for interim relief is denied because Petitioner has not complied with the requirements for filing an application for interim relief. (7 C.F.R. § 900.70(a), (b).) Petitioner's application for interim relief is included in its petition for declaratory relief, a refund of assessments, a preliminary and permanent injunction, and attorney fees under the Equal Access to Justice Act. The Rules of Practice require that Petitioner file a separate application for interim relief. (7 C.F.R. § 900.70(a).)

Second, even if Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's application for interim relief would be denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief. *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Cal-Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan Farming, Inc.*, 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co.*, 48 Agric. Dec. 79 (1989); *In re Cal-Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*,

47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981).

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

Order

Petitioner's application for interim relief is denied.

In re: HARLANDA. VALIQUETTE.

A.Q. Docket No. 96-0003.

Order Dismissing Complaint filed October 10, 1996.

Susan Golabek, for Complainant.

Respondent, Pro se.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion to dismiss the Complaint is granted. It is ordered that the Complaint filed herein on November 30, 1995, be dismissed.

In re: COLIN JOHNSON.

A.Q. Docket No. 95-0042.

Order Dismissing Complaint filed November 21, 1996.

Scott Safian, for Complainant.

Respondent, Pro se.

Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint, filed herein on August 7, 1995, be dismissed.

In re: J. C. "JACK" WILLIAMS.
A.Q.Docket No. 92-0013.
Order Dismissing Complaint filed December 12, 1996.

Cynthia Koch, for Complainant.
Respondent, Pro se.

Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on December 6, 1991, be dismissed.

In re: BETTY AALSETH.
AWA Docket No. 95-0075.
Supplemental Order filed August 8, 1996.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.

Supplemental Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's license as a dealer under the Animal Welfare Act, as amended, contained in the order in this case on October 13, 1995, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

In re: KRISTINA K. FOLSOM d/b/a KRITTER KORRAL.
AWA Docket No. 96-0054.
Dismissal of Complainant filed August 20, 1996.

Denise Y. Hansberry, for Complainant.
Respondent, Pro se.

Dismissal of Complaint issued by Victor W. Palmer, Chief Administrative Law Judge.

Complainant has requested that the complaint be dismissed and for the reasons stated by complainant it is hereby dismissed.

**In re: SHIRLEY MYERS, d/b/a SHIRLEY'S POODLES PARLOR.
AWA Docket No. 93-0038.
Order Dismissing Complaint filed August 29, 1996.**

Robert A. Ertman, for Complainant.
Respondent, Pro se.

Order Dismissing Complaint issued by Victor W. Palmer, Chief Administrative Law Judge.

Upon Motion of the Complainant and for good cause shown, the complaint in this matter, as amended, is dismissed, with prejudice.

**In re: JAMES MICHAEL LATORRES
AWA Docket No. 96-0056.
Order of Dismissal filed September 9, 1996.**

Frank Martin, Jr., for Complainant.
Respondent, Pro se.

Order of Dismissal issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on June 7, 1996, be dismissed without prejudice.

**In re: LORIN WOMACK, d/b/a LAND O'LORIN EXOTICS.
AWA Docket No. 95-0031.
Supplemental Order filed September 24, 1996.**

James Booth, for Complainant.
Respondent, Pro se.

Supplemental Order issued by Dorothea A. Baker, Administrative Law Judge.

Upon the motion of Complainant, the Animal and Plant Health Inspection Service, the suspension of respondents' license as a exhibitor under the Animal Welfare Act, as amended, contained in paragraph three of the Order issued in this case on June 19, 1996, is hereby terminated. However, paragraphs one and two of the Order are still in effect and are not affected by this supplemental Order.

This Order shall be effective upon issuance. Copies shall be served upon the parties.

In re: THOMAS F. SCHOENFELD.
AWA Docket No. 96-0013.
Motion to Dismiss filed October 25, 1996.

Donald Tracy, for Complainant.
Respondent, pro se.
Motion to Dismiss issued by Victor W. Palmer, Chief Administrative Law Judge.

FOR GOOD CAUSE SHOWN, this case is hereby dismissed without prejudice.

In re: NORMAN TROSPER d/b/a DAWG GONE KENNEL.
AWA Docket No. 96-0032.
Supplemental Order filed November 5, 1996.

Tejal Mehta, for Complainant.
David W. Urbom, Arapahow, NE., for Respondent.
Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

Complainant's motion for a supplemental order is granted, and the suspension of the respondent's license pursuant to the order issued June 25, 1996, is hereby terminated.

This order shall become effective immediately, copies shall be served upon the parties.

In re: LARRY MARKO.
AWA Docket No. 96-0034.
Supplemental Order filed December 16, 1996.

Donald Tracy, for Complainant.
Respondent, Pro se.
Supplemental Order issued by James W. Hunt, Administrative Law Judge.

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the Suspension of respondent's license as a dealer under the Animal

Welfare Act, as amended, contained in the Order issued in this case on August 29, 1996, is hereby terminated.

This order shall be effective upon issuance. Copies shall be served upon the parties.

In re: JEFF FORTIN and LIZANN FORTIN, d/b/a BEAVER CREEK KENNELS.

AWA Docket No. 96-0072.

Order filed December 19, 1996.

Robert Ertman, for Complainant.

Respondent, Pro se.

Order issued by Victor W. Palmer, Chief Administrative Law Judge.

For good cause shown and upon motion of complainant, the complainant, the complaint in this matter is dismissed.

In re: FAR WEST MEATS AND MICHAEL A. SERRATO.

FMIA Docket No. 91-0002, PPIA Docket No. 91-0001.

Ruling on Certified Questions filed September 27, 1996.

Harold J. Reuben and Scott C. Safian, for Complainant.

Brett T. Schwemer, Washington, D.C., for Respondents.

Ruling issued by William G. Jenson, Judicial Officer.

On September 5, 1996, Administrative Law Judge James W. Hunt certified two questions to the Judicial Officer. The first question certified by Judge Hunt is, as follows:

Can a question be certified to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)) when the question arises in the context of a proceeding for which there is no appeal to the Judicial Officer?

September 5, 1996, Certification of Questions to the Judicial Officer.

Answer: Yes.

Section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice) provides:

§ 1.143 Motions and requests.

....

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145[, (7 C.F.R. § 1.145)], shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

The only expressed limitation in section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), on the authority of an administrative law judge (hereinafter ALJ) to certify a question to the Judicial Officer, is temporal; viz., the ALJ must certify the question prior to the filing of an appeal pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). While this limitation appears to anticipate that any question certified by an ALJ to the Judicial Officer would arise in a proceeding with a right of appeal to the Judicial Officer, the Rules of Practice do not explicitly place this limitation on the ALJ's authority to certify questions. Moreover, it does not appear that any party would be harmed by allowing an ALJ to certify a question in a proceeding in which there is no right of appeal to the Judicial Officer, and I find that the better practice would be to reserve discretion in the Judicial Officer to provide requested guidance to ALJs where it is not expressly prohibited.

The second question certified to the Judicial Officer by Judge Hunt arises in connection with a Consent Decision that has become final,¹ and the Judicial Officer has no jurisdiction to hear an appeal of that Consent

¹The Stipulation and Consent Decision in the instant proceeding became final on November 8, 1991.

Decision.² However, since there has been no appeal to the Judicial Officer in the instant proceeding pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145), I find that Judge Hunt may certify the question to the Judicial Officer even though the question arises in connection with a proceeding in which there is no right of appeal to the Judicial Officer.

The second question certified by Judge Hunt is, as follows:

If such a question can be certified, the question is whether an administrative law judge has the authority to entertain [R]espondents' motion in this proceeding to modify a consent decision?

September 5, 1996, Certification of Questions to the Judicial Officer.³

Answer: An ALJ has authority to entertain and to rule on motions to modify Consent Decisions.

Section 1.143(a) and (b)(1) of the Rules of Practice provides:

§ 1.143 Motions and requests.

²*In re Velasam Veal Connection*, 55 Agric. Dec. ____, slip op. at 4-6 (June 25, 1996) (FMIA Docket No. 96-6, PPIA Docket No. 96-5); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1475-76 (1988).

³Judge Hunt's second question certified to the Judicial Officer refers to "[R]espondents' motion . . . to modify a consent decision." (September 5, 1996, Certification of Questions to the Judicial Officer. (Emphasis added.)) Respondent's Motion to Modify Consent Decision does not clearly indicate whether the motion is filed by both Respondents in this proceeding or only one of the Respondents in this proceeding. The motion to modify the consent decision is entitled "*Respondent's Motion to Modify Consent Decision*" (emphasis added) and is signed by Mr. Brett T. Schwemer, "Counsel for Far West Meats." The body of Respondent's Motion to Modify Consent Decision states that "*respondents respectfully move that the Administrative Law Judge (ALJ) modify the Consent Decision entered between respondents Far West Meats (Far West) and Michael A. Serrato, and the complainant United States Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS) on November 8, 1991.*" (Respondent's Motion to Modify Consent Decision, p. 1. (Emphasis added.)) I infer from the record, particularly the body of Respondent's Motion to Modify Consent Decision, that both Respondent Far West Meats and Respondent Michael A. Serrato are represented by Mr. Brett T. Schwemer and, thus, both Respondents filed Respondent's Motion to Modify Consent Decision.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147[, (7 C.F.R. § 1.147)], (2) requests for subpoenas pursuant to § 1.149[, (7 C.F.R. § 1.149)], and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to filing an appeal of the Judge's decision pursuant to § 1.145[, (7 C.F.R. § 1.145)], except motions directly relating to the appeal. . . .

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143(a), (b)(1).

Respondent's Motion to Modify Consent Decision: (1) was filed prior to the filing of an appeal of the ALJ's decision pursuant to § 1.145 of the Rules of Practice, (7 C.F.R. § 1.145); (2) is not a motion directly relating to an appeal; and (3) is not a motion to dismiss on the pleadings. Under these circumstances, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), not only authorizes an ALJ to entertain Respondent's Motion to Modify Consent Decision, but requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and rule on the motion.⁴

Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), provides that *any* motion will be entertained other than a motion to dismiss on the pleading. Generally, the word *any* is broadly inclusive.⁵ Section

⁴See generally *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (the Judicial Officer, as well as the ALJ, is bound by the Rules of Practice, which state that "[a]ny motion will be entertained other than a motion to dismiss on the pleading").

⁵See *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (the use of the words *each* and *any* to modify *employee* which, in turn, is defined to include *any* employed individual, discloses congressional intention to include all employees within the scope of the Fair Labor Standards Act, unless specifically excluded); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992) (the word *any* is generally used in the sense of *all* or *every* and its meaning is most comprehensive), *cert. denied sub nom. Doughboy Recreational, Inc. v. Fleck*, 507 U.S. 1005 (1993); *Kalmbach, Inc. v. Insurance Company of the State of Pennsylvania, Inc.*, 529 F.2d 552, 556 (9th Cir. 1976) (the common understanding of the word *any* is that it means *all* or *every*; generally, though not necessarily, the word *any* serves to enlarge the noun it modifies); *FDIC v. Winton*, 131 F.2d 780, 782 (6th Cir. 1942) (the word *any* modifying the word *deposits* in a provision of the Federal Reserve Act means *one indiscriminately of whatever kind or quantity*); *Kuhlman v. W. & A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927) (an Act giving any seaman authority to sue,

1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), provides that the ALJ shall rule upon *all* motions and requests filed or made prior to filing an appeal of the ALJ's decision pursuant to 7 C.F.R. § 1.145, except motions directly relating to the appeal. As commonly used, the word *all* does not permit an exception or exclusion not specified.⁶ Moreover, the context in which the words *all* and *any* are used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), and section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), respectively, provides no basis for reading the words *all* and *any* narrowly.

Thus, I find section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), requires an ALJ to rule on Respondent's Motion to Modify Consent Decision.

While the Rules of Practice do not explicitly address the modification of Consent Decisions, section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), describes the nature of Consent Decisions and the ALJ's limited jurisdiction with respect to entry of Consent Decisions, as follows:

applies to *every* seaman); *Kmart Corp. v. Key Industries, Inc.*, 877 F. Supp. 1048, 1051 (E.D. Mich. 1994) (the word *any* in a provision of the Michigan long-arm statute includes *each* and *every*); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (the word *any* is a broad and comprehensive term); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 792 (1978) (Remand Order) (the word *any* is a broad and comprehensive term, and there is no basis for engrafting an exception not stated), *final decision*, 39 Agric. Dec. 862 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984).

⁶See *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944) (*all* means all, not substantially all); *McLean v. United States*, 226 U.S. 374, 383 (1912) (*all* excludes the idea of limitation); *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969) (*all* means the whole of that which it defines, not less than its entirety; its purpose is to underscore that intended breadth is not to be narrowed); *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 464 (S.D. Miss. 1964) (*all* means *the whole, the sum of all the parts, the aggregate*; *all* is about the most comprehensive and all inclusive word in the English language), *aff'd per curiam*, 358 F.2d 723 (5th Cir. 1966); *Travelers Insurance Co. v. Cimarron Insurance Co.*, 196 F. Supp. 681, 684 (D. Or. 1961) (the word *all* when referring to the amount, quantity, extent, duration, quality, or degree means *the whole of*; a statute which says *all* excludes nothing); *In re Central of Georgia Ry.*, 58 F. Supp. 807, 813 (S.D. Ga. 1945) (a more comprehensive and all-inclusive word than *all* can hardly be found in the English language; there is a totality about the word *all* that few words possess), *rev'd on other grounds and remanded sub nom. Liberty National Bank & Trust Co. v. Bankers Trust*, 150 F.2d 453 (5th Cir. 1945).

§ 1.138 Consent decision.

At any time before the Judge files the decision, *the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document.* Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

7 C.F.R. § 1.138. (Emphasis added.)

A Consent Decision entered in accordance with section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), mirrors the agreement between parties previously engaged in litigation with one another. An ALJ, presented with the parties' agreement in the form of a decision that contains no error on its face, is required to enter the agreement as the ALJ's Consent Decision. The ALJ has no jurisdiction either to modify the terms of the agreement before its entry as a Consent Decision, or to refuse to enter the agreement as a Consent Decision, for any reason, including the ALJ's well-founded belief that the terms are unjust or that one or more of the parties cannot possibly comply.⁷ An ALJ's attempted modification of the parties' agreement and entry of that modified agreement as a purported Consent Decision would not constitute the entry of a Consent Decision, but rather, would constitute a nullity.

Once the written agreement of the parties is entered by the ALJ, it becomes the ALJ's decision, and it is no longer an agreement between the

⁷*In re David Harris*, 50 Agric. Dec. 683, 701-06(1991) (Ruling on Certified Questions) (even if error exists, but the error is not apparent on the face of the document embodying the parties' agreement, the ALJ is required by the Rules of Practice to enter the document as a Consent Decision without any further procedure); *In re Herman Lee Hall, Jr.*, 50 Agric. Dec. 373, 374 (1991) (since the parties consented to a decision, the ALJ has no jurisdiction to challenge the Department's compliance with the Administrative Procedure Act and is required to enter a Consent Decision); *In re Gateway Freight Services, Inc.*, 49 Agric. Dec. 902, 904 (1990) (since the jurisdictional issue raised by the ALJ is not apparent on the face of the document, the ALJ must enter the parties' agreement as a Consent Decision).

parties.⁸ Nonetheless, I find that the entry of a Consent Decision in accordance with section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), does not so enlarge the ALJ's jurisdiction that he or she may, either *sua sponte* or at the request of one or more parties to the Consent Decision, modify the Consent Decision when a party to the Consent Decision opposes the modification. Such a modification of a previously-entered Consent Decision would result in the creation of a document that would not reflect the agreement of the parties, and, therefore, would not be a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138). Moreover, if an ALJ had jurisdiction to modify a Consent Decision in a manner that affects a party and is opposed by that party, many parties engaged in litigation might be reluctant to resolve the litigation by the entry of a Consent Decision.

Respondents contend that judges, under Rule 60(b) of the Federal Rules of Civil Procedure and their broad equity powers, have great discretion to dissolve or modify consent decrees. (Memorandum in Support of Respondent's Motion to Modify Consent Decision, p. 4.) While I agree with Respondents that Rule 60(b) provides judges with discretion to dissolve and modify consent decrees,⁹ the Federal Rules of Civil Procedure are not

⁸See generally *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) (consent decrees and orders have attributes of contracts and of judicial decisions, or administrative orders; while they are arrived at by negotiation between the parties, they must be approved by the court or administrative agency); *Pope v. United States*, 323 U.S. 1, 12 (1944) (it is a judicial function and an exercise of the judicial power to render judgment on consent; a judgment on consent is a judicial act); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (we reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992) (while consent decrees have many of the attributes of a contract voluntarily undertaken, they are judicial acts); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1119-20 (3d Cir. 1979) (consent decrees are judicial acts, but are recognized as having many of the attributes of a contract voluntarily undertaken), *cert. denied sub nom. Thornburgh v. Philadelphia Welfare Rights Org.*, 444 U.S. 1026 (1980).

⁹It should be noted, however, that, while Rule 60(b) of the Federal Rules of Civil Procedure does provide Judges with flexibility to revise consent decrees, the burden is on the moving party to establish that a significant change in circumstances warrants revision of the consent decree. See, e.g., *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992) (while a court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that modification will be warranted in all circumstances; a party seeking modification bears the burden of establishing that a significant change in

(continued...)

applicable to this Department's proceedings conducted under the Rules of Practice. Moreover, relief under Rule 60(b) of the Federal Rules of Civil Procedure is equitable in nature,¹⁰ and neither the ALJs nor the Judicial Officer can provide equitable relief under the Rules of Practice. *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976).

⁹(...continued)

circumstances warrants revision of the decree, and, if the moving party meets the standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances); *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961) (the district court has power to modify a consent decree and sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the consent decree unworkable); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, *supra*, 977 F.2d at 561 (when litigation is ended by the deliberate choice of the parties, a movant's burden for modification of a consent order is particularly heavy, for while consent decisions are judicial acts, they have often been recognized as having many of the attributes of a contract voluntarily undertaken; still modification of a consent order under Fed. R. Civ. P. 60(b) is not precluded in appropriately exceptional circumstances); *Phylerv. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application; in the exercise of that power, consent decrees may be modified in appropriate cases on the basis of material changes in operative law or facts, but, in general, modification should be granted only when the change in circumstances urged by the movant was largely beyond that party's control and when compliance has been put beyond reach despite a good faith effort of the movant to comply); *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (a court may modify the parties' rights and obligations under a consent decision but modification should rarely be granted and the party seeking modification bears a heavy burden of demonstrating that new and unforeseen conditions have produced such extreme and unexpected hardship that the decree is oppressive).

¹⁰*King v. Greenblatt*, 52 F.3d 1, 5 (1st Cir.) (relief from a decree under Rule 60(b)(5) is equitable in nature), *cert. denied sub nom. Class of 48 + 1 v. Greenblatt*, 116 S. Ct. 175 (1995); *United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994) (relief under Rule 60(b)(6) is an exercise of the court's equitable power); *National Credit Union Adminis. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)'s catch-all phrase — any other reason justifying relief — has been described as a grand reservoir of equitable power); *Phylerv. Evatt*, *supra*, 924 F.2d at 1324 (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1208 (7th Cir. 1984) (relief under Rule 60(b) of the Federal Rules of Civil Procedure is essentially equitable in nature and is to be administered on equitable principles).

Settlement agreements in administrative proceedings before this Department are enforced in the absence of extraordinary circumstances.¹¹ Since a Consent Decision under the Rules of Practice is to reflect agreement of the parties, the ALJ should not modify the Consent Decision in a manner that is opposed by one or more of the parties, but rather, in extraordinary circumstances, should vacate the Consent Decision. The parties would then be free to proceed with litigation of the case or to agree to the entry of a new Consent Decision.

Thus, while an ALJ has jurisdiction to entertain and rule on Respondent's Motion to Modify Consent Decision, the ALJ should not modify the Stipulation and Consent Decision entered on November 8, 1991, even if he or she finds that extraordinary circumstances require that the Consent Decision should not be enforced. Instead, if the ALJ determines that extraordinary circumstances exist, the ALJ should vacate the Stipulation and Consent Decision. The parties would then be free to proceed with litigation of the case or to agree to the entry of a new Consent Decision.

¹¹*In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 5 (May 21, 1996) (Order Denying Petition for Reconsideration) (Respondent failed to demonstrate any extraordinary circumstances which would warrant setting aside the settlement agreement voluntarily reached with Complainant on the record); *In re Jim Fobber*, 55 Agric. Dec. ___, slip op. at 14 (Feb. 7, 1996) (Complainant's request to modify settlement agreement reached by the parties on the record, denied); *In re Moore Mktg. Int'l, Inc.*, *supra*, 47 Agric. Dec. at 1477 (even if Respondent's appeal were proper under the Rules of Practice, Respondent's request to modify Consent Decision based upon alleged mutual mistake of fact would be denied on the merits since it would not be in the public interest to upset the consent agreement of the parties); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Rodney W. Dick*, 42 Agric. Dec. 784, 785 (1983) (even if the Judicial Officer had jurisdiction to consider Respondent's motion to be relieved from the Consent Decision, Respondent's motion would be denied because a party's unilateral mistake as to the legal effect of the Consent Decision is not a ground for permitting a party to withdraw from a settlement agreement); *In re Mountainside Butter & Egg Co.*, *supra*, 38 Agric. Dec. at 799-80 (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976) (voluntary settlements in administrative proceedings should be enforced in the absence of extraordinary circumstances), *aff'd*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

In re: RAY SHAPE, d/b/a SHAPE LIVESTOCK.

BPRA Docket No. 93-0001.

Order Dismissing Complaint Without Prejudice filed November 21, 1996.

Sharlene A. Deskins, Attorney for Complainant.

Respondent, Pro se.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

Wherefore, for good cause shown the complaint against the Respondent is dismissed without prejudice.

In re: HANDLERS AGAINST PROMOFLOL.

FCFGPIA Docket No. 96-0001.

Order Denying Interim Relief filed November 5, 1996.

The Judicial Officer denied an application for interim relief. Under the governing Rules of Practice, (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), interim relief is only available to a person who files a petition pursuant to 7 C.F.R. § 900.52. (See 7 C.F.R. § 900.70(a).) Petitioner filed its petition pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief is not available to Petitioner. Further, even if interim relief had been available, Petitioner did not file a separate application for interim relief in accordance with 7 C.F.R. § 900.70(a). Finally, even if interim relief had been available to Petitioner and Petitioner had filed a separate application for interim relief in accordance with the applicable Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent.

Denise Y. Hansberry, for Respondent.

Brian C. Leighton, Clovis, California, and James A. Moody, Washington, D.C., for Petitioner.

Order issued by William G. Jenson, Judicial Officer.

On September 3, 1996, Handlers Against Promoflor (hereinafter Petitioner) instituted a proceeding under the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993 (hereinafter FCFGPIA), (7 U.S.C. §§ 6801-6814), the Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Order (hereinafter FCFGPIO), (7 C.F.R. §§ 1208.1-.85), and the Rules of Practice Governing Proceedings on Petitions to Modify or be Exempted from Research, Promotion and Education Programs (hereinafter Rules of Practice), (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52), seeking, *inter alia*, interim relief, as follows:

[Petitioner] seeks interim relief enjoining further collection of the tax from [Petitioner] members on the ground that even a temporary tax

or escrow account violates the First Amendment rights of [Petitioner] members.

In the alternative, [Petitioner] seeks interim relief allowing [Petitioner] members to escrow taxes, its members' assessments, in an interest-bearing account pending a decision of the case on the merits so that [Petitioner] members' taxes are not used by the Council to convey the messages complained of herein, and so that there is an available source of money to refund when [Petitioner] prevails.

Petition ¶¶ 36-37, at 13.

On October 9, 1996, Respondent filed Motion to Dismiss Petition of Handlers Against Promoflor and Memorandum in Support of Motion to Dismiss Petition of Handlers Against Promoflor, but did not specifically address Petitioner's request for interim relief. On October 31, 1996, Petitioners filed Opposition to AMS's Motion to Dismiss on the Grounds of Form, and on November 1, 1996, the case was referred to the Judicial Officer for a decision regarding Petitioner's request for interim relief.

Petitioner's request for interim relief is denied for the following reasons.

First, interim relief is not available to Petitioner. Section 900.70(a) of the Rules of Practice provides:

§ 900.70 Applications for interim relief.

(a) *Filing the application.* A person who has filed a petition pursuant to [7 C.F.R.]§ 900.52 may by separate application filed with the hearing clerk apply to the Secretary [f]or an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

7 C.F.R. § 900.70(a). The petition-filing provisions in 7 C.F.R. § 900.52 are not applicable to this proceeding. Rather, the petition-filing provisions applicable to this proceeding are set forth in 7 C.F.R. § 1200.52. The petition herein was filed pursuant to 7 C.F.R. § 1200.52, not 7 C.F.R. § 900.52; therefore, interim relief, which is only available to a person who has filed a petition pursuant to 7 C.F.R. § 900.52, is not available to Petitioner.

Second, even if I found that Petitioner had filed its petition in accordance with 7 C.F.R. § 900.52 (which I do not so find), Petitioner's request for

interim relief would be denied because Petitioner has not complied with the requirements for filing an application for interim relief. (7 C.F.R. § 900.70(a), (b).) Petitioner's request for interim relief is included in its petition for declaratory relief, for exemption from and modification of the FCFGPIO, (7 C.F.R. §§ 1208.1-.85), and for attorneys' fees and costs under the Equal Access to Justice Act, and the Rules of Practice require that Petitioner file a separate application for interim relief. (7 C.F.R. § 900.70(a).)

Third, even if interim relief had been available to Petitioner in this proceeding and Petitioner had filed a separate application for interim relief in accordance with the Rules of Practice, Petitioner's request for interim relief would be denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief. *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Cal-Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan Farming, Inc.*, 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal-Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co., Inc.*, 48 Agric. Dec. 79 (1989); *In re Cal-Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983); *In re Moser Farm Dairy, Inc.*, 40 Agric. Dec. 1246, 1246-50 (1981). The reasons for denial of applications for interim relief from marketing orders are applicable to Petitioner's application for interim relief from the FCFGPIO, (7 C.F.R. §§ 1208.1-.85), issued pursuant to the FCFGPIA, (7 U.S.C. §§ 6801-6814).¹

¹See generally *In re Gallo Cattle Co.*, 55 Agric. Dec. 340, 342 (1996) (the reasons for denial of interim relief from marketing orders are applicable to Petitioner's application for interim
(continued...)

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

Order

Petitioner's application for interim relief is denied.

**In re: McCAFFREY MANAGEMENT INC., and JAMES J. McCAFFREY
III.
FMIA Docket No. 96-0004/PPIA Docket No. 96-0003.
Order of Dismissal filed November 8, 1996.**

Darlene M. Bolinger, for Respondent.
Mark D. Dopp, and Edward L. Weindenfeld, Washington, D.C., for Complainant.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on February 29, 1996, be dismissed without prejudice.

**In re: FAR WEST MEATS and MICHAEL A. SERRATO.
FMIA Docket No. 91-0002, PPIA Docket No. 91-0001.
Clarification of Ruling on Certified Questions filed November 27, 1996.**

The Judicial Officer clarified the September 27, 1996, Ruling on Certified Questions in *In re Far West Meats*. The word *entertain*, as used in section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), means *consider* and does not authorize or require an ALJ to make any particular ruling. The word *rule*, as used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), means *decide* and does not authorize or require an ALJ to make a particular ruling. Thus, while an ALJ is required by section 1.143(b)(1) of the Rules of Practice to *entertain* motions and required by section 1.143(a) of the Rules of Practice to *rule* on motions, neither section 1.143(b)(1) nor section 1.143(a) authorizes or requires an ALJ to make a particular ruling. An ALJ does not have jurisdiction to modify a previously-entered Consent Decision, when a party to the Consent Decision opposes the modification. Such a modification would result in the creation of a document that would not reflect the agreement of the parties. The resulting

¹(...continued)

relief from the Dairy Promotion and Research Order, (7 C.F.R. §§ 1150.101-.187), issued pursuant to the Dairy Production Stabilization Act of 1983, (7 U.S.C. §§ 4501-4513)).

document would not constitute a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), but rather, would be a nullity. Further, section 1.138 of the Rules of Practice provides that a Consent Decision becomes final upon issuance. Once the Consent Decision is issued, the administrative proceeding is closed and the ALJ has no jurisdiction over the proceeding, except to vacate the Consent Decision in extraordinary circumstances. Therefore, while an ALJ must entertain a motion to modify a Consent Decision and must rule on the motion to modify a Consent Decision, the ALJ has no jurisdiction to grant the motion and enter a modified Consent Decision, if the motion is opposed by one or more of the parties to the previously-entered Consent Decision. The extraordinary circumstances exception is limited to an examination of circumstances that relate to the assent of the parties to the agreement and the ALJ may only vacate a Consent Decision if the ALJ finds that there was no genuine assent to the agreement that was entered as a Consent Decision. A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an ALJ may vacate a Consent Decision.

Harold J. Reuben, Scott C. Safian, and Howard D. Levine, for Complainant.

Brett T. Schwemer, Washington, D.C., for Respondents.

Ruling issued by William G. Jenson, Judicial Officer.

On September 5, 1996, Administrative Law Judge James W. Hunt certified two questions to the Judicial Officer. On September 27, 1996, I issued a Ruling on Certified Questions, *In re Far West Meats*, 55 Agric. Dec. ___ (Sept. 27, 1996). On October 9, 1996, Complainant filed Complainant's Motion for Extension of Time to Petition Judicial Officer to Reconsider Ruling on Certified Questions (hereinafter Complainant's Motion), and on October 11, 1996, I issued a Ruling on Complainant's Motion in which I provided the parties with an opportunity to file written comments and stated that I would review the Ruling on Certified Questions in light of any timely-filed written comments.¹ (Ruling on Complainant's Motion for Extension of Time to

¹Complainant's Motion, filed pursuant to section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (hereinafter Rules of Practice), (7 C.F.R. § 1.146(a)(3)), requested an "extension of time to file a petition to reconsider the decision of the Judicial Officer on the questions certified in this case." Complainant's Motion was denied because the September 27, 1996, Ruling on Certified Questions was not a *decision* as that term is defined in section 1.132 of the Rules of Practice, (7 C.F.R. § 1.132).

Section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), provides that an administrative law judge (hereinafter ALJ) may certify questions to the Judicial Officer. Since questions may only be certified by an ALJ, requests for clarification or review of Rulings on Certified Questions generally should be made by the ALJ who certifies the question. Judge Hunt did not ask that I clarify or review the September 27, 1996, Ruling on Certified Questions.

(continued...)

Petition Judicial Officer to Reconsider Ruling on Certified Questions and Order Requesting Comments on Ruling on Certified Questions at 4.) Respondents and Complainant filed written comments on the Ruling on Certified Questions on November 8, 1996. (Respondents' Comments on Ruling on Certified Questions and Complainant's Comments on Ruling on Certified Questions.)

The first question certified by Judge Hunt is, as follows:

Can a question be certified to the Judicial Officer pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)) when the question arises in the context of a proceeding for which there is no appeal to the Judicial Officer?

September 5, 1996, Certification of Questions to the Judicial Officer.

I answered Judge Hunt's first certified question in the affirmative, stating that:

Section 1.143(e) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (hereinafter Rules of Practice) provides:

§ 1.143 Motions and requests.

....

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145[(7 C.F.R. § 1.145),] shall be made by and in the discretion of the Judge. The Judge may either rule

¹(...continued)

Nonetheless, since the September 27, 1996, Ruling on Certified Questions could raise significant issues which might impact United States Department of Agriculture programs, and Judge Hunt did not oppose the parties' filing comments on the September 27, 1996, Ruling on Certified Questions or my review of the Ruling in light of any comments received from the parties, I agreed to review the September 27, 1996, Ruling on Certified Questions in light of any comments filed by the parties.

upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

7 C.F.R. § 1.143(e).

The only expressed limitation in section 1.143(e) of the Rules of Practice, (7 C.F.R. § 1.143(e)), on the authority of an administrative law judge (hereinafter ALJ) to certify a question to the Judicial Officer, is temporal; viz., the ALJ must certify the question prior to the filing of an appeal pursuant to section 1.145 of the Rules of Practice, (7 C.F.R. § 1.145). While this limitation appears to anticipate that any question certified by an ALJ to the Judicial Officer would arise in a proceeding with a right of appeal to the Judicial Officer, the Rules of Practice do not explicitly place this limitation on the ALJ's authority to certify questions. Moreover, it does not appear that any party would be harmed by allowing an ALJ to certify a question in a proceeding in which there is no right of appeal to the Judicial Officer, and I find that the better practice would be to reserve discretion in the Judicial Officer to provide requested guidance to ALJs where it is not expressly prohibited.

In re Far West Meats, supra, slip op. at 1-2. Neither Respondents' Comments on Ruling on Certified Questions nor Complainant's Comments on Ruling on Certified Questions addresses the Ruling on Judge Hunt's first certified question, and I find no basis for clarifying the September 27, 1996, Ruling on Certified Questions as it relates to Judge Hunt's first certified question.

The second question certified by Judge Hunt is, as follows:

If such a question can be certified, the question is whether an administrative law judge has the authority to entertain [R]espondents' motion in this proceeding to modify a consent decision?

September 5, 1996, Certification of Questions to the Judicial Officer.

I answered Judge Hunt's second certified question in the affirmative. *In re Far West Meats, supra*, slip op. at 3-6. While Respondents and Complainant agree with the answer in the September 27, 1996, Ruling on Certified Questions to Judge Hunt's second certified question, both Respondents and

Complainant commented on the Ruling as it relates to Judge Hunt's second certified question.

As an initial matter, I note that the September 27, 1996, Ruling on Certified Questions contains a discussion of matters that, while related to Judge Hunt's second certified question, are outside the scope of the narrow question asked by Judge Hunt. I find that a response to some of the comments filed by the parties would necessitate my discussion of matters that are even more remotely related to Judge Hunt's second certified question than the discussion in the September 27, 1996, Ruling on Certified Questions. Therefore, I have restricted this clarification of the September 27, 1996, Ruling on Certified Questions to those comments filed by the parties that most directly relate to Judge Hunt's second certified question.

First, Complainant requests that:

[I] clarify that section[] 1.143(a) and (b)(1) of the Rules of Practice do not enlarge an administrative law judge's jurisdiction or authority to grant relief--they only require that an administrative law judge entertain and rule on motions such as Respondent's Motion To Modify Consent Decision.

Complainant's Comments on Ruling on Certified Questions at 20. I agree with Complainant that section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), does not enlarge an ALJ's authority to grant relief. Moreover, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), contains explicit limitations on an ALJ's authority to grant relief. Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), prohibits an ALJ from entertaining a motion to dismiss on the pleading. Section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), prohibits an ALJ from ruling on any motion upon the filing of an appeal of the ALJ's decision and prohibits an ALJ from ruling on any motion directly relating to the appeal.

Complainant cites my failure in the September 27, 1996, Ruling on Certified Questions to distinguish between an ALJ's obligation to rule and an ALJ's authority to make a particular ruling as a possible source of confusion. (Complainant's Comments on Certified Questions at 7.) In this regard, the September 27, 1996, Ruling on Certified Questions addresses an ALJ's obligation to entertain motions and rule on motions, as follows:
Section 1.143(a) and (b)(1) of the Rules of Practice provides:

§ 1.143 Motions and requests.

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147[(7 C.F.R. § 1.147)], (2) requests for subpoenas pursuant to § 1.149[(7 C.F.R. § 1.149)], and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to filing an appeal of the Judge's decision pursuant to § 1.145[(7 C.F.R. § 1.145)], except motions directly relating to the appeal. . . .

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143(a), (b)(1).

Respondent's Motion to Modify Consent Decision: (1) was filed prior to the filing of an appeal of the ALJ's decision pursuant to § 1.145 of the Rules of Practice, (7 C.F.R. § 1.145); (2) is not a motion directly relating to an appeal; and (3) is not a motion to dismiss on the pleadings. Under these circumstances, section 1.143(a) and (b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(a), (b)(1)), not only authorizes an ALJ to entertain Respondent's Motion to Modify Consent Decision, but requires an ALJ to entertain Respondent's Motion to Modify Consent Decision and rule on the motion.

Section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), provides that *any* motion will be entertained other than a motion to dismiss on the pleading. Generally, the word *any* is broadly inclusive. Section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), provides that the ALJ shall rule upon *all* motions and requests filed or made prior to filing an appeal of the ALJ's decision pursuant to 7 C.F.R. § 1.145, except motions directly relating to the appeal. As commonly used, the word *all* does not permit an exception or exclusion not specified. Moreover, the context in which the words *all* and *any* are used in section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), and section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), respectively, provides no basis for reading the words *all* and *any* narrowly.

Thus, I find section 1.143(b)(1) of the Rules of Practice, (7 C.F.R. § 1.143(b)(1)), requires an ALJ to entertain Respondent's Motion to Modify

Consent Decision and section 1.143(a) of the Rules of Practice, (7 C.F.R. § 1.143(a)), requires an ALJ to rule on Respondent's Motion to Modify Consent Decision.

In re Far West Meats, supra, slip op. at 3-6. (Footnotes omitted.)

I agree with Complainant that the September 27, 1996, Ruling on Certified Questions does not distinguish between the obligation under section 1.143(a) and (b)(1) of the Rules of Practice to entertain and rule on motions on the one hand and authority to make a particular ruling on the other hand. I did not make this distinction in the September 27, 1996, Ruling on Certified Questions only because, as Complainant states, the distinction is "obvious."² However, since my failure to make the distinction could be a possible source of confusion, my views regarding the distinction are as follows.

Section 1.143(b)(1) of the Rules of Practice requires ALJs to *entertain* motions other than motions to dismiss on the pleadings. While the meaning of the word *entertain*, when used in connection with an authorization or requirement to entertain a motion or petition, varies according to its surroundings,³ it generally means *consider* and has not been construed to authorize or require a judge to make a particular ruling.⁴ I find that the word *entertain*, as used in section 1.143(b)(1) of the Rules of Practice, means *consider* and does not authorize or require an ALJ to make any particular ruling.

Section 1.143(a) of the Rules of Practice requires ALJs to *rule* on all motions filed or made prior to filing an appeal of the ALJ's decision, except motions directly relating to an appeal. While the word *rule* has been variously

²Complainant's Comments on Ruling on Certified Questions at 7.

³*Brown v. Allen*, 344 U.S. 443, 461 (1953); *Denholm & McKay Co. v. Commissioner*, 132 F.2d 243, 247 (1st Cir. 1942); *Ortiz v. Public Service Comm'n*, 108 F.2d 815, 817 (1st Cir. 1940).

⁴*See, e.g., Ribaud v. Citizens National Bank of Orlando*, 261 F.2d 929, 932 (5th Cir. 1958) (where the court must *entertain* a petition, it seems to be that the court must consider the petition on the merits); *Fernandez v. Carrasquillo*, 146 F.2d 204, 206 (1st Cir. 1944) (when the published rules of the court permit the filing of a petition for rehearing, that means the court will ordinarily consider such petition on the merits, *i.e., entertain* it; when the petition for rehearing is thus considered and disposed of, it has been *entertained* by the court although the court may deny the petition without setting the case down for reargument and without any written opinion); *Denholm & McKay Co., supra*, 132 F.2d at 247 (*entertainment* of a petition for rehearing apparently means merely that the court considers on the merits the grounds urged in the petition for rehearing).

defined,⁵ I have not found any circumstance in which the word *rule* has been construed as authorizing or requiring a judge to make a particular ruling. I find that the word *rule*, as used in section 1.143(a) of the Rules of Practice, means *decide* and does not authorize or require an ALJ to make a particular ruling. Thus, while an ALJ is required by section 1.143(b)(1) of the Rules of Practice to *entertain* motions and required by section 1.143(a) of the Rules of Practice to *rule* on motions, neither section 1.143(b)(1) nor section 1.143(a) requires or authorizes an ALJ to make a particular ruling.

As stated in the September 27, 1996, Ruling on Certified Questions, an ALJ does not have jurisdiction to modify a previously-entered Consent Decision, when a party to the Consent Decision opposes the modification. Such a modification would result in the creation of a document that would not reflect the agreement of the parties. The resulting document would not

⁵ **Rule, v.** To command or require by a rule of court; as, to rule the sheriff to return the writ, to rule the defendant to plead, to rule against an objection to evidence. To settle or decide a point of law arising upon a trial, and, when it is said of a judge presiding at such a trial that he "ruled" so and so, it is meant that he laid down, settled, or decided such and such to be the law.

Black's Law Dictionary 1331 (6th ed. 1990).

rule. . . . An order of court; a specific direction or requirement of a court, made in a particular matter or proceeding, with respect to the performance of some act incidental thereto. . . .

Ballentine's Law Dictionary 1127 (3d ed. 1969).

RULE.

An order or direction. See ORDER.

To establish by direction; to determine; to decide.

2 Bouvier's Law Dictionary 2975 (3d rev. 1914).

RULE (Decide), verb

adjudge, adjudicate, ascertain, come to a conclusion, come to a determination, conclude, decide by judicial sentence, declare, declare authoritatively, decree, deliver judgment, determine, draw a conclusion, establish, exercise judgment, find, fix conclusively, give an opinion, give judgment, hold, make a decision, make a resolution, pass judgment, pass sentence, pass upon, pronounce, pronounce judgment, reach an official decision, resolve, settle by decree, umpire **ASSOCIATED CONCEPTS:** rule from the bench

Legal Thesaurus 457 (1980).

constitute a Consent Decision under section 1.138 of the Rules of Practice, (7 C.F.R. § 1.138), but rather, would be a nullity. *In re Far West Meats, supra*, slip op. at 7-8. Further, section 1.138 of the Rules of Practice provides that a Consent Decision becomes final upon issuance, as follows:

§ 1.138 Consent decision.

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. *The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance* to become effective in accordance with the terms of the decision.

7 C.F.R. § 1.138. (Emphasis added.) Once the Consent Decision is issued, the administrative proceeding is closed and the ALJ has no jurisdiction over the proceeding, except to vacate the Consent Decision in extraordinary circumstances described in the September 27, 1996, Ruling on Certified Questions and further described *infra* pp. 10-13.

Therefore, while an ALJ must entertain a motion to modify a Consent Decision and must rule on the motion to modify a Consent Decision, the ALJ has no jurisdiction to grant the motion and enter a modified Consent Decision, if the motion is opposed by one or more of the parties to the previously-entered Consent Decision.⁶

⁶The parties may agree upon modifications to a Consent Decision and move that the ALJ modify the Consent Decision by the entry of those modifications. Only when the ALJ finds that the parties have agreed to and requested the entry of a modification may an ALJ enter a modification of the Consent Decision. See *In re Leonard Wade Yager*, 48 Agric. Dec. 1046 (1989) (the ALJ entered modifications to the Consent Decision that were agreed upon and requested by the parties); cf. *In re Leonard McDaniel*, 46 Agric. Dec. 125 (1987) (the Judicial Officer modified the original order issued in *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) only

The September 27, 1996, Ruling on Certified Questions provides:

Settlement agreements in administrative proceedings before this Department are enforced in the absence of extraordinary circumstances. Since a Consent Decision under the Rules of Practice is to reflect agreement of the parties, the ALJ should not modify the Consent Decision in a manner that is opposed by one or more of the parties, but rather, in extraordinary circumstances, should vacate the Consent Decision.

In re Far West Meats, supra, slip op. at 10. (Footnote omitted.)
Complainant requests that I clarify that:

[T]he extraordinary circumstances exception is limited to an examination of the circumstances under which the consent decision was entered. And . . . the extraordinary circumstances exception does not permit an examination of conditions which have changed since the issuance of the consent decision.

Complainant's Comments on Ruling on Certified Questions at 20-21.

I agree with Complainant that the extraordinary circumstances exception is limited to an examination of circumstances under which the Consent Decision was entered. Moreover, the only circumstances under which the Consent Decision was entered that an ALJ may examine are circumstances that relate to the assent of the parties to the agreement that was subsequently entered as a Consent Decision. The ALJ may only vacate a Consent Decision if the ALJ finds that there was no genuine assent to the agreement that was entered as a Consent Decision because of factors such as fraud or duress.⁷

⁶(...continued)

because the parties agreed to the modification and requested that the Judicial Officer modify the original Decision and Order).

⁷See *In re Jim Fobber*, 55 Agric. Dec. 74, 77 (1996) (Order Denying Petition for Reconsideration) (Respondent failed to demonstrate any extraordinary circumstances which would warrant setting aside the settlement agreement voluntarily reached with Complainant on the record); *In re Jim Fobber*, 55 Agric. Dec. 60, 71 (1996) (Complainant's request to modify settlement agreement reached by the parties on the record, denied); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988) (even if Respondent's appeal were proper under the Rules of (continued...))

A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an ALJ may vacate a Consent Decision.

While Rule 60(b) of the Federal Rules of Civil Procedure provides judges with discretion to dissolve and modify consent decrees based upon a change of circumstances that makes compliance with the consent decree inequitable,⁸

⁷(...continued)

Practice, Respondent's request to modify Consent Decision based upon alleged mutual mistake of fact would be denied on the merits since it would not be in the public interest to upset the consent agreement of the parties); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Rodney W. Dick*, 42 Agric. Dec. 784, 785 (1983) (even if the Judicial Officer had jurisdiction to consider Respondent's motion to be relieved from the Consent Decision, Respondent's motion would be denied because a party's unilateral mistake as to the legal effect of the Consent Decision is not a ground for permitting a party to withdraw from a settlement agreement); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 799-80 (1978) (Remand Order) (in all administrative proceedings before this Department, settlement agreements are enforced in the absence of extraordinary circumstances, such as fraud, duress, or a unilateral mistake of fact); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976) (voluntary settlements in administrative proceedings should be enforced in the absence of extraordinary circumstances), *aff'd*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

⁸E.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (a party seeking modification bears the burden of establishing that a significant change in circumstances warrants revision of the decree, and, if the moving party meets the standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances; a party seeking modification of a consent decree may meet its initial burden by showing a significant change in factual conditions or in law); *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961) (the district court has power to modify a consent decree and sound judicial discretion may call for modification of the terms of an injunctive decree if the circumstances, whether law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen); *Building & Constr. Trades Council v. NLRB*, 64 F.3d 880, 888 (3d Cir. 1995) (central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the consent decree unworkable); *W.L. Gore & Associates, Inc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992) (a consent injunction may be modified when circumstances have sufficiently changed and unexpected hardship and inequity have resulted); *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application; in the exercise of that power, consent decrees may be modified in appropriate cases on the basis of material changes in operative law or facts, but, in general, modification should be granted only when the change in circumstances urged by the movant was

(continued...)

the Federal Rules of Civil Procedure are not applicable to this Department's proceedings conducted under the Rules of Practice.⁹ Moreover, relief under Rule 60(b) of the Federal Rules of Civil Procedure is equitable in nature,¹⁰ and neither the ALJs nor the Judicial Officer can provide equitable relief under the Rules of Practice. *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976).

⁸(...continued)

largely beyond that party's control and when compliance has been put beyond reach despite a good faith effort of the movant to comply); *United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (a court may modify the parties' rights and obligations under a consent decision but modification should rarely be granted and the party seeking modification bears a heavy burden of demonstrating that new and unforeseen conditions have produced such extreme and unexpected hardship that the decree is oppressive).

⁹*In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (the Federal Rules of Civil Procedure are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture); see *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (the Federal Rules of Civil Procedure do not apply to administrative hearings); *In re Ron Morrow*, 53 Agric. Dec. 144, 154 (1994) (the Federal Rules of Civil Procedure are not applicable to disciplinary proceeding conducted under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) pursuant to the Rules of Practice), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Miguel A. Machado* (Decision as to Respondent Cozzi) (Remand Order), 42 Agric. Dec. 820, 832 (1983) (the Rules of Practice do not provide for discovery in sharp contrast to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure), *final decision*, 42 Agric. Dec. 1454 (1983), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21).

¹⁰*King v. Greenblatt*, 52 F.3d 1, 5 (1st Cir.) (relief from a decree under Rule 60(b)(5) is equitable in nature), *cert. denied sub nom. Class of 48 + 1 v. Greenblatt*, 116 S. Ct. 175 (1995); *United States v. Bank of New York*, 14 F.3d 756, 760 (2d Cir. 1994) (relief under Rule 60(b)(6) is an exercise of the court's equitable power); *National Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (Rule 60(b)'s catch-all phrase — any other reason justifying relief — has been described as a grand reservoir of equitable power); *Plyler v. Evatt*, *supra*, 924 F.2d at 1324 (under inherent equity powers, as now expressed in Fed. R. Civ. P. 60(b)(5), a district court may modify a judgment if it is no longer equitable that the judgment should have prospective application); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1208 (7th Cir. 1984) (relief under Rule 60(b) of the Federal Rules of Civil Procedure is essentially equitable in nature and is to be administered on equitable principles).

In re: BILLY JACOBS, SR.
HPA Docket No. 95-0005.
Order Denying Petition for Reconsideration filed September 20, 1996.

Failure to file timely petition for reconsideration.

The Judicial Officer denied the Petition for Reconsideration because it was not timely filed. If it had been timely filed, it would have been denied on the merits for the reasons set forth in the Decision and Order filed August 15, 1996.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted pursuant to the Horse Protection Act of 1970, as amended, (15 U.S.C. §§ 1821-1831) (hereinafter the Horse Protection Act), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151)(hereinafter the Rules of Practice). On August 15, 1996, I issued a Decision and Order assessing Billy Jacobs, Sr. (hereinafter Respondent) a civil penalty of \$3,000 for a violation of section 6(c) of the Horse Protection Act, (15 U.S.C. § 1825(c)). (Decision and Order, pp. 4, 17.) On August 23, 1996, the Office of the Hearing Clerk served Respondent with a copy of the Decision and Order and a letter from the Office of the Hearing Clerk dated August 15, 1996. Section 1.146(a)(3) of the Rules of Practice provides:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the

matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The August 15, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the time for filing a petition for reconsideration, as follows:

Enclosed is a date-stamped copy of the decision and order issued by the Judicial Officer on the Secretary's behalf in the above-captioned proceeding.

Judicial review of this decision is available in an appropriate court if an appeal is timely filed. This office does not provide information on how to appeal. Please refer to the governing statute. If you are not currently represented by an attorney, you may choose to seek legal advice regarding an appeal.

Prior to filing an appeal, you may file a petition for reconsideration of the Judicial Officer's decision within 10 days of service of the decision. An original and three copies of the petition for reconsideration must be filed with this office.

August 15, 1996, letter from Joyce A. Dawson, Hearing Clerk, to Mr. Billy Jacobs, Sr. (Emphasis in the original.)

On September 5, 1996, 13 days after Respondent was served with the Decision and Order, Respondent filed a Petition for Reconsideration. Respondent's Petition for Reconsideration, which was required by section 1.146(a)(3) of the Rules of Practice, (7 C.F.R. § 1.146(a)(3)), to be filed within 10 days after service of the Decision and Order, was filed too late, and, accordingly, Respondent's Petition for Reconsideration is denied.¹

¹See *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Petition for Reconsideration, filed approximately 2 months after service of the Decision and Order, dismissed); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Petition for Reconsideration dismissed, since it was not filed within 10 days after service of the Decision and Order); *In re Robert Aull*, 50 Agric. Dec. 356 (1991) (Petition for Reconsideration, filed 11 days after service of the Decision and Order, denied); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Petition for Reconsideration, filed more than 4 months after service of the Decision and Order, dismissed); *In re Toscony Provision Co.* 45 Agric. Dec. 583 (1986) (Petition for Reconsideration denied, since

Moreover, if Respondent's Petition for Reconsideration had been timely filed, it would have been denied for the reasons set forth in the Decision and Order filed August 15, 1996. Since Respondent's Petition for Reconsideration was not timely filed, there will be no change in the date by which payment must be made, as required by the Decision and Order.

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

Order

Respondent's Petition for Reconsideration is denied.

In re: WILLIAM EARL BOBO and JACK MITCHELL.
HPA Docket No. 91-0202.
Order Lifting Stay Order filed November 7, 1996.

Colleen Carroll, for Complainant.
Boyce C. Cabaniss, Austin, TX, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On January 12, 1994, the Judicial Officer issued a Decision and Order assessing each Respondent a civil penalty of \$2,000 and disqualifying each Respondent for a period of 2 years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, exhibition, or horse sale or auction. *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *petition for reconsideration denied*, 53 Agric. Dec. 210 (1994). Respondents appealed the Decision and Order to the United States Court of Appeals for the Sixth Circuit and the Judicial Officer issued a Stay Order pending the outcome of proceedings for judicial review. *In re William Earl Bobo*, 53 Agric. Dec. 212 (1994).

The United States Court of Appeals denied Respondents' petition for review, *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406 (6th Cir. 1995), and Complainant filed a Motion to Lift Stay Order on June 6, 1996, stating that

it was not filed within 10 days after service of the Decision and Order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Petition for Reconsideration, filed 17 days after service of the Decision and Order, denied).

Respondents have not filed any further appeal petitions and the time for filing such appeal petitions has expired. Respondents have not responded to Complainant's Motion to Lift Stay Order.

Therefore, the Stay Order issued in this proceeding is lifted. The disqualification provisions of the Order filed on January 12, 1994, shall become effective on the 30th day after service of this Order on Respondents, and Respondents shall pay the civil penalty assessed in the Order filed on January 12, 1994, within 30 days after service of this Order on Respondents.

**In re: DEAN BYARD, LaRUE McWATERS, and ANN McWATERS.
HPA Docket No. 94-0038.
Order Vacating Decision and Reopening Case filed August 19, 1996.**

Denise Hansberry, for Complainant.
Respondent, Pro se.

Order issued by James W. Hunt, Administrative Law Judge.

The decision filed on May 6, 1996, as to respondent Dean Byard was not properly served on him. Accordingly, for this reason, complainant's motion to reopen the case is granted. It is ordered that the decision filed on May 6, 1996, as to respondent Dean Byard be vacated and that the case be reopened.

**In re: LUTHER HANKINS and DEBBIE HANKINS BALLARD.
HPA Docket No. 95-0001.
Order Dismissing Complaint as to Respondent Debbie Hankins Ballard filed
December 23, 1996.**

Robert Ertman, for Complainant.
Walton B. Johnson, Louisville, KY, for Respondent.

Order issued by Edwin S. Bernstein, Administrative Law Judge.

Upon motion of complainant and for good cause shown, the complaint as to respondent Debbie Hankins Ballard is dismissed with prejudice.

In re: THERESA HETTY JOHN.
P.Q. Docket No. 96-0036.
Order Dismissing Complaint filed September 5, 1996.

James A. Booth, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on August 9, 1996, be dismissed.

In re: GEORGE BAMFO.
P.Q. Docket No. 96-0039.
Dismissal of Complaint filed September 20, 1996.

Howard D. Levine, for Complainant.
Respondent, Pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

At Complainant's request the Complaint in this case is hereby dismissed.

In re: RAMONA CHOY.
P.Q. Docket No. 96-0029.
Order Granting Motion To Dismiss Without Prejudice filed November 20, 1996.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.
Order issued by James W. Hunt, Administrative Law Judge.

Complainant's motion to dismiss the complaint is granted. It is ordered that the complaint filed herein on April 3, 1996, be dismissed without prejudice, this the 20th day of November 1996.

DEFAULT DECISIONS

ANIMAL QUARANTINE AND RELATED LAWS

In re: THERESA M. ZAK.

A.Q.Docket No. 95-0038.

Decision and Order filed March 19, 1996.

Failure to file an answer - Importation of ham and pork sausage from Germany into the United States without the required certificate - Civil penalty.

Jane Settle, 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, as authorized by section of the Act of February 2, 1903, as amended (21 U.S.C. § 122), for a violation of the regulations governing the importation of meat products from Germany (9 C.F.R. §94 *et. seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et. seq.*, and 7 C.F.R. § 1.130 *et. seq.*

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111) and regulations promulgated thereunder (9 C.F.R. § 94 *et. seq.*), by an amended complaint filed on August 3, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This amended complaint alleges that on or about October 3, 1994, respondent imported approximately, one (1) ham and one (1) pork sausage from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the amended complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the amended complaint are adopted and set forth in the Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Theresa M. Zak is an individual whose mailing address is (b) (6)

(b) (6) by (b) (6).

2. On or about October 3, 1994, respondent imported approximately on (1) ham and one (1) pork sausage from Germany into the United States in violation of 9 C.F.R. § 94.11, because such products were not accompanied by a certificate, as required.

Conclusion

By reason of the Finding of Fact set forth above, the respondent has violated the Act of February 3, 1903, as amended, and the regulations issued under that Act (9 C.F.R. § 94 *et. seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars (375.00)². This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

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

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to A.Q. Docket No. 95-38.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the

²The respondent has failed to file an answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, Agric. Dec. 849 (1990).

Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final April 30, 1996.-Editor]

In re: JOSE ANTONIO CABALLERO.

A.Q.Docket No. 95-0039.

Decision and Order filed June 12, 1996.

Failure to file an answer - Importation of horse from Mexico into United States without inspection at port of entry, certificate of veterinary officer or written application for inspection - Importation of horse from Mexico into United States without shipment directly to designated port or quarantine or entry at designated port - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of a horse from Mexico into the United States (9 C.F.R. § 92.300*et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), and regulations promulgated thereunder the Act, by a complaint filed on July 14, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondent filed an answer with the Hearing Clerk but failed to file within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Jose Antonio Caballero is an individual with a mailing address of (b) (6).
2. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being inspected at a port of entry, as required.
3. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being shipped directly to a designated port, as required.
4. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being accompanied by a certificate of a salaried veterinary officer, as required.
5. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being quarantined at a designated port, as required.
6. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without the horse being entered at a designated port of entry, as required.
7. On or about March 5, 1994, respondent imported a horse from Mexico into the United States without first presenting a written application for inspection, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act, 9 C.F.R. § 92.300 *et seq.* Therefore, the following Order is issued.

Order

Jose Antonio Caballero, respondent is hereby assessed a civil penalty of one thousand five hundred dollars (\$1,500.00).¹This penalty shall be payable

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, 49 Agric. Dec. 849 (1990).

to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 95-39

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding.

[This Decision and Order became final July 22, 1996-Editor]

In re: DENNIS PROELL.
A.Q. Docket No. 96-0006.
Decision and Order filed June 11, 1996.

Failure to file an answer - Interstate movement of equine infection anemia reactor horse without required certificate - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of a horse from Wisconsin to Minnesota (9 C.F.R. § 75.4(b), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § 70.1 *et seq.* and 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111), sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120)(Acts) and regulations promulgated thereunder, by a complaint filed on January 19, 1996, by the Acting

Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about July 25, 1995, respondent moved an equine infectious anemia reactor horse from Wisconsin to Minnesota, in violation of 9 C.F.R. § 75.4(b) because the horse was moved unaccompanied by a certificate, as required.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Dennis Proell is an individual whose mailing address is (b) (6) (b) (6).
2. On or about July 25, 1995, respondent moved an equine infection anemia reactor horse from Wisconsin to Minnesota, unaccompanied by a certificate, as required.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 75.4(b)). Therefore, the following Order is issued.

Order

Respondent Dennis Proell, is hereby assessed a civil penalty of five hundred dollars (\$500.00)¹. This penalty shall be payable to the "Treasurer

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re: Bobo*, 49 Agric. Dec. 849 (1990).

of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 96-06.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final July 22, 1996.-Editor]

ANIMAL WELFARE ACT

In re: CHARLES E. LOHNES, BEVERLY A. LOHNES and VERMONT VIEW ANIMAL PARK.

AWA Docket No. 96-0007.

Decision and Order filed July 23, 1996.

Failure to file an answer - Failure to construct and maintain facilities in structurally sound manner and good repair - Failure to provide outdoor animal with adequate shelter from inclement weather - Failure to keep food and water receptacles clean and sanitized - Failure to maintain primary enclosure in clean and sanitary condition - Failure to keep premises clean and in good repair and free of accumulations of trash - Failure to control weeds, grass and bushes - Failure to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care - Cease and desist order - Civil penalty - License disqualification.

James Booth, for Complainant.
Respondent, pro se.

Decision and Order issued by Victor W. Palmer, Chief 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 by the acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed on November 30, 1995, alleging that the respondents willfully violated the Act.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent to respondents Charles E. Lohnes, Beverly A. Lohnes, and Vermont View Animal Park, by the Hearing Clerk by certified mail on December 1, 1995, and was returned unclaimed. Pursuant to section 1.147(b), copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondents by the Hearing Clerk by regular mail on January 3, 1996. Respondents were 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.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R.

§ 1.139). Since Respondents have failed to file an answer within the time prescribed in the Rules of Practice, the material facts alleged in the complaint are admitted by respondents' failure to file an answer. Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

I.

1. Charles E. Lohnes and Beverly A. Lohnes are individuals doing business as Vermont View Animal Park, a partnership in which they are general partners. Respondents' mailing address is RD 2 - Box 73-A, Hoosick Falls, New York 12090.

2. At all times material herein, the respondents, doing business as the Vermont View Animal Park, were operating as an exhibitor as defined in the Act and the regulations.²

3. When the respondents became licensed and annually thereafter, they received copies of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

4. On January 29, 1993, APHIS inspected the respondents' 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:

a. Supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.50(c) and 3.125(c));

b. Animals kept outdoors were not provided with adequate shelter from inclement weather (9 C.F.R. § 3.127(b));

c. The premises were not kept clean and free of accumulations of trash (9 C.F.R. § 3.131(c));

²The Respondents had a class "C" exhibitor license through out the entire time period of all the allegations of violations listed in the complaint and up until April 3, 1996. On March 13, 1996, Respondents surrender their exhibitor license (No. 21-C-067, expiration date: 11/01/96) to an APHIS REAC animal care inspector in the presence of a New York State police officer who were attempting to obtain emergency veterinary care for a male African lion in extreme distress that was euthanized shortly thereafter. The surrender of their license was effective on April 3, 1996.

d. Substances that are toxic to nonhuman primates were stored in food storage areas (9 C.F.R. § 3.75(e)); and

e. The respondent failed to develop, document, and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of one nonhuman primate (9 C.F.R. § 3.81).

5. On May 5, 1993, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

6. On May 5, 1993, APHIS inspected the respondents' 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:

a. Supplies of food were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.50(c) and 3.125(c));

b. Housing facilities for rabbits and other animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. §§ 3.53(a)(1) and 3.125(a));

c. Food receptacles for rabbits and other animals were not kept clean and sanitized (9 C.F.R. §§ 3.54 and 3.129(b));

d. Water receptacles were not kept clean and sanitary (9 C.F.R. §§ 3.55 and 3.130); and

e. Primary enclosures were not kept clean, as required (9 C.F.R. §§ 3.56(a) and 3.131(a)).

7. On July 21, 1993, APHIS inspected the respondents' facility and found the following willful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a) and the standard specified as follows: Housing facilities for nonhuman primates were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals securely, and to restrict the entrance of other animals (9 C.F.R. § 3.75(a)).

8. On September 29 1993, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

9. On September 29, 1993, APHIS inspected the respondents' 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:

a. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. § 3.125(a));

b. The premises were not kept clean and free of accumulations of trash (9 C.F.R. § 3.131(c)); and

c. Water receptacles were not kept clean and sanitary (9 C.F.R. § 3.130).

10. On October 13, 1994, APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

11. On October 13, 1994, APHIS inspected the respondents' 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:

a. Housing facilities for nonhuman primates and other animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals securely, and to restrict the entrance of other animals (9 C.F.R. § 3.75(a) and 3.125(a));

b. Food receptacles for animals were not kept clean and sanitized (9 C.F.R. § 3.129(b)); and

c. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a)).

Conclusions

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

2. The following Order is authorized by the Act and warranted under the circumstances.

3. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations and standards issued under the Act. Therefore, the following Order is issued.

Order

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

- (a) Failing to construct and maintain facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain them securely, and restrict other animals from entering;
- (b) Failing to provide animals kept outdoors with shelter from inclement water;
- (c) Failing to keep food and water receptacles clean and sanitized;
- (d) Failing to maintain primary enclosures for animals in a clean and sanitary condition;
- (e) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes; and
- (f) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

2. Respondents are jointly and severally assessed a civil penalty of TEN THOUSAND DOLLARS (\$10,000.00), which shall be paid by a certified check or money order made payable to the Treasurer of the United States. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondents shall indicate on the certified check or money order that payment is in reference to A.W.A. Docket No. 96-07.

3. Respondents' are disqualified from applying for a new license for a period of one (1) year from the effective date of this Order.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

[This decision and order became final and effective September 13, 1996-Editor.]

In re: LARRY WESTFALL

AWA Docket No. 96-0040.

Decision and Order filed June 14, 1996.

Failure to file a timely answer - Failure to construct and maintain housing facilities in structurally sound and repaired manner - Failure to provide adequate veterinary care - Failure to remove excreta and food waste from primary enclosures - Failure to regularly remove and dispose of waste in a manner that minimizes disease risks - Failure to keep premises clean and in good repair - Failure to maintain primary enclosure so that it protects animals from injury - Failure to permit APHIS employees to conduct inspection - Cease and desist order - Civil Penalty - License suspension.

Tejal Mehta, 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 (APHIS), United States Department of Agriculture, alleging that Larry Westfall, hereafter the respondent, wilfully violated the Act.

The complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the respondent on April 16, 1996, by certified mail. 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 within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are

admitted 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

1. Larry Westfall, hereinafter referred to as respondent, is an individual whose address is (b) (6)

2. The respondent, at all times material herein, was licensed and operating as a dealer as defined in the Act and the regulations.

3. On February 10, 1993, APHIS inspected respondent's facility and found that housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)) in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

4. On April 15, 1993, APHIS inspected respondent's facility and found that provisions were not made for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks (9 C.F.R. § 3.1(f)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

5. On June 28, 1993, APHIS inspected respondent's facility and found that excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

6. On September 28, 1993, APHIS inspected respondent's facility and found that housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)).

7. On April 7, 1994, APHIS inspected respondent's facility and found the following wilful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the standards specified below:

A. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)); and

B. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R. § 3.11(c)).

8. On August 10, 1994, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in wilful violation of section 2.40 of the regulations (9 C.F.R. § 2.40 (1993)).

9. On August 10, 1994, APHIS inspected respondent's facility and found the following wilful violations of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)) and the standards specified below:

A. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));

B. Primary enclosures for dogs were not constructed and maintained so that the floors protect the animals' feet and legs from injury (9 C.F.R. §§ 3.6(a)(1); 3.6(a)(2)(ii), (x));

C. Excreta and food waste were not removed from primary enclosures daily, to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)); and

D. The premises, including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses, and bushes were not controlled in order to protect the animals from injury and facilitate the required husbandry practices (9 C.F.R. § 3.11(c)).

10. On October 6, 1994, respondent was not home to permit APHIS employees to conduct a complete inspection of his animal facilities, in wilful violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

11. On October 14, 1994, APHIS inspected respondent's facility and found that provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.1(d)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)).

12. On December 16, 1994, respondent was not home to permit APHIS employees to conduct a complete inspection of his animal facilities, in wilful

violation of section 16 of the Act (7 U.S.C. § 2146) and section 2.126 of the regulations (9 C.F.R. § 2.126).

13. On January 11, 1995, APHIS inspected respondent's facility and found that provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. § 3.1(d)), in wilful violation of section 2.100(a) of the regulations (9 C.F.R. 2.100(a)).

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following order is authorized by the Act and warranted under the circumstances.

Order

Complainant proposes, as a sanction, a cease and desist order, a 30-day suspension of respondent's license, and a \$4,000 civil penalty. The complaint itself, however, did not allege a specific amount for a civil penalty, but only that one be assessed "in accordance with section 19 of the Act (7 U.S.C. § 2149)." Section 19 provides, in part, that "the Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." Complainant does not indicate that consideration was given to these factors in its proposed civil penalty.

Although not timely filed, respondent did file an answer to the complaint and also filed a response to complainant's motion for a default decision. Respondent states, among other things, that he is disabled and receives no more than \$4,000 a year from the sale of his animals. The complaint further shows that the nature of the violations for the most part related to housekeeping items rather than any cruel or inhumane treatment of the animals. Finally, there is no allegation that respondent has had a history of failing to comply with the Act. In these circumstances, a civil penalty of \$2,000 will be assessed, as well as a cease and desist order and a 30-day license suspension.

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating

the Act and the regulations issued thereunder, and in particular, shall cease and desist from:

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

B. Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

C. Failing to remove excreta and food waste from primary enclosures daily in order to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors.

D. Failing to make provisions for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks.

E. Failing to keep the premises, including buildings and surrounding grounds, in good repair, and clean and free of trash, junk, waste, and discarded matter, and failing to keep weeds, grasses and bushes under control in order to protect the animals from injury and to facilitate the required husbandry practices.

F. Failing to construct and maintain primary enclosures so that the floors protect the animals' feet and legs from injury.

G. Failing to permit APHIS employees to conduct a complete inspection of the animal facilities.

2. Respondent is assessed a civil penalty of \$ 2,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent's license is suspended for a period of 30 days and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein. When respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied this condition, a supplemental order will be issued in this proceeding upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension.

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 and effective August 2, 1996.]

In re: JEANETTE FORD.
AWA Docket No. 96-0004.
Decision and Order filed August 19, 1996.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondent Jeanette Ford on March 29, 1996.¹ Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent Jeanette Ford has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

¹The Hearing Clerk attempted to serve a copy of the complaint and the Rules of Practice on the respondent by certified mail but the documents were returned marked unclaimed. Pursuant to section 1.147(c) of the Rules of Practice, the Hearing Clerk mailed a copy of the complaint and the Rules of Practice by regular mail to the respondent on March 29, 1996.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

1. Jeanette Ford, hereinafter referred to as respondent, is an individual whose address is (b) (6).

2. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. The respondent willfully violated section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1) by operating as a dealer as defined in the Act and the regulations without having obtained a license. Respondent sold, in commerce, dogs and/or cats to a licensed dealer on eleven occasions. The sale of each animal constitutes a separate violation. Each violation occurred on or about the date listed in the following table:

DATE	ANIMALS	DATE	ANIMALS
01/28/94	5 puppies	10/14/94	5 kittens
05/13/94	4 puppies	10/21/94	5 puppies
	1 kitten		1 kitten
05/20/94	2 puppies	11/18/94	6 puppies
	1 kitten	11/25/94	10 puppies
05/27/94	13 kittens		2 kittens
06/17/94	3 puppies	12/02/94	3 puppies
06/24/94	4 kittens		

Conclusions

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

Order

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

shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$11,000, which is hereby suspended provided that respondent does not violate the Act and the regulations and standards for a period of two years from the date this order becomes effective.

3. Respondent is disqualified for a period of two years from becoming licensed under the Act and regulations.

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 became final and effective November 29, 1996]

**In re: CITY OF ORANGE, CALIFORNIA, COMMUNITY SERVICES
DEPARTMENT, d/b/a EISENHOWER PARK.
AWA Docket No. 96-0044.
Decision and Order filed September 12, 1996.**

Default — Failure to file a timely answer — Civil penalty — Cease and desist order — Sanction policy.

The Judicial Officer affirmed the Default Decision by Administrative Law Judge James W. Hunt (ALJ) assessing a civil penalty of \$5,000 against Respondent and directing Respondent to cease and desist from violating the Animal Welfare Act (Act) and the Regulations and Standards issued under the Act. Respondent's failure to file a timely Answer is deemed an admission of the allegations in the Complaint, (7 C.F.R. § 1.136(c)), and constitutes a waiver of hearing, (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Application of the default provisions of the Rules of Practice does not deny Respondent due process. The civil penalty assessed is warranted and appropriate in light of the factors that must be considered under section 19(b) of the Act, (7 U.S.C. § 2149(b)), and the Department's sanction policy, and is consistent with civil penalties assessed in previous cases for similar violations of the Act and the Regulations and Standards issued under the Act.

Colleen A. Carroll, for Complainant.

David Rudat, Orange, California, for Respondent.

Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

This case is a disciplinary administrative proceeding instituted under the Animal Welfare Act, as amended, (7 U.S.C. §§ 2131-2159) (hereinafter the Animal Welfare Act), and the Regulations and Standards promulgated under the Animal Welfare Act, (9 C.F.R. §§ 1.1-3.142) (hereinafter the Regulations and Standards). The proceeding was instituted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, (7 C.F.R. §§ 1.130-.151), and the Rules of Practice Governing Proceedings Under the Animal Welfare Act, (9 C.F.R. §§ 4.1-.11) (hereinafter the Rules of Practice), by a Complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service (hereinafter Complainant) on April 22, 1996. The Complaint, which alleges that the City of Orange, California, Community Services Department, doing business as Eisenhower Park (hereinafter Respondent), willfully violated the Animal Welfare Act and the Regulations and Standards, was served on Respondent on May 7, 1996. Section 1.136(a) of the Rules of Practice provides that Respondent may file an Answer to the Complaint within 20 days after service of the Complaint on Respondent, (7 C.F.R. § 1.136(a)). Administrative Law Judge James W. Hunt (hereinafter ALJ) extended the time for Respondent to file its Answer from May 28, 1996, to June 3, 1996. (Order Extending Time to Answer Complaint.)

Respondent failed to answer by June 3, 1996, and on July 26, 1996, in accordance with section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), the ALJ issued a Proposed Decision and Order Upon Admission of Facts By Reason of Default (hereinafter Default Decision) in which the ALJ assessed a civil penalty of \$5,000 against Respondent and ordered Respondent to cease and desist from various practices, including engaging in activity for which a license is required under the Animal Welfare Act and Regulations without being licensed; failing to ensure that animals have access to adequate uncontaminated food and water; failing to maintain a written program of veterinary care; failing to ensure that adequate barriers are maintained between the animals and the public and that employees are present during periods of public contact; failing to maintain adequate records; and failing to ensure that facilities and enclosures for animals provide adequate shelter, and are constructed, maintained, and cleaned, as required.

On August 12, 1996, Respondent appealed to the Judicial Officer to whom authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 has been delegated. (7 C.F.R.

§ 2.35.)¹ On August 22, 1996, Complainant filed Complainant's Response to Respondent's Appeal of Decision and Order (hereinafter Complainant's Response), and on August 26, 1996, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Default Decision is adopted as the final Decision and Order in this case, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S DEFAULT DECISION (AS MODIFIED)

....

... Respondent has failed to file an Answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by Respondent's failure to file a [timely] Answer, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice[, (7 C.F.R. § 1.139).]

Findings of Fact

1. [The] ... City of Orange, California, is a municipality that owns and operates Eisenhower Park, located at 2894 North Tustin Avenue, Orange, California 92666 (also referred to hereinafter as the Premises), through the city's Community Services Department. The mailing address of the Community Services Department is 326 East Almond Avenue, Orange, California 92661.

2. At all times mentioned herein, Respondent ... was operating Eisenhower Park as an exhibitor, as that term is defined in the [Animal Welfare] Act and the Regulations and Standards.

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940, (7 U.S.C. §§ 450c-450g); Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1490 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994, (7 U.S.C. § 6912(a)(1)).

3. On September 22, 1993, [the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter] APHIS), inspected the Premises and found that:

a. Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to maintain the Premises clean and free from accumulations of trash [and by failing] to protect the health of the animals, in violation of section 3.131(c) of the Standards, (9 C.F.R. § 3.131(c));

b. Respondent willfully violated section 2.131(c)(2) of the Regulations, (9 C.F.R. § 2.131(c)(2)), by failing to have a responsible employee or attendant present at all time[s] during periods of public contact;

c. Respondent willfully violated section 2.131(c)(4) of the Regulations, (9 C.F.R. § 2.131(c)(4)), by allowing the public to feed animals, but failing to provide appropriate food; and

d. Respondent willfully violated section 2.25(a) of the Regulations, (9 C.F.R. § 2.25(a)), by exhibiting animals without being licensed.

4. On September 22, 1993, February 25, April 11, and August 30, 1994, and January 27, 1995, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to comply with the Standards, as follows:

a. Respondent failed to provide shelter for animals kept outdoors to protect them and prevent discomfort, in violation of section 3.127(b) of the Standards, (9 C.F.R. § 3.127(b)); and

b. Respondent failed to maintain outdoor housing facilities in good repair so as to protect the animals from injury and to contain them, in violation of section 3.125(a) of the Standards, (9 C.F.R. § 3.125(a)).

5. On September 22, 1993, February 25, April 11, July 26, and August 30, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to provide animals with food, free from contamination, in violation of section 3.129(a) of the Standards, (9 C.F.R. § 3.129(a)).

6. On February 25, 1994, APHIS inspected the Premises and found that:

a. Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to take adequate measures to prevent contamination of food, in violation of section 3.129(b) of the Standards, (9 C.F.R. § 3.129(b)); and

b. Respondent had willfully violated section 2.131(b)(1) of the Regulations, (9 C.F.R. § 2.131(b)(1)), by failing to . . . maintain sufficient distance or barriers [or both] between the animals and the general viewing public, so as to ensure the safety of the animals and the public.

7. On April 11, July 26, and October 3, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.100(a) of the Regulations, (9 C.F.R. § 2.100(a)), by failing to make potable water accessible to animals as necessary for the health and comfort of the animals, and to keep water receptacles clean and sanitary, in violation of section 3.130 of the Standards, (9 C.F.R. § 3.130).

8. On April 11, May 3, and July 26, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.40(a)(1) of the Regulations, (9 C.F.R. § 2.40(a)(1)), by failing to have a written program of veterinary care.

9. On July 26, August 30, and October 3, 1994, APHIS inspected the Premises and found that Respondent had willfully violated section 2.75(b)(1) of the Regulations, (9 C.F.R. § 2.75(b)(1)), by [failing to] make, keep, and maintain records or forms disclosing information concerning the acquisition of animals.

Conclusions

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

2. By reason of the facts set forth in the Findings of Fact, Respondent has violated sections 2.25(a), 2.40(a), 2.75([b]), 2.100(a), and 2.131(b) and (c) of the Regulations, [(9 C.F.R. §§ 2.25(a), .40(a), .75(b), .100(a), .131(b), (c))], and sections 3.125(a), 3.127(b), 3.129(a) [and (b)], 3.130 and 3.131(c) of the Standards, [(9 C.F.R. §§ 3.125(a), .127(b), .129(a), (b), .130, .131(c))].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's letter dated August 9, 1996, addressed to Joyce Dawson, Hearing Clerk, United States Department of Agriculture, which was filed on August 12, 1996 (hereinafter Respondent's Appeal Petition), appears to be and is treated herein as Respondent's appeal of the Default Decision.

Respondent's Appeal Petition, Respondent's first and only filing in this proceeding, contains responses to the allegations in the Complaint. (Respondent's Appeal Petition, pp. 1-2.)

Sections 1.136, 1.139, and 1.141 of the Rules of Practice provide:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138[(7 C.F.R. § 1.138)].

7 C.F.R. § 1.136(a), (c).

§ 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. § 1.139.

§ 1.141 Procedure for Hearing.

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

7 C.F.R. § 1.141(a).

The Complaint, Rules of Practice, and a letter dated April 23, 1996, from the Office of the Hearing Clerk, were served on Respondent on May 7, 1996, by certified mail. The Complaint states:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Complaint, p. 4.

The Complaint clearly informs Respondent of the consequences of failure to file an Answer. Moreover, the accompanying April 23, 1996, letter from the Office of the Hearing Clerk expressly advises Respondent of the effect of failure to file an Answer or deny any allegation in the Complaint, as follows:

Most importantly, you have *20 days from the receipt of this letter to file with the Hearing Clerk an original and five 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.

April 23, 1996, letter from Joyce A. Dawson, Hearing Clerk, to City of Orange California, Community Services Department, dba Eisenhower Park, p. 1. (Emphasis in original.)

On May 22, 1996, the ALJ extended the time for Respondent's Answer from May 28, 1996, to June 3, 1996. (Order Extending Time to Answer Complaint.)

Respondent failed to answer by June 3, 1996, and on June 18, 1996, in accordance with 7 C.F.R. § 1.139, Complainant filed Complainant's Motion for Adoption of Proposed Decision and Order (hereinafter Complainant's Motion for Default Decision) and Complainant's Proposed Decision and Order Upon Admission of Facts by Reason of Default (hereinafter Complainant's Proposed Default Decision). The Office of the Hearing Clerk

served a letter dated June 18, 1996, and one copy each of Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on Respondent, by certified mail, on July 1, 1996. The Office of the Hearing Clerk's June 18, 1996, letter states, as follows:

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

June 18, 1996, letter from Joyce A. Dawson, Hearing Clerk, to City of Orange California, Community Services Department, dba Eisenhower Park.

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days, as provided in 7 C.F.R. § 1.139, and, on July 26, 1996, the ALJ filed the Default Decision, which was served on Respondent on August 6, 1996.

Respondent's response to the allegations in the Complaint comes too late. Section 1.136(a) of the Rules of Practice, (7 C.F.R. § 1.136(a)), requires that within 20 days after service of the Complaint, the Respondent shall file an Answer with the Hearing Clerk. Respondent was served with the Complaint on May 7, 1996, and the time for Respondent to file an Answer was extended by the ALJ from May 28, 1996, to June 3, 1996. Respondent's Appeal Petition, Respondent's first and only filing in this proceeding, was filed on August 12, 1996, 70 days after Respondent's Answer was due. Respondent's failure to file a timely Answer constitutes an admission of the material allegations in the Complaint, (7 C.F.R. § 1.136(a),(c)), and a waiver of hearing, (7 C.F.R. §§ 1.139, .141(a)). Further, Respondent was served with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on July 1, 1996, which states that Respondent, by its failure to file an Answer, is deemed to have admitted the material allegations in the Complaint. Section 1.139 of the Rules of Practice, (7 C.F.R. § 1.139), provides that Respondent may file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service of the motion on Respondent. Respondent's first filing in this proceeding, Respondent's Appeal Petition, was filed August 12, 1996, 42 days after Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were served on Respondent.

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,² Respondent has shown no basis for setting aside the Default Decision here.³

²*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173(1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ*, L.A.W.A.Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

³*See In re Bibi Uddin*, 55 Agric. Dec. ____ (Aug. 23, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. ____ (Aug. 15, 1996) (default decision proper where response to Complaint filed more than 9 months after service of Complaint on Respondent); *In re Sandra L. Reid*, 55 Agric. Dec. ____ (July 17, 1996) (default decision proper where response to Complaint filed 43 days after service of Complaint on Respondent); *In re Jeremy Byrd*, 55 Agric. Dec. ____ (Feb. 21, 1996) (default order proper where timely Answer not filed); *In re Moreno Bros.*, 54 Agric. Dec. 1425 (1995) (default order proper where timely Answer not filed); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (default order proper where Answer not filed); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (default order proper where Answer not filed); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (default order proper where Answer not filed); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (default order proper where Respondent was given an extension of time until March 22, 1994, to file an Answer, but it was not received until March 25, 1994), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Donald D. Richards*, 52 Agric. Dec. 1207 (1993) (default order proper where timely Answer not filed); *In re Mike Robertson*, 47 Agric. Dec. 879 (1988) (default order proper where Answer not filed); *In re Morgantown Produce, Inc.*, 47 Agric. Dec. 453 (1988) (default order proper where Answer not filed); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430 (1988) (default order proper where Answer not filed); *In re Charley Charon*, 46 Agric. Dec. 1082 (1987) (default order proper where Answer not filed); *In re Les Zedric*, 46 Agric. Dec. 948 (1987) (default order proper where timely Answer not filed); *In re Arturo Bejarano, Jr.*, 46 Agric. Dec. 925 (1987) (default order proper where timely Answer not filed; Respondent properly served even though his sister, who signed for the Complaint, forgot to give it to him until after the 20-day period had expired); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. 586 (1987) (default order proper where timely Answer not filed); *In re Roy Carter*, 46 Agric. Dec. 207 (1987) (default order proper where timely Answer not filed; Respondent properly served where Complaint sent to his last known address was signed for by someone); *In re Luz G. Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where Answer not filed); *In re Elmo Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where Answer not filed), *rev'd on other grounds*, 836 F.2d 550, 1987 WL 27139 (6th Cir. 1987); *In re Leonard McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely Answer not filed); *In*

The requirement in the Rules of Practice that Respondent deny or explain any allegation of the Complaint and set forth any defense in a timely Answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. The Department's four ALJ's frequently dispose of hundreds of cases in a year. In recent years, the Department's Judicial Officer has disposed of 40 to 60 cases per year.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable

re Joe L. Henson, 45 Agric. Dec. 2246 (1986) (default order proper where Answer admits or does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely Answer not filed); *In re J.W. Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Wayne J. Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where Answer does not deny material allegations); *In re Jerome B. Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely Answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Gutman Bros., Ltd.*, 45 Agric. Dec. 956 (1986) (default order proper where Answer does not deny material allegations); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (default order proper where Answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely Answer not filed; irrelevant that Respondent's main office did not promptly forward Complaint to its attorneys); *In re Carl D. Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely Answer not filed; Respondent Carl D. Cuttone properly served where Complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely Answer not filed; Respondent cannot present evidence that it is unable to pay \$54,000 civil penalty where it waived its right to a hearing by not filing a timely Answer); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely Answer not filed); *In re Joseph Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely Answer not filed; Respondent Joseph Buzun properly served where Complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439 (1984) (default order proper where timely Answer not filed; irrelevant whether Respondent was unable to afford an attorney), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re William Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely Answer not filed); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely Answer not filed); *In re Danny Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where Respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where Respondents misunderstood the nature of the order that would be issued); *In re Jerry Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely Answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of Respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

of permitting them to discharge their multitudinous duties.'"⁴ If Respondent were permitted to contest some of the allegations of fact after failing to file a timely Answer, or raise new issues, all other Respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

The record clearly establishes that Respondent was provided with a meaningful opportunity for a hearing in accordance with the Rules of Practice. Respondent waived its right to a hearing by failing to file a timely Answer. (7 C.F.R. § 1.139.) Moreover, Respondent's failure to file a timely Answer is deemed, for the purposes of this proceeding, to be an admission of the allegations in the Complaint. (7 C.F.R. § 1.136(c).) Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. See *United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

Respondent contends that it has made "efforts to comply in good faith," has corrected the violations alleged in the Complaint, and is now "in complete compliance" with the Animal Welfare Act and the Regulation and Standards. Based upon these contentions, Respondent asserts that it should not be assessed a civil penalty of \$5,000. (Respondent's Appeal Petition, p. 3.)

Section 19(b) of the Animal Welfare Act provides:

⁴*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Accord *Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). See *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

§ 2149. Violations by licensees

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- (b) **Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. . . . The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149(b).

The Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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.

Respondent operates a 25-acre park in which an "animal area" is located. (Respondent's Appeal Petition, p. 1.) Respondent exhibits approximately 24 deer, (Respondent's Appeal Petition, attachment 7), approximately 20 chickens, (Respondent's Appeal Petition, attachment 1), and an unspecified

number of rabbits, (Respondent's Appeal Petition, p. 2), at its facility. The annual licensing fee regulations, (9 C.F.R. § 2.6), classify exhibitors by the number of animals exhibited. Under this scheme, Respondent's facility is considered moderate-sized. While there is nothing in the record to indicate that Respondent deliberately mistreated its animals or that Respondent has a history of violations previous to those alleged in the Complaint, Respondent repeatedly and willfully violated the Animal Welfare Act and the Regulations and Standards. Most of the violations are serious and could have impaired the health of the animals.

Complainant could have sought the assessment of \$2,500 for each of the 30 violations alleged in the Complaint, or a total of \$75,000. In light of the amount that Complainant could have requested, and the number of violations and serious nature of many of the violations, the sanction of a civil penalty of \$5,000 and a cease and desist order requested by Complainant and imposed by the ALJ is appropriate and warranted.

Moreover, an examination of other cases brought by APHIS for similar violations reveals that civil penalties similar to those sought by Complainant and assessed by the ALJ in this case have been assessed in the past.⁵

⁵See, e.g., *In re Big Bear Farm, Inc.*, 55 Agric. Dec. ____ (March 15, 1996) (\$6,750 civil penalty and a 45-day license suspension for 36 violations of the Animal Welfare Act and the Regulations and Standards); *In re Otto Berosini*, 54 Agric. Dec. 886 (1995) (\$7,500 civil penalty and 60-day license suspension for 46 violations of the Animal Welfare Act and the Regulations and Standards); *In re Ronald D. DeBruin*, 54 Agric. Dec. 876 (1995) (\$5,000 civil penalty and 30-day license suspension for 21 violations of the Animal Welfare Act and the Regulations and Standards); *In re Tuffy Truesdell*, 53 Agric. Dec. 1101 (1994) (\$2,000 civil penalty and 60-day license suspension for violations of the Animal Welfare Act and the Regulations and Standards on four different dates over a 13-month period); *In re James Petersen*, 53 Agric. Dec. 80 (1994) (\$5,000 civil penalty and 1-year license disqualification for numerous violations of the Animal Welfare Act); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047 (1992), *aff'd sub nom. Wilson v. USDA*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)) (\$5,000 civil penalty and a 30-day license suspension for 61 violations of the Animal Welfare Act and the Regulations and Standards); *In re Dwight Carpenter*, 51 Agric. Dec. 239 (1992) (\$3,000 civil penalty and 6-month license suspension for 13 violations of the Animal Welfare Act and the Regulations and Standards); *In re S.S. Farms Linn County, Inc.*, *supra*, (\$10,000 civil penalty and 1-year license suspension for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re Rudolph Vrana*, 43 Agric. Dec. 1758 (1984) (\$3,000 civil penalty and 30-day license suspension for 14 violations of the Animal Welfare Act and the Standards); *In re Donald Stumbo*, 43 Agric. Dec. 1079 (1984), *aff'd*, 779 F.2d 35 (2d Cir. 1985) (not to be cited as precedent) (\$4,000 civil penalty and 120-day license suspension for numerous violations of the Animal Welfare Act and the Regulations and Standards); *In re Willard Lambert*, 43 Agric.

Further, I disagree with Respondent's contention that the assessment of a \$5,000 civil penalty is inappropriate because Respondent has made "efforts to comply in good faith," has corrected the violations alleged in the Complaint, and is now "in complete compliance" with the Animal Welfare Act and the Regulation and Standards. (Respondent's Appeal Petition, p. 3.)

This Department's policy is that the subsequent correction of a condition not in compliance with the Animal Welfare Act or the Regulations or Standards has no bearing on the fact that a violation has occurred. *In re Big Bear Farm, Inc.*, *supra*, slip op. at 44-45; *In re Pet Paradise, Inc.*, *supra*, 51 Agric. Dec. at 1069-70, 1075. Each dealer, exhibitor, operator of an auction sale, and intermediate handler must always be in compliance in all respects with the Regulations in 9 C.F.R. pt. 2 and the Standards in 9 C.F.R. pt. 3. (9 C.F.R. § 2.100(a).) This duty exists regardless of a "correction date" suggested by an APHIS inspector who notes the existence of a violation. While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.

Under these circumstances, the assessment of a civil penalty of \$5,000 against Respondent is warranted and appropriate and consistent with civil penalties requested and assessed in similar circumstances.

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

Order

1. Respondent City of Orange, California, Community Services Department, d/b/a Eisenhower Park, is assessed a civil penalty of \$5,000, which shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded within 30 days after service of this Order on Respondent to:

Colleen A. Carroll

Dec. 46 (1984) (\$1,000 civil penalty for 5 violations of the Animal Welfare Act and the Standards); *In re Lorraine McBryde*, 42 Agric. Dec. 1375 (1983) (\$500 civil penalty for 2 violations of the Animal Welfare Act and the Regulations); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983) (\$500 civil penalty for 1 violation of the Animal Welfare Act).

United States Department of Agriculture
Office of the General Counsel
Room 2014 South Building
Washington, D.C. 20250-1417

2. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

a. Engaging in activity for which a license is required under the Animal Welfare Act and Regulations without being licensed;

b. Failing to ensure that animals have access to adequate uncontaminated food and water;

c. Failing to maintain a written program of veterinary care;

d. Failing to ensure that adequate barriers are maintained between the animals and the public, and that employees are present during periods of public contact;

e. Failing to maintain adequate records; and

f. Failing to ensure that facilities and enclosures for animals provide adequate shelter, and are constructed, maintained, and cleaned, as required.

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

**In re: JAMES B. GARRETTSON d/b/a Garrettson Enterprises.
AWA Docket No. 96-0053.
Decision and Order filed September 17, 1996.**

Failure to file an answer - Operating as a dealer without being licensed - Operating as an exhibitor without being licensed - Cease and desist order - Civil Penalty - License Disqualification.

Tejal Mehta, for Complainant.
Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator,

Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that James Brandon Garretson, hereafter the Respondent, willfully violated the Act.

The complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondent by ordinary mail on June 27, 1996.¹ 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 within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1. James Brandon Garretson, dba Garretson Enterprises, hereinafter referred to as respondent, is an individual whose address is (b) (6)

2. The respondent, at all times material herein, was operating as a dealer and an exhibitor, as defined in the Act and the regulations.

3. From June 11, 1994, and continuing to the present, respondent has been operating as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent offered for sale and sold numerous exotic animals in commerce. The sale or offer for sale of animal constitutes a separate violation.

4. On June 11, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported two lions. The sale transaction for each animal constitutes a separate violation.

¹The Hearing Clerk attempted service on respondent James Brandon Garretson by certified mail on May 15, 1996. Upon return of the complaint as "Unclaimed" on June 18, 1996, the Hearing Clerk served respondent by ordinary mail as per § 1.147 of the Rules of Practice (7 C.F.R. § 1.136).

5. On June 26, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported one tiger. The sale transaction for each animal constitutes a separate violation.

6. On August 8, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent bought and transported one lion. The sale transaction for each animal constitutes a separate violation.

7. On November 10, 1994, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two lions and one tiger. The transportation of each animal constitutes a separate violation.

8. On March 1, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported one tiger. The transportation of each animal constitutes a separate violation.

9. On May 2, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two tigers. The transportation of each animal constitutes a separate violation.

10. On May 5, 1995, respondent operated as an exhibitor as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent exhibited two tigers. The exhibition of each animal constitutes a separate violation.

11. On May 6, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent transported two tigers. The transportation of each animal constitutes a separate violation.

12. On June 16, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R.

§ 2.1). Specifically, respondent bought and transported one black bear. The sale transaction of each animal constitutes a separate violation.

13. On June 27, 1995, respondent operated as a dealer as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent sold one black bear. The sale transaction of each animal constitutes a separate violation.

14. On July 3, 1995, respondent operated as an exhibitor as defined in the Act and regulations, without possessing a license, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). Specifically, respondent exhibited two tigers. The exhibition of each animal constitutes a separate violation.

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 violate the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$ 11,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for a one year period from becoming licensed under the Act and regulations.

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 became final and effective October 28, 1996-Editor]

FEDERAL CROP INSURANCE ACT

In re: GERALDA. KLEIN.
FCIA Docket No. 96-0001
Decision and Order filed August 22, 1996.

Admission of material allegations - Filing false and inaccurate information with the FCIC - Disqualification.

Kimberly Arrigo, for Complainant.
Orell D. Schmitz, Bismark, North Dakota, for Respondent.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

The respondent, Gerald A. Klein, admitted that he filed false and inaccurate information with the Federal Crop Insurance Corporation and agreed to be disqualified.

Pursuant to section 506 of the Federal Crop Insurance Act (7 U.S.C. § 1506)(the Act), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 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 in accordance with § 1.145.

If 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.

[This Decision became final and effective September 30, 1996.-Editor]

In re: TED JOHN WAGGONER.
FCIA Docket No. 96-0002.
Decision filed September 6, 1996.

Failure to file an answer - Providing false and inaccurate information to FCIC or to an insurer with respect to an insurance plan or policy - Disqualification.

Kimberly Arrigo, for Complainant.

Respondent, Pro se.

Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of the respondent. Ted John Waggoner, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that 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 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 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 pursuant to § 1.145.

If 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.

[This Decision became final and effective October 16, 1996.-Editor]

In re: BRYANT WINSTON ODLAND.

FCIA Docket No. 96-0006.

Decision filed September 4, 1996.

Failure to file an answer - Providing false and inaccurate information to FCIC to an insurer with respect to an insurance plan or policy - Disqualification.

Kimberly Arrigo, for Complainant.

Respondent, Pro se.

Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure

of the respondent, Brain Winston Odland, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraph II of the Complaint are deemed admitted, it is found that 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 1990 Act. (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection or receiving noninsured assistance for a period of two years and from receiving any other benefit under the Act for a period of 10 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 pursuant to § 1.145.

If 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.

[This Decision became final and effective October 18, 1996.-Editor]

PLANT QUARANTINE ACT**In re: PRIVATE JET EXPEDITIONS, INC.****P.Q. Docket No. 95-0056.****Decision and Order filed March 7, 1996.****Failure to file an answer - Failure to provide advance notification of aircraft - Civil Penalty.**

Jane Settle, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations notification of foreign aircraft arriving in the United States (7 C.F.R. § 330.111)[hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq* and 7 C.F.R. §§ 1.130 *et seq*.

This proceeding was instituted under the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa *et seq*), the Act of February 2, 1903, as amended (21 U.S.C. § 111) (Acts), and the regulations promulgated thereunder, by a complaint filed on August 21, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about May 6, 1994, at Cincinnati/Northern Kentucky International Airport, in Cincinnati, Ohio, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 528/529 from Barbados, in violation of 7 C.F.R. § 330.111. Also, on or about January 7, 1995, at Lambert Field in St. Louis, MO, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 801 from Mexico, in violation of 7 C.F.R. § 330.111.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Private Jet Expeditions, Inc., is a company doing business in the states of Ohio and Missouri with a mailing address of 3520 Piedmont Road, Suite 300, Atlanta, GA 20205.

2. On or about May 6, 1994, at Cincinnati/Northern Kentucky International Airport, in Cincinnati, Ohio, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 528/529 from Barbados, in violation of 7 C.F.R. § 330.111.

3. On or about January 7, 1995, at Lambert Field in St. Louis, MO, respondent failed to provide the Plant Protection and Quarantine Service with advance notification of arrival of an aircraft, namely, PJE 801 from Mexico, in violation of 7 C.F.R. § 330.111.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 330.111). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars (\$1,000.00)(\$500.00 per count)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

¹The respondent has failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-56.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 29, 1996-Editor]

In re: YOLANDA M. GUERRERO.
P.Q. Docket No. 95-0064.
Decision and Order filed April 10, 1996.

Failure to file an answer - Importation of plums from Ecuador into United States - Civil penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on September 26, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about January 9, 1995, the respondent imported approximately five pounds of plums (*Spondias* spp.) from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of plums from Ecuador into the United States is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing.

7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Yolanda M. Guerrero, respondent herein, is an individual whose mailing address is (b) (6)

2. On or about January 9, 1995, the respondent imported approximately five pounds of plums (*Spondias* spp.) from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of plums from Ecuador into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred fifty dollars (\$ 250.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

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

¹Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaptinsky*, 47 Agric. Dec. 613 (1988).

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 95-64.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final July 27, 1996-Editor]

In re: MANUEL JESUS PALAGUACHI.
P.Q. Docket No. 96-0007.
Decision and Order filed May 3, 1996.

Failure to file an answer - Importation of apples and peaches from Ecuador into the United States - Civil Penalty.

Susan Golabek, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.* and 7 C.F.R. § 380.1 *et seq.*

This proceeding was instituted by a Complaint filed on November 8, 1995, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that on or about March 24, 1995, the respondent imported approximately one pound each of apples and peaches from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of apples and peaches from Ecuador into the United States is prohibited.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under section 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations alleged in the complaint are adopted and set forth herein as the Findings of Fact, and this

Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Manuel Jesus Palaguachi, respondent herein, is an individual whose mailing address is (b) (6).
2. On or about March 24, 1995, the respondent imported approximately one pound each of apples and peaches from Ecuador into the United States at Jamaica, New York, in violation of 7 C.F.R. § 319.56, because the importation of apples and peaches from Ecuador into the United States is prohibited.

Conclusion

By reason of the facts contained in the Findings of Fact above, the respondent has violated 7 C.F.R. § 319.56. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred fifty dollars (\$ 250.00).¹ This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

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

within thirty (30) days from the effective date of this Order. Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-07.

¹Inasmuch as the respondent has failed to file an answer, and, therefore, the Department is not required to hold a hearing, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decision in *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988).

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final July 22, 1996-Editor]

In re: FEDERICO GALLEGOS-SIGALA.
P.Q. Docket No. 96-0028.
Decision and Order filed August 22, 1996.

Failure to file an answer - Importation of avocados into the United States from Mexico - Civil Penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on April 3, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Federico Gallegos-Sigala is an individual whose mailing address is (b) (6)

2. On or about August 1, 1995, at El Paso, Texas, respondent imported four (4) avocados from Mexico into the United States in violation of Section 7 C.F.R. § 319.56 because importation of avocados is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred and seventy-five dollars (\$375.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-28.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final October 2, 1996.-Editor]

In re: Bork Tree Farms, Inc., also d/b/a B & S Tree, B & S Tree Farm, and B & S Tree Co., Norman's Brokerage, Inc., also d/b/a Normans Truck Brokerage, Inc., LaFave Recycling, Independent Operator Inc., Heidema Brothers, Inc., Stan Koch & Sons, Windy Hill Foliage, Inc., Todd Transportation, Inc., Zweber Trucking, Green Enterprise Lines, Midwest Transportation, Inc., Keith Wright Trucking, P & H Trucking Co., Hensley, Inc., Zeitner & Sons, Inc., Ankrum Trucking, Inc., Karl's Transport, Inc., Lykes Transport, Inc., ATI Enterprises, Ltd., Buchan Trucking Co., Pyle Truck Line, Inc., Action Carriers, Inc., and Dittmer Transit.

P.Q. Docket No. 96-0027.

Decision and Order as to Dittmer Transit filed August 23, 1996.

Failure to file an answer - Interstate movement of trees from a gypsy moth generally infested area to a not generally infested area without a certificate or permit - Civil penalty.

James A. Booth, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of trees from a gypsy moth generally infested area to or near a not generally infested area (7 C.F.R. § 301.81 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. § 151-167)(Acts), and the regulations promulgated under the Acts, by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This Complaint alleges that on or about April 23, 1994, Respondent Dittmer moved interstate approximately fifty-three (53) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Hinckley, MN, without a certificate or permit, as required.

The Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings

of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Dittmer Transit (Dittmer), Respondent, is a business with a mailing address of 445 27th Street South, Fargo, ND 58103.

2. On or about April 23, 1994, Respondent Dittmer, in violation of 7 C.F.R. § 301.45-4(a), moved interstate approximately fifty-three (53) trees from a gypsy moth generally infested area at or near Ludington, MI, to or near the not generally infested area of Hinckley, MN, without a certificate or permit in accordance with §§ 301.45-5 and 301.45-8, as required.

Conclusion

By reason of the Findings of Fact set forth above, the Respondent has violated the Acts and the regulations issued under the Acts). Therefore, the following Order is issued.

Order

Respondent Dittmer is hereby assessed a civil penalty of two hundred fifty dollars (\$250.00)¹. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

¹The respondent has failed to file a timely answer, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half, in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 96-27.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final October 4, 1996.-Editor]

In re: ADELE CRISTE.

P.Q. Docket No. 96-0024.

Decision and Order filed September 5, 1996.

Failure to file an answer - Offered raw chili peppers for shipment from Hawaii to the continental United States - Civil penalty.

Jane H. Settle, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations importation of fruits and/or vegetables from Hawaii to the continental United States (7 C.F.R. §§ 318.13(b) and 318.13-2(a)) [hereinafter referred to as the regulations], in accordance with the Rules of Practice in 7 C.F.R. § 380.1 *et seq.* and 7 C.F.R. §§ 1.130 *et. seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165, and 167) (Acts), and the regulations promulgated thereunder, by a complaint filed on March 27, 1996, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleges that on or about July 8, 1995, respondent offered to a common carrier, specifically the United States Postal Service approximately 2 ounces of raw chili peppers for shipment from Hawaii to the Continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a) because such products are prohibited movement from Hawaii into the continental United States.

The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.13(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.1.36(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in

the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing. (7 C.F.R. §1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. §1.139).

Findings of Fact

1. Adele Criste, is an individual with a mailing address of (b) (6) (b) (6).
2. On or about July 8, 1995, respondent offered to a common carrier, specifically the United States Postal Service, approximately 2 ounces of raw chili peppers for shipment from Hawaii to the Continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a) because such products are prohibited movement from hawaii into the continental United States.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. §§ 318.13(b) and 318.13-2(a)).

Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of three hundred seventy five dollars (375.00)¹. This penalty shall be payable to the "Treasure 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 Service Office

¹The respondent failed to file an answer within the prescribed time, and, under the Rules of Practice applicable to this proceeding, the Department is not required to hold a hearing. Therefore, the civil penalty requested is reduced by one-half in accordance with the Judicial Officer's Decisions in *In re: Shulamis Kaplinsky*, 47 Agric. Dec. 613 (1988) and *In re: Richard Duran Lopez*, 44 Agric. Dec. 2201 (1985).

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-24.

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 the Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final October 14, 1996.-Editor]

In re: ROSENDA MATIAS.
P.Q. Docket No. 96-0009.
Decision and Order filed October 25, 1996.

Failure to file an answer - Importation of fresh mangoes into the United States from the Dominican Republic - Civil penalty.

Darlene M. Bolinger, for Complainant.
Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on December 12, 1995, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of

the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Rosenda Matias is an individual whose mailing address is (b) (6) (b) (6).
2. On or about April 8, 1995, respondent imported fresh mangoes from a foreign country, Dominican Republic, to a place within the United States, Jamaica, New York, in violation of Section 7 C.F.R. § 319.56-2(e).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred and dollars (\$500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to P.Q. Docket No. 96-09.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the

Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final December 7, 1996-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

ANIMAL QUARANTINE AND RELATED LAWS

Gil Comeaux. A.Q. Docket No. 96-0010. 9/18/96.

Gumersindo Marin-Cazarez. A.Q. Docket No. 96-0014. 10/4/96.

Martha Gonzalez Rodriguez. A.Q. Docket No. 96-0016. 11/1/96.

Jeffrey S. Craig and Greencastle Livestock Market, Inc. A.Q. Docket No. 95-0001. 11/27/96.

ANIMAL WELFARE ACT

Donald Schrage and Mary Ruth Schrage, d/b/a Rabbit Ridge Kennels. AWA Docket No. 95-0061. 7/8/96.

Jim Armstrong. AWA Docket No. 95-0021. 7/16/96.

David Piper, Jr. d/b/a Everglades Wonder Gardens. AWA Docket No. 95-0049. 7/24/96.

Allen's Exotic Animals, Inc., and Lonnie D. Allen. AWA Docket No. 96-0043. 7/30/96.

Michael Wyche and Debbie Wyche d/b/a CAT TALES. AWA Docket No. 96-0015. 8/22/96.

Sugarloaf Dolphin Sanctuary, Inc. and Lloyd A. Good, III. AWA Docket No. 96-0055. 8/27/96.

Norristown Zoological Society, d/b/a Elmwood Park Zoo. AWA Docket No. 96-0027. 8/28/96.

Larry Marko. AWA Docket No. 96-0034. 8/29/96.

Southern Nevada Zoological Park, Inc., Nevada Zoological Foundation, and Pat Dingle. AWA Docket No. 95-0076. 8/30/96.

Rose Groll. AWA Docket No. 96-0022. 9/5/96.

Robert Grady and Lynette Grady, d/b/a Cripple Creek Kennels. AWA Docket No. 95-0011. 9/9/96.

Betty Honn's Animal Adoptions Ltd. and Betty Honn. AWA Docket. No. 95-0080. 9/11/96.

Frank Strout. AWA Docket No. 96-0009. 9/18/96.

Roy Lee Jones, d/b/a, Exotic Love Cattery. AWA Docket No. 96-0014. 9/24/96.

William L. Hargrove, d/b/a U. S. Research Farm. AWA Docket No. 95-0047. 10/8/96.

Randall B. Huffstutler. AWA Docket No. 95-0051. 10/15/96.

Bill Delozier and Three Bears Gift Shop. AWA Docket No. 95-0015. 10/16/96.

Craig A. Perry d/b/a Perry's Wilderness Ranch and Zoo. AWA Docket No. 96-0025. 10/21/96.

Romulus E. Scalf d/b/a Steel City Zoo. AWA Docket Nos. 95-0078 and 96-0059. 10/23/96.

Michigan State University. AWA Docket No. 95-0079. 12/19/96.

Sun Jet International Airlines, a Delaware corporation. AWA Docket No. 96-0046. 12/23/96.

FEDERAL MEAT INSPECTION ACT

Velasam Veal Connection, and Simon Samson. FMIA Docket No. 96-0008. 8/6/96.

John Krusinski, d/b/a Krusinski's Finest Meats. FMIA Docket No. 96-0007. 8/8/96.

Johnson & Johnson Meats, Inc. d/b/a Johnson & Johnson Wholesale Meats and James Boyd Johnson, III. FMIA Docket No. 95-0005. 9/4/96.

Mohawk Meat Packing Co., and Charles Bonnici. FMIA Docket No. 97-0001. 10/22/96.

Jordan Supply House and Richard R. Seyfried. FMIA Docket No. 96-0005. 10/30/96.

GRAIN STANDARDS ACT

Foxley Grain Company, Inc. G.S.A. Docket No. 96-0001. 8/26/96.

HORSE PROTECTION ACT

Harlan Minton and Nancy Minton. HPA Docket No. 94-0063. 8/13/96.

Conley Dockery. HPA Docket No. 96-0001. 8/20/96.

Sandra Huffman. HPA Docket No. 95-0002. 10/30/96.

Luther Hankins. HPA Docket No. 95-0001. 12/23/96.

PLANT QUARANTINE ACT

Nirmala Shiwmgangal. P.Q. Docket No. 95-0062. 7/17/96.

Lykes Transport, Inc. P.Q. Docket No. 96-0027. 8/1/96.

Carolyn K. Wood, d/b/a Tropical Connections. P.Q. Docket No. 96-0030. 8/9/96.

C.H. Robinson Co. P.Q. Docket No. 96-0030. 8/9/96.

Action Carriers, Inc. P.Q. Docket No. 96-0027. 8/20/96.

Robin S. Stein, d/b/a Foliage Link, Inc. P.Q. Docket No. 96-0030. 8/26/96.

Vern Thuney Trucking. P.Q. Docket No. 96-0030. 9/17/96.

Mesilla Valley Transportation. P.Q. Docket No. 96-0015. 9/19/96.

American Airlines, Inc. P.Q. Docket No. 96-0034. 10/16/96.

Amerijet International, Inc. P.Q. Docket No. 95-0043. 11/4/96.

Buchan Trucking Co. P.Q. Docket No. 96-0027. 11/21/96.

Continental Airlines. P.Q. Docket No. 94.0020. 12/10/96.

Petal L. Evans. P.Q. Docket No. 96-0031. 12/20/96.

POULTRY PRODUCTS INSPECTION ACT

Velasam Veal Connection, and Simon Samson. PPIA Docket No. 96-0007. 8/6/96.

John Krusinski, d/b/a Krusinski's Finest Meats. PPIA Docket No. 96-0006. 8/8/96.

Johnson & Johnson Meats, Inc. d/b/a Johnson & Johnson Wholesale Meats and James Boyd Johnson, III. PPIA Docket No. 95-0004. 9/4/96.

Mohawk Meat Packing Co., and Charles Bonnici. PPIA Docket No. 97-0001. 10/22/96.

Jordan Supply House and Richard R. Seyfried. PPIA Docket No. 96-0004. 10/30/96.