

**In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Order Denying Petition to Reopen Hearing and Remand Order filed April 6, 2001.**

Petition to reopen B Opportunity to file B Remand order B Oral decision B Bench decision.

The Judicial Officer denied the Respondent's petition to reopen the hearing stating the Respondent did not state the nature and purpose of the evidence to be adduced or set forth a good reason for the Respondent's failure to adduce evidence at the November 17, 1999, hearing. The Judicial Officer found that Administrative Law Judge Edwin S. Bernstein did not afford the Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with 7 C.F.R. ' 1.142(b). Therefore, the Judicial Officer remanded the proceeding to the Chief Administrative Law Judge to assign the case to an administrative law judge and ordered that the administrative law judge provide the Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. ' 1.142(b), and issue a decision.

Jane McCavitt, for Complainant.

Paul T. Gentile, New York, NY, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding on November 16, 1998. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. " 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. " 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. ' 499b(4)) (Compl. && III-IV). Respondent filed an Answer on January 6, 1999, denying the material allegations of the Complaint (Answer && 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact,

Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. ' 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.¹ Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of \$767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately \$769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. ' 499b(4)); and (4) ordered publication of the facts and circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a document entitled "Bench Decision," which is a written excerpt of the decision orally announced at the close of the hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed Complainant's Response to Respondent's Appeal. On February 15, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's Appeal Petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal).

On March 15, 2000, Respondent filed Respondent's Petition for Reconsideration. On March 29, 2000, Complainant filed Complainant's Response to Respondent's Motion for Reconsideration. On

¹On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance).

March 30, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures. On April 4, 2001, Respondent filed Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure.

On April 5, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge.

Petition to Reopen Hearing

Respondent requests reopening of the hearing for two reasons. First, Respondent contends "errors of fact and law that occurred at the hearing that denied Respondent due process of law" require reopening the hearing. Second, Respondent contends the appearance that Complainant scripted the ALJ's decision orally announced at the close of the hearing requires reopening the hearing (Respondent's Appeal Pet. at 2, 4).

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

' 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

. . . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. ' 1.146(a)(2).

I deny Respondent's petition to reopen the hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce.

**Opportunity to Submit Proposed Findings of Fact,
Conclusions, Order, and Brief**

On November 12, 1999, Complainant filed a Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order, requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. ' 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent with additional time within which to submit for the ALJ's consideration proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order. The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. (Tr. 6, 94-101.)

Section 1.142(b) of the Rules of Practice provides that prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as follows:

' 1.142 Post-hearing procedure.

.....

(b) *Proposed findings of fact, conclusions, orders, and briefs.* Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

7 C.F.R. ' 1.142(b).

Respondent contends Complainant was permitted to file proposed findings of fact, conclusions, order, and a brief, but the ALJ denied Respondent a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief, as provided in 7 C.F.R. ' 1.142(b). Further, Respondent contends the use of the word “shall” in section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) indicates that the provisions of section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) are mandatory. (Respondent’s Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure at 2-3.)

Complainant states “[t]he PACA allows that if a complaint is issued the respondent is afforded the opportunity for a hearing. 7 U.S.C. ' 499f(c)(2).” Complainant contends that “[t]here is no statutory requirement for the filings of findings of facts, conclusions of law, and briefs by a respondent, rather, the Department’s Rules of Practice allow for that opportunity when it is deemed appropriate.” (Complainant’s Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10.)

I disagree with Complainant’s contention that the Rules of Practice allow for the filings of findings of fact, conclusions of law, and briefs when it is deemed appropriate. The Rules of Practice do not provide that parties have an opportunity to file proposed findings of fact, conclusions of law, order, and a brief only “when it is deemed appropriate.” Instead, section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) states that, prior to the administrative law judge’s decision, each party *shall* be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. The word *shall* is ordinarily the language of command and leaves no room for administrative law judge discretion.² Thus, under the Rules of Practice an administrative

²See generally *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word “shall” normally creates an obligation impervious to judicial discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word “shall” is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word “shall” is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word “shall” means “must”); *Barbieri v. RAJ Acquisition Corp.*, 199 F.3d 616, 619 (2d Cir. 1999) (stating the term “shall” generally is mandatory and leaves no room for the exercise of discretion by the trial court); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999) (stating the word “shall” is used to express a command or exhortation and is used in laws, regulations, or directives to express what is mandatory); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999) (stating that “shall” is an imperative); *United States v. Insurance Co. of North America*, 83 F.3d 1507, 1510 n.5 (D.C. Cir. 1996) (stating the cases are legion affirming the mandatory character of “shall”); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating the word “shall” generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive); *Lefkowitz v. Arcadia Trading Co.*, 996 F.2d 600, 603 (2d Cir. 1993) (stating the word “shall” ordinarily connotes language of command); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (stating “shall” is a term of legal significance, in that it is mandatory or imperative, not merely precatory); *Randolph-Sheppard Vendors v. Weinberger*, 795 F.2d 90, 102 n.19 (D.C. Cir. 1986) (stating “shall” is normally the language of command in a statute); *American Federation of Government Employees v. FLRA*, 739 F.2d 87, 89 (2d Cir. 1984) (stating “shall” is ordinarily the language of command and indicates a mandatory intent unless a convincing argument to the contrary is made); *Association of American Railroads v. Costle*, 562 F.2d

law judge must afford each party a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief. Moreover, there is no provision in the Rules of Practice which makes section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) inapplicable when a decision is issued orally in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. ' 1.142(c)).

1310, 1312 (D.C. Cir. 1977) (stating the word "shall" is the language of command in a statute); *Boyden v. Commissioner of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir.) (stating "shall" is the language of command), *cert. denied*, 404 U.S. 842 (1971); *Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949) (stating the word "shall" is mandatory); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

Complainant also contends an interpretation of the Rules of Practice that requires that each party be given a reasonable opportunity to submit proposed findings of fact, conclusions, order, and a brief would defeat the purpose of issuing an oral decision in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. ' 1.142(c)) (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 11). However, compliance with section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) does not preclude the issuance of an oral decision. Section 1.142(c)(1) of the Rules of Practice (7 C.F.R. ' 1.142(c)(1)) provides that an oral decision may be issued within a reasonable time after the close of the hearing. Thus, parties can be afforded a reasonable opportunity to submit proposed findings of fact, conclusions, orders, and briefs after the close of a hearing, and an administrative law judge may still issue an oral decision.³

³Complainant cites 7 U.S.C. ' 499f(c)(2) as the statutory provision requiring hearings in disciplinary administrative proceedings under the PACA. Complainant contends "[t]here is no statutory requirement for filings of findings of fact, conclusions of law, and briefs" in disciplinary administrative proceedings under the PACA (Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures at 10). I agree with Complainant that 7 U.S.C. ' 499f(c)(2) does not require that litigants be provided a reasonable opportunity to file proposed findings of fact, conclusions, orders, and briefs. I deduce from Complainant's argument that Complainant takes the position that the Administrative Procedure Act is not applicable to disciplinary administrative proceedings under the PACA, and consequently the requirement in the Administrative Procedure Act that parties be given a reasonable opportunity to submit proposed findings of fact, conclusions, and reasons for the proposed findings of fact and conclusions (5 U.S.C. ' 557(c)) is not applicable to disciplinary administrative proceedings under the PACA. I do not address this issue in this Order Denying Petition to Reopen Hearing and Remand Order. However, if Complainant is correct, the Rules of Practice may be amended to make section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)) inapplicable to disciplinary administrative proceedings under the PACA.

I find the ALJ did not afford Respondent a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)). Therefore, I remand this proceeding to Chief Administrative Law Judge James W. Hunt for assignment of this proceeding to an administrative law judge in accordance with 5 U.S.C. ' 3105.⁴ The administrative law judge to whom this proceeding is assigned must provide Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. ' 1.142(b)). After providing Respondent with a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief, the administrative law judge to whom this proceeding is assigned should then issue a decision (or adopt the ALJ's November 17, 1999, decision), which either party may then appeal to the Judicial Officer in accordance with 7 C.F.R. ' 1.145(a).

⁴If Administrative Law Judge Edwin S. Bernstein, the administrative law judge who issued the decision orally at the close of the November 17, 1999, hearing, was available, I would have remanded this proceeding to him. However, Administrative Law Judge Edwin S. Bernstein retired on August 26, 2000, and he is no longer available to conduct this proceeding on remand.