

**In re: PAUL EUGENIO, d/b/a REPXOTICS, INC.
AWA Docket No. 00-0027.
Order Denying Late Appeal.
Filed December 21, 2001.**

Late appeal – Jurisdiction.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer stated that he has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Dorothea A. Baker's Decision and Order Upon Admission of Facts By Reason of Default became final.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Bobby R. Acord, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on April 12, 2000. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) from August 14, 1998, through July 26, 1999, Paul Eugenio, d/b/a Repxotics, Inc. [hereinafter Respondent], operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);¹ (2) Respondent sold, in commerce, \$61,822.30 worth of small mammals on at least 861 occasions; and (3) the Animal and Plant Health Inspection Service inspected Respondent's premises and found that from August 14, 1998, through July 26, 1999, Respondent failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine 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) (Compl. ¶¶ II, III).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter. Respondent failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On October 5, 2000, in accordance with section 1.139 of the Rules of Practice

¹Complainant erroneously refers to section 2.1 of the Regulations as "subsection" 2.1 of the Regulations (Compl. ¶ II). I find this incorrect reference harmless error.

(7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Proposed Default Decision]. On November 29, 2000, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On August 2, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts By Reason of Default" [hereinafter Initial Decision and Order]: (1) finding that from August 14, 1998, through July 26, 1999, the Animal and Plant Health Inspection Service found that Respondent had operated as a dealer when he sold, in commerce, \$61,822.30 worth of small mammals, which covered at least 861 occasions, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);² (2) finding that from August 14, 1998, through July 26, 1999, the Animal and Plant Health Inspection Service found Respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40); (3) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and "standards issued thereunder";³ (4) assessing Respondent a \$50,000 civil penalty; and (5) prohibiting Respondent from obtaining an Animal Welfare Act license for 2 years.

On October 11, 2001, Respondent appealed to the Judicial Officer. On December 18, 2001, Complainant filed "Objections to Respondent's Appeal." On December 19, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

The record establishes that the Hearing Clerk served Respondent with the Initial Decision and Order on August 17, 2001.⁴ Section 1.145(a) of the Rules of Practice provides the time for appealing an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's

² The ALJ erroneously refers to section 2.1 of the Regulations as "subsection" 2.1 of the Regulations (Initial Decision and Order at second unnumbered page). I find this incorrect reference harmless error.

³ The ALJ's reference to "standards issued thereunder" is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142). Complainant did not allege and the ALJ did not find that Respondent violated the standards issued under the Animal Welfare Act.

⁴ Domestic Return Receipt for Article Number 7099 3400 0014 4579 4035.

decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Therefore, Respondent's appeal petition was required to be filed with the Hearing Clerk no later than September 17, 2001.⁵ However, Respondent timely requested an extension of time in which to file an appeal petition.⁶ On September 18, 2001, I granted Respondent's request for an extension of time by extending the time for filing Respondent's appeal petition to October 9, 2001.⁷ On October 11, 2001, Respondent filed with the Hearing Clerk an appeal petition dated October 11, 2001. Respondent acknowledges in the appeal petition that the appeal petition is 2 days late, but states that he filed the appeal petition late because he "did not know what to do."

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.⁸ The ALJ's Initial Decision and Order became

⁵Thirty days after August 17, 2001, was September 16, 2001. However, September 16, 2001, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

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

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

7 C.F.R. § 1.147(h).

The next business day after Sunday, September 16, 2001, was Monday, September 17, 2001. Therefore, prior to my granting Respondent's September 17, 2001, request for an extension of time, Respondent was required to file his appeal petition no later than September 17, 2001.

⁶Letter dated September 13, 2001, from Respondent to "To Whom it May Concern" filed with the Hearing Clerk on September 17, 2001.

⁷Informal Order dated September 18, 2001.

⁸See *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric.

final on October 10, 2001.

Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

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

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

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

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

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.⁹

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order

⁹*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule), *cert. denied*, 493 U.S. 1060 (1990); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend).

has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final. Therefore, under the Rules of Practice, even if I were to find Respondent's statement that he failed to file a timely appeal petition because he "did not know what to do" constitutes a showing of excusable neglect or good cause, I could not extend the time for Respondent's filing an appeal petition after the ALJ's Initial Decision and Order became final.

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

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.¹⁰

Accordingly, Respondent's appeal petition must be denied, since it is too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal" (7 C.F.R. § 1.142(c)(4)).

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

ORDER

Respondent's appeal petition filed October 11, 2001, is denied. The Decision

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

and Order Upon Admission of Facts By Reason of Default filed by Administrative Law Judge Dorothea A. Baker on August 2, 2001, is the final decision and order in this proceeding.
