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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) [PACA-D]  
 ) Docket No. **14-0098**  
Paradise Corner, LLC )  
 )  
Respondent ) **Decision and Order on Remand**

Appearances:

Christopher P. Young, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., for the Complainant AMS (see paragraph 2); and

Tony S. Liu, the manager of the Respondent Paradise Corner, LLC (see paragraph 3).

Decision Summary

1. The Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$4,158.75, for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner purchased, received, and accepted in the course of interstate or foreign commerce.

Parties and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Program (now known as Specialty Crops Program), Agricultural Marketing Service, United States

Department of Agriculture (herein frequently “AMS” or “Complainant”).

3. The Respondent Paradise Corner, LLC, is a limited liability company, organized and existing under the laws of the state of Hawaii (herein frequently “Paradise Corner” or “Respondent”).

4. On June 26, 2015, I issued a “Notice that a Decision Will Be Issued on the Written Record”. The “Decision and Order on the Written Record” was issued on August 19, 2016. Paradise Corner, LLC filed a Petition for Reopening the Hearing on September 19, 2016, which was granted. This “Decision and Order on Remand” replaces the Decision that was issued on August 19, 2016, and decides the allegations regarding Paradise Corner, LLC, Honolulu, Hawaii, <sup>1</sup> brought under the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

5. AMS alleged in the Complaint filed on April 30, 2014, that the Respondent Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce, as more particularly described in the Complaint and in Appendix A. Appendix A specified that the alleged amount past due and unpaid was

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1. This “Decision and Order on Remand” does not address allegations which I decided July 30, 2015 regarding the four Respondents Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102. [http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO\\_Redacted\\_0.pdf](http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO_Redacted_0.pdf)

\$164,958.75 to Pamela Lee for 124 lots of mixed fruits and vegetables; and that the alleged payment due dates were February 28, 2011 through July 23, 2011. AMS asked the judge so to find, and to order the facts and circumstances of the violations published pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

6. Paradise Corner, LLC was directed, controlled, and managed by Tony S. Liu at all times material herein, and particularly in 2011. Paradise Corner, LLC through Tony S. Liu denied the allegations regarding Paradise Corner contained in the Complaint and Appendix A and filed documents, in the answer and thereafter, in opposition to the allegations.

7. Paradise Corner, LLC through Tony S. Liu has maintained throughout this proceeding that, although the exact dollar amount owed from the transactions between Paradise Corner and Pamela Lee in 2011 is not known precisely, that if Paradise Corner owed to Pamela Lee from their transactions in 2011, the net amount would be \$5,000.00 or less; and that Pamela Lee may instead have owed money to Paradise Corner. Paradise Corner's calculations with supporting documentation are discussed below in the Findings of Fact.

8. Telephone conferences I held with counsel for AMS Christopher Young and Paradise Corner manager Tony S. Liu, on February 18, 2015, on June 26, 2015, on July 27, 2016, and on August 9, 2016, helped me understand Tony S. Liu's and Paradise Corner's opposition to a judgment, which included \$164,958.75 principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I take official notice of that judgment, and in issuing this Decision, I am not

permitted to allow Tony S. Liu and Paradise Corner, LLC to “re-litigate” that judgment.

9. During each of our telephone conferences, Paradise Corner manager Tony S. Liu lamented the judgment which included \$164,958.75 principal, stating that the judgment is unjust and based on false and fraudulent information. Tony S. Liu stated that the judgment happened because he and Paradise Corner could not afford to be represented by an attorney, that he was not permitted to represent the limited liability company, that he was in danger of being found in contempt of court, and that his limited English and his inability to communicate in court kept him from presenting the evidence that would have prevented the judgment. The evidence, which Tony S. Liu has described and documented in this case, is evidence of numerous large cash payments for fruits and vegetables made to Pamela Lee by Paradise Corner that had not been credited by Pamela Lee; Paradise Corner’s sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for (20 shipments); and credits due from Pamela Lee for inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. Tony S. Liu’s assertions during the telephone conferences and in the documents he filed in this case are discussed below in the Findings of Fact.

#### Discussion

10. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires licensed produce dealers to make “full payment promptly” for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. § 46.2(aa)(5) and (11) (defining “full payment promptly”).

11. The policy of the U.S. Department of Agriculture in cases where PACA licensees

have failed to make full or prompt payment for produce is straightforward:

In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. In any “no-pay” case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

*Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998).

12. The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. A civil penalty is not appropriate because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA”, and it would not be consistent with the purposes of the PACA to require a PACA violator to pay a civil penalty rather than pay produce sellers to whom the PACA violator owes money. *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 570-71 (U.S.D.A. 1998).

13. Here, the Respondent Paradise Corner, LLC “shifted the risk of nonpayment to sellers of the perishable agricultural commodities”, intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)). *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998). Here, buying perishable agricultural commodities without sufficient funds to comply with the prompt payment provision of the PACA is regarded as an intentional violation of the PACA or, at the least, careless disregard of the statutory requirements.

14. Where there is no license to revoke (the Respondent Paradise Corner, LLC never had a PACA license), the appropriate sanction is a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. *Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-387 (U.S.D.A. 2003).

15. A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held. *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998). *See also, Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997).

16. Even if Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

17. I measure at two times the past due amounts that determine the outcome of this "Decision and Order on the Written Record": (a) when the amounts were first past due and unpaid; that is, during 2011; and, when AMS employee Scott McKenna, Senior Marketing Specialist, determined the remaining balances in January 2015, because more than 120 days had passed since the Complaint was served.

#### **Findings of Fact regarding Paradise Corner, LLC, Honolulu, Hawaii**

18. Paradise Corner, LLC, Respondent, was a limited liability company organized and existing under the laws of the state of Hawaii, with a business and mailing address that was 1290 C Maunakea Street, Honolulu, Hawaii 96817.

19. At all times material herein, and specifically in 2011, Paradise Corner, LLC was not licensed under the PACA but was operating subject to the provisions of the PACA, the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a - 499t), and the regulations issued thereunder, 7 C.F.R. Part 46.

20. At all times material herein, and, specifically, in 2011, Tony S. Liu, an individual, directed, controlled and managed Paradise Corner, LLC. Tony S. Liu's business and mailing address in 2011 was 1290 C Maunakea Street, Honolulu, Hawaii 96817, the same as that of Paradise Corner, LLC.

21. Paradise Corner, LLC still owed, past due and unpaid, \$164,958.75 to Pamela Lee, Kcaau, Hawaii, according to Ralph Smith, representing Pamela Lee, more than three years later. Ralph Smith made this statement on January 8, 2015 to AMS employee Scott McKenna, Senior Marketing Specialist. *See Declaration of Scott McKenna*, attached to AMS's Additional Information filed July 22, 2015.

22. The Complaint was served on May 3, 2014. More than 120 days later, Paradise Corner, LLC still had failed to pay past due amounts. Paradise Corner, LLC's inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA, but also, that the respondent have no credit agreements with produce sellers for more than 30 days.

*Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998);

*Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), *aff'd*, 851 F.2d 1500

(D.C. Cir. 1988).

23. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences with opposing counsel and me, \$128,800.00 in cash payments that Paradise Corner made to Pamela Lee in 2011, for which Pamela Lee gave Paradise Corner no receipt and no credit. All but \$13,000.00 of these cash payments are documented with bank deposit receipts that Tony S. Liu maintains represent cash paid into Pamela Lee's personal checking account that Pamela Lee did not give Paradise Corner credit for. The \$13,000.00 for which there are not bank deposit receipts was, according to Tony S. Liu, cash paid directly into Pamela Lee's hands in Honolulu.

24. Thus, Tony S. Liu maintains that there were two types of cash payments, totaling \$128,800.00, which Paradise Corner paid to Pamela Lee in 2011 and did not receive credit for:

(a) \$115,800.00 cash deposited into Pamela Lee's personal checking account, documented by the bank deposit receipts for Hawaii National Bank, Honolulu, Hawaii. These deposits were made from March 1, 2011 to June 28, 2011. The account number is not included in this Decision. The bank deposit slip copies were filed twice, on July 7, 2014; and on July 21, 2014.

The second filing, which is in color, is more legible.

(b) \$13,000.00 cash given in person to Pamela Lee, in Honolulu, documented in Paradise Corner's records with notations on/with the bank deposit receipts.

Tony S. Liu said that cash was given directly into Pamela Lee's hands on two



occasions, and on each occasion Pamela Lee said she did not have her receipt book with her, so Paradise Corner consequently has no receipt for the cash.

Tony S. Liu on behalf of Paradise Corner shows these details for the two occasions: \$10,000.00 cash paid to Pamela Lee in Honolulu on May 15, 2011; and \$3,000.00 cash paid to Pamela Lee in Honolulu on June 24, 2011.

25. I take official notice of a judgment, which included \$164,958.75 principal, entered against Tony S. Liu and Paradise Corner, LLC on October 30, 2012 (U.S. District Court, District of Hawaii, CV 12-00281 SOM-KSC). I do not know the particulars of how the \$164,958.75 principal was calculated [if Pamela Lee's sales to Paradise Corner totaled \$238,000.00, more than \$73,000.00 was credited]. For purposes of this Decision only, I credit Paradise Corner, LLC with the \$128,800.00 described in paragraphs 23 and 24 as an offset to the \$164,958.75. For purposes of this Decision only, subtracting the \$128,800.00 described in paragraphs 23 and 24 would leave an unpaid balance of approximately \$36,158.75.

26. Paradise Corner representative Tony S. Liu described in his answer and other filings and during the telephone conferences, Paradise Corner's sales of fruits and vegetables to Pamela Lee that Pamela Lee did not pay for, 20 shipments from May to July 2011. *See, especially*, filings received by the Hearing Clerk on July 21, 2014, August 9, 2016, August 19, 2016, and September 19, 2016. Paradise Corner describes these sales to Pamela Lee as Young Brothers' shipments from Honolulu to Hilo. Young Brothers' Bills of Lading document the shipments, but not the values of the sales to Pamela Lee. By my order issued

July 28, 2016, paragraph 5, I suggested “The Declaration may include the **values**, relevant to this case,” . . . With no values, I could not consider any credit for any offset for Paradise Corner’s sales of fruits and vegetables to Pamela Lee. In Paradise Corner’s September 19, 2016 filing, Paradise Corner included **values**: \$32,000.00, comprised of (a) the market value of approximately \$24,500.00 for 25,000 pounds of “Chill Produce” (including watermelon, pineapple, jalapeno peppers, snap beans, cherries, honeydew melon, green onion, cantaloupe, mango, apples, okra, corn, tomato); plus (b) the market value of approximately \$7,500.00 for “Dried Merchandise” (including 107 cases of China Dried Garlic, 20 bags of Thai Jasmine Rice, and 40 bags of Fresh Maui Onion). Pamela Lee likely would have owed Paradise Corner the wholesale value for these 20 shipments, and I accept “the market value” provided by Paradise Corner for these 20 shipments to mean the wholesale market value. No other supporting paperwork (invoices or FAXes or emails or accounting entries) has been filed. As stated in paragraph 25, I do not know the particulars of how the \$164,958.75 principal was calculated [if Pamela Lee’s sales to Paradise Corner totaled \$238,000.00, more than \$73,000.00 was credited]. For purposes of this Decision only, I accept Paradise Corner’s representation that Pamela Lee did not pay for these 20 shipments from May to July 2011; and I will proceed as if the value of these 20 shipments was not already credited in calculating the \$164,958.75 principal; and I credit Paradise Corner, LLC with the \$32,000.00 described in Paradise Corner’s September 19, 2016 filing as an additional offset to the \$164,958.75 principal entered in the judgment against Tony S. Liu and Paradise Corner, LLC on October 30, 2012. For purposes of this Decision only, that leaves an unpaid balance of

approximately \$4,158.75 [ $\$164,958.75 - \$128,800.00 = \$36,158.75$ ] and [ $\$36,158.75 - \$32,000.00 = \$4,158.75$ ].

27. My finding that the unpaid balance is approximately \$4,158.75 for purposes of this Decision only, despite the tension my finding produces with a judgment which included \$164,958.75 principal, is based on the persuasiveness of Paradise Corner's \$128,800.00 cash payments claim, plus the persuasiveness of Paradise Corner's \$32,000.00 unpaid 20 shipments from May to July 2011 claim, and because of the prohibitive expense that would be required to conduct an in-person, face-to-face hearing in Hawaii using subpoena power to make an exact finding. An exact finding is not required here. Only if there is no material issue of fact, can I follow through on my "Notice that a Decision Will Be Issued on the Written Record". Only by accepting Paradise Corner's \$128,800.00 cash payments claim plus Paradise Corner's \$32,000.00 unpaid 20 shipments from May to July 2011 claim, or by accepting as conclusive the judgment which included \$164,958.75 principal, can I issue this Decision. I choose to accept Paradise Corner's \$128,800.00 cash payments claim plus Paradise Corner's \$32,000.00 unpaid 20 shipments from May to July 2011 claim, for purposes of this Decision only.

28. Paradise Corner representative Tony S. Liu has described in his answer and other filings and during the telephone conferences, credits due from Pamela Lee for inferior quality fruits and vegetables that Pamela Lee delivered to Paradise Corner. No specifics were provided. With no values, I cannot consider any credit for any offset for inferior quality deliveries from Pamela Lee.

29. Paradise Corner, LLC failed, during February 28, 2011 through July 23, 2011, to make full payment promptly of the purchase prices, or balances thereof, for purposes of this Decision only, of approximately \$4,158.75 [ $\$164,958.75 - \$128,800.00 = \$36,158.75$ ] and [ $\$36,158.75 - \$32,000.00 = \$4,158.75$ ] for fruits and vegetables, in 124 lots, all being perishable agricultural commodities, that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce, from Pamela Lee, Keaau, Hawaii. See Appendix A to Complaint, and paragraphs 23, 24, 25 and 26.

30. Paradise Corner, LLC's violations of the PACA are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)) because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

31. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 2009 WL 218027, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

32. Paradise Corner, LLC intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

33. Paradise Corner, LLC’s violations are “repeated” (repeated means more than one); and Paradise Corner, LLC’s violations are “flagrant”. Whether violations are “flagrant” under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred’s Produce v. U.S. Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

### **Conclusions**

34. The Secretary of Agriculture has jurisdiction over Paradise Corner, LLC, the Respondent, and the subject matter involved herein.

35. Tony S. Liu, day-to-day during 2011, directed, controlled, and managed Paradise Corner, LLC, including the timing and amount of payments to Pamela Lee, a supplier of perishable agricultural commodities.

36. The Respondent Paradise Corner, LLC, failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

37. More than 120 days after the Complaint was served, the amount still owed and unpaid on January 8, 2015, by Respondent Paradise Corner, LLC for its purchases from Pamela Lee,

Keaau, Hawaii, was still the entire \$164,958.75, according to Ralph Smith, representing Pamela Lee, who made his statement to AMS employee Scott McKenna, Senior Marketing Specialist.

38. Even if Respondent Paradise Corner, LLC were eventually to complete payment in full, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

39. Willfulness is not a prerequisite to the publication of the facts and circumstances of violations of 7 U.S.C. § 499b(4). Nonetheless, the violations detailed above in the Findings of Fact are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)).

40. Paradise Corner, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during 2011 of the purchase prices or balances thereof to Pamela Lee of, for purposes of this Decision only, approximately \$4,158.75 for fruits and vegetables, all being perishable agricultural commodities that Paradise Corner, LLC purchased, received, and accepted in the course of interstate or foreign commerce.

### **Order**

41. The Respondent, Paradise Corner, LLC, is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

42. This Order shall take effect on the 11th day after this Decision and Order becomes final.

43. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect **as of the effective date for purposes of employment sanctions pursuant to the Decision and Order regarding the four Respondents** Cheung Chau Trading, Inc., PACA-D Docket No. 14-0099; Super Aloha, Ltd., PACA-D Docket No. 14-0100; Super Save Market, LLC, PACA-D Docket No. 14-0101; and Tony S. Liu, PACA-D Docket No. 14-0102, which may have been **October 21, 2015**.

[http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO\\_Redacted\\_0.pdf](http://www.oaljdecisions.dm.usda.gov/sites/default/files/14-0102%20DO_Redacted_0.pdf)

When I issued that Decision and Order regarding those four Respondents, I was not yet prepared to issue a Decision and Order regarding Paradise Corner, LLC. It would be unfair to prolong the employment sanctions beyond what would have been imposed if I had decided all five Respondents' cases together. The employment sanctions here will run concurrently with those employment sanctions already in effect.

### **Finality**

44. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A).

Copies of this Decision and Order shall be sent by the Hearing Clerk to each of the parties.

Done at Washington, D.C.  
this 26<sup>th</sup> day of October 2016

A black rectangular redaction box covering the signature of Jill S. Clifton. A blue ink flourish is visible to the right of the box.

Jill S. Clifton  
Administrative Law Judge

Hearing Clerk's Office  
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## APPENDIX A

### 7 C.F.R.:

#### TITLE 7—AGRICULTURE

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

#### PART 1—ADMINISTRATIVE REGULATIONS

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#### SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

#### ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

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##### **§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145