

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) DPSA Docket No. 19-J-0147
)
DAKIN DAIRY FARMS, INC.)
)
)
Respondent.)

ORDER DENYING LATE APPEAL

Appearances:

Brian T. Hill, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., for the Complainant, Administrator of the Agricultural Marketing Service (“AMS”)

Jerry Dakin, representative of the Respondent, Dakin Dairy Farms, Inc.

Order issued by John Walk, Judicial Officer

SUMMARY OF PROCEDURAL HISTORY

This is a proceeding under the Dairy Production Stabilization Act of 1983 (7 U.S.C. §§ 4501-4514) (Dairy Stabilization Act); the Dairy Promotion and Research Order (7 C.F.R. §§ 1150.01-1150.278) (Dairy Promotion Order); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) (Rules of Practice).¹

¹ Although the Dairy Stabilization Act is not one of the statutes listed in the Rules of Practice (see 7 C.F.R. § 1.131(a)), the “rules of practice shall also be applicable to . . . [o]ther adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.” 7 C.F.R. § 1.131(b)(4).

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture (Complainant), initiated this proceeding by filing a complaint against Dakin Dairy Farms, Inc. (Respondent) on September 4, 2019. The Complaint alleged that Respondent willfully violated the Dairy Stabilization Act and Dairy Promotion Order. On December 16, 2019, Respondent filed an answer to the Complaint. Thereafter, on February 13, 2020, Complainant filed an amended complaint alleging additional violations by Respondent. Respondent was duly served with a copy of the Amended Complaint and did not file an answer thereto within the time prescribed by the Rules of Practice. On May 11, 2020, Complainant filed a Motion for Adoption of Decision and Order by Reason of Default (Motion for Default) and Proposed Decision and Order by Reason of Default (Proposed Decision). Respondent did not file objections to the Motion for Default or Proposed Decision. On August 11, 2020, Chief Administrative Law Judge Channing D. Strother (CALJ Strother) filed his Decision and Order Without Hearing by Reason of Default (Decision and Order), granting Complainant's Motion for Default.

The Office of the Hearing Clerk (OHC) served the Decision and Order upon the Respondent on August 21, 2020 by certified mail. On September 25, 2020, Respondent filed a letter with the subject "Dakin Dairy Farms, Inc., Respondent," which I construe as an appeal petition.

DISCUSSION

Section 1.145(a) of the Rules of Practice provides that an administrative law judge's decision must be appealed to the Judicial Officer within thirty (30) days after service. 7 C.F.R. §

Concurrence was granted to Complainant in this case. *See* August 6, 2019 Memorandum attached to Complaint.

1.145(a). The record establishes that OHC served the Decision and Order upon Respondent on August 21, 2020.² Thirty (30) days from the date of service was September 20, 2020. Where, as here, a filing deadline falls on a Sunday, the Rules of Practice provide that the time allowed for filing “shall be extended to include the next following business day.” 7 C.F.R. § 1.147(h). Accordingly, the time for Respondent to file an appeal petition expired at the close of business on September 21, 2020. Respondent filed its appeal petition on September 25, 2020. Therefore, I find Respondent’s appeal petition is late.

It has continuously and consistently been held that under the Rules of Practice the Judicial Officer is without jurisdiction to hear an appeal after the decision of the administrative law judge (ALJ) becomes final.³ The ALJ’s decision becomes final 35 days after the date of service thereof unless an appeal is made to the Judicial Officer pursuant to the applicable Rules

² United States Postal Service Domestic Return Receipt for Article Number 7018 2290 0000 8607 0822.

³ *Vega Nunez*, 63 Agric. Dec. 766, 769-71 (U.S.D.A. 2004) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on the day the ALJ decision and order became final); *Mary Fran Hamilton and M.F. Hamilton, Inc.*, 45 Agric. Dec. 2395, 2395 (U.S.D.A. 1986) (dismissing appeal filed on the day the initial decision became final); *Samuel Simon Petro*, 42 Agric. Dec. 921, 921 (U.S.D.A. 1983) (stating that the Judicial Officer lacks jurisdiction to hear an appeal after it has become final and effective); *Veg-Pro Distrib.*, 42 Agric. Dec. 1173, 1174 (U.S.D.A. 1983) (denying appeal of ALJ’s default decision and order filed after it became final); *Tim Gray*, 64 Agric. Dec. 1699, 1702-05 (U.S.D.A. 2005) (concluding the Judicial Officer had no jurisdiction to hear an appeal that was filed one day after the ALJ’s decision became final); *David L. Noble*, 68 Agric. Dec. 1060, 1061-62 (U.S.D.A. 2009) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed November 24, 2009 after the ALJ’s decision became final on November 23, 2009); *Paul Rosberg & Nebraska’s Finest Meats, L.L.C.*, 73 Agric. Dec. 551, 554 (U.S.D.A. 2014) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on July 29, 2014 after the ALJ’s decision became final on July 28, 2014); *Phyllis J. Britz*, 76 Agric. Dec. 26, 29 (U.S.D.A. 2017) (concluding that Judicial Officer had no jurisdiction to hear appeal petition filed one day after ALJ’s decision and order granting motion for default became final).

of Practice. 7 C.F.R. § 1.139. CALJ Strother’s Decision and Order contained the following notice to Respondent:

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Pursuant to the Rules of Practice, the Decision and Order as to Respondent became final on September 25, 2020, the day Respondent filed the appeal petition. Therefore, I have no jurisdiction to hear Respondent’s appeal.

The Rules of Practice do not provide for an extension of time to file an appeal petition after an ALJ’s decision becomes final.⁴ The absence of such a provision in the Rules of Practice emphasizes that the Judicial Officer is without jurisdiction to extend the time for filing an appeal after the ALJ’s decision becomes final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent to file an appeal petition after CALJ Strother’s Decision and Order became final. Moreover, Respondent did not request an extension of time to file an appeal petition and provided no explanation at all for missing the deadline. Therefore, even if I had jurisdiction, which I do not, I would deny the appeal petition as late filed.

⁴ *Anglen Produce, Inc.*, 46 Agric. Dec. 1239, 1239 (U.S.D.A. 1987) (denying request for extension to file an appeal because ALJ’s decision became final before the request was made and Judicial Officer no longer had jurisdiction); *Palmer G. Hulings*, 44 Agric. Dec. 298, 299 (U.S.D.A. 1985) (stating that “. . . since the Decision and Order had already become final, the Judicial Officer lacked jurisdiction to grant an extension of time for filing an appeal.”); *Houston Livestock Co., Inc.*, 63 Agric. Dec. 896, 897-99 (U.S.D.A. 2002), 2002 WL 31396962, at * 1 (stating that “. . . the Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge’s initial decision becomes final.”).

ORDER

1. Respondent's appeal petition filed on September 25, 2020 is denied.
2. CALJ Strother's Decision and Order as to Respondent filed on August 11, 2020 is the final Order in this proceeding.

Done at Washington, D.C.,
this 8th day of February 2021

**JOHN
WALK** Digitally signed
by JOHN WALK
Date: 2021.02.08
15:20:22 -05'00'

John Walk
Judicial Officer

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