AGRICULTURE DECISIONS

Volume 73

Book Two

Part One (General)

Pages 369 – 586

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

LIST OF DECISIONS REPORTED

JULY – DECEMBER 2014

AGRICULTURAL COMMODITIES PROMOTION ACT

DEPARTMENTAL DECISIONS

AGRICULTURAL MARKETING ACT

COURT DECISIONS

ANIMAL WELFARE ACT

COURT DECISIONS

EQUAL ACCESS TO JUSTICE ACT

FOOD AND NUTRITION ACT

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISIONS

--

MISCELLANEOUS ORDERS & DISMISSALS

AGRICULTURAL MARKETING AGREEMENT ACT

ANIMAL WELFARE ACT

EQUAL ACCESS TO JUSTICE ACT

FEDERAL MEAT INSPECTION ACT

HORSE PROTECTION ACT

ORGANIC FOODS PRODUCTION ACT

--

DEFAULT DECISIONS

--

CONSENT DECISIONS

ANIMAL WELFARE ACT

FEDERAL CROP INSURANCE ACT

FEDERAL MEAT INSPECTION ACT

HORSE PROTECTION ACT

POULTRY PRODUCTS INSPECTION ACT

AGRICULTURAL COMMODITIES PROMOTION ACT

DEPARTMENTAL DECISIONS

In re: RESOLUTE FOREST PRODUCTS.
Docket No. 12-0040.
Decision and Order.
Filed November 26, 2014.

ACPA – Appointments Clause – Assessments – Discretion of Secretary – Order, approval of – Purpose of ACPA – Referenda – Softwood Lumber Order.

Elliot J. Feldman, Esq. for Petitioner.
Frank Martin Jr., Esq. and Brian T. Hill, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On October 28, 2011, Resolute Forest Products [Resolute], formerly AbitibiBowater, Inc., instituted this proceeding by filing a petition in accordance with the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. §§ 7411-7425) [CPRIA]; the Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (7 C.F.R. pt. 1217) [Softwood Lumber Order]; and the Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted from Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)-.71, 1200.50-.52). On June 22, 2012, Resolute filed an amended petition,[1] which is the operative pleading in this proceeding.

Resolute alleges the Softwood Lumber Order is not established in accordance with law because the Softwood Lumber Order: (1) violates the constitutional separation of powers; (2) unconstitutionally delegates legislative power; and (3) is premised upon an arbitrary and capricious

[1] Resolute entitles its amended petition "First Amended Petition To Terminate Or Amend USDA's Softwood Marketing Order Or, In The Alternative, To Exempt Petitioner From USDA's Softwood Marketing Order" [Amended Petition].

decision to accept the results of a referendum tainted by fraud and bias and incapable of ascertaining true industry preferences.[2] Resolute seeks termination of the Softwood Lumber Order, amendment of the Softwood Lumber Order such that Resolute is not subject to the Softwood Lumber Order, or exemption of Resolute from the Softwood Lumber Order.[3]
On July 3, 2012, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], filed "Respondent's Answer To Petitioner's First Amended Petition" in which the Administrator denies the allegations in the Amended Petition and requests denial of the relief sought by Resolute and dismissal of Resolute's Amended Petition.

On January 28-31, 2013, Administrative Law Judge Jill S. Clifton [ALJ] conducted a hearing in Washington, DC. Elliot J. Feldman, Andrew Grossman, Erik Raven-Hansen, Michael S. Snarr, and Jennifer Walrath of Baker & Hostetler, LLP, Washington, DC, represented Resolute. Robert A. Ertman, Brian Hill, and Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. The Administrator called one witness and Resolute called three witnesses.[4] Resolute introduced 28 exhibits which were received in evidence and are identified as PX 1-PX 28, and the Administrator introduced 52 exhibits which were received in evidence and are identified as RX 1-RX 52.[5] In addition, the ALJ admitted into evidence three exhibits identified as ALJX 1-ALJX 3.[6]

On April 30, 2014, after the parties submitted post hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) found the CPRIA and the Softwood Lumber Order, as written and as administered, are in accordance with law; and (2) concluded, in light of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Gerawan Farming, Inc.*, 67 Agric. Dec. 45 (U.S.D.A. 2008), Resolute's Amended Petition must be denied.[7]

---

2 Am. Pet. at 1.
3 Am. Pet. at 30.
4 References to the transcript of the January 28-31, 2013 hearing are designated as "Tr." and the page number.
5 Tr. at 979.
6 Tr. at 12, 215, 621.
7 ALJ's Decision and Order ¶¶ 33-34 at 23.

On June 12, 2014, Resolute filed "Appeal of Administrative Law Judge's April 30, 2014 Decision Denying Petition" [Resolute's Appeal Petition] and, on June 23, 2014, the Administrator filed "Respondent's Brief in Opposition to Petitioner's Appeal of the ALJ's Decision and Order."

On June 24, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Decision

1. *Discussion*

Congress identified the purpose of the CPRIA, as follows:

> **§ 7411. Findings and purpose**
>
> . . . .
> **(b) Purpose**
>
> The purpose of this subchapter is to authorize the establishment, through the exercise by the Secretary of Agriculture of the authority provided in this subchapter, of an orderly program for developing, financing, and carrying out an effective, continuous, and coordinated program of generic promotion, research, and information regarding agricultural commodities designed to—
>
> (1) strengthen the position of agricultural commodity industries in the marketplace;
>
> (2) maintain and expand existing domestic and foreign markets and uses for agricultural commodities;
>
> (3) develop new markets and uses for agricultural commodities; or
>
> (4) assist producers in meeting their conservation

objectives.

7 U.S.C. § 7411(b).

The CPRIA authorizes any association of producers of an agricultural commodity to submit a proposed order to the Secretary of Agriculture.[8] If the Secretary of Agriculture determines that a proposed order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must publish the proposed order in the Federal Register and give notice and opportunity for public comment on the proposed order.[9] The Secretary of Agriculture must take comments received into consideration in preparing a final order and must ensure the final order is in conformity with the terms, conditions, and requirements of the CPRIA.[10] If the Secretary of Agriculture determines the final order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must issue the final order.[11]

For the purpose of ascertaining whether persons to be covered by an order favor the order, the order may provide for the Secretary of Agriculture to conduct an initial referendum among persons to be subject to an assessment under 7 U.S.C. § 7416 who, during a representative period, engaged in the production, handling, or importation of the agricultural commodity covered by the order.[12]

In February 2010, the Blue Ribbon Commission[13] submitted a proposed softwood lumber industry research and promotion program to the Secretary of Agriculture.[14] On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order[15] and a proposed rule inviting comments on procedures for conducting an initial

---

8 7 U.S.C. § 7413(b)(1).
9 7 U.S.C. § 7413(b)(2).
10 7 U.S.C. § 7413(b)(4).
11 7 U.S.C. § 7413(c).
12 7 U.S.C. § 7417(a)(1).
13 The Blue Ribbon Commission is a committee of 21 chief executive officers and heads of businesses that domestically manufacture and import softwood lumber (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2).
14 75 Fed. Reg. 61,005 (Oct. 1, 2010); RX 12 at 5.
15 75 Fed. Reg. 61,002-25 (Oct. 1, 2010); RX 12.

referendum to determine whether issuance of a proposed Softwood Lumber Order is favored by domestic manufacturers and importers of softwood lumber.[16]

On April 22, 2011, the Agricultural Marketing Service published a proposed rule and referendum order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order and announced that the Agricultural Marketing Service would be conducting a referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the proposed Softwood Lumber Order.[17] The Agricultural Marketing Service also issued a final rule establishing procedures for conducting the Softwood Lumber Order initial referendum.[18]

On August 2, 2011, after a referendum in which 67 percent of those voting representing 80 percent of the volume of the softwood lumber represented in the referendum favored the implementation of the softwood lumber program, the Agricultural Marketing Service published a final rule establishing the Softwood Lumber Order.[19] Resolute imports softwood lumber into the United States and is subject to the Softwood Lumber Order.[20]

Resolute's Appeal Petition

Resolute raises nine issues in its appeal of the ALJ's Decision and Order denying Resolute's Amended Petition. First, Resolute contends the ALJ erroneously concluded the CPRIA does not violate the Appointments Clause of Article II of the Constitution of the United States (Resolute's Appeal Pet. ¶¶ 9-15 at 4-6).

The Appointments Clause provides that the president shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme

[16] 75 Fed. Reg. 61,025-30 (Oct. 1, 2010); RX 13.
[17] 76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16.
[18] 76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17.
[19] 76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35.
[20] Tr. at 792.

Court, and all other officers of the United States.[21] Any person exercising significant authority pursuant to the laws of the United States is an officer of the United States and must be appointed in the manner prescribed by Article II, section 2, clause 2, of the Constitution of the United States.[22] The Secretary of Agriculture, an officer of the United States nominated by the president and confirmed by the Senate, is authorized to administer the CPRIA.[23]

Resolute argues, however, that the CPRIA violates the Appointments Clause because the CPRIA provides non-appointed referendum voters "significant authority belonging to the Executive Branch[.]"[24] Specifically, Resolute cites the requirement in the CPRIA that the Secretary of Agriculture suspend or terminate an order or a provision of an order, if the Secretary of Agriculture determines the order or a provision of an order is not favored by persons voting in a referendum conducted in accordance with 7 U.S.C. § 7417, as follows:

> **§ 7421. Suspension or termination**
>
> **(a) Mandatory suspension or termination**
>
> The Secretary shall suspend or terminate an order or a provision of an order if the Secretary finds that an order or a provision of an order obstructs or does not tend to effectuate the purpose of this subchapter, or if the Secretary determines that the order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 of this title.
>
> **(b) Implementation of suspension or termination**
>
> If, as a result of a referendum conducted under section 7417 of this title, the Secretary determines that an order is not approved, the Secretary shall—

---

21 U.S. Const. art. II, § 2, cl. 2.

22 Buckley v. Valeo, 424 U.S. 1, 125-26 (1976); Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1337 (D.C. Cir. 2012).

23 7 U.S.C. § 7411(b).

24 Resolute's Appeal Pet. ¶ 9 at 4.

> (1) not later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under the order; and
>
> (2) as soon as practicable, suspend or terminate, as the case may be, activities under the order in an orderly manner.

7 U.S.C. § 7421.

Generally, an administrative agency has no authority to declare unconstitutional a statute that the agency administers.[25] Resolute does not cite and I cannot locate any authority which gives me the power to declare the CPRIA unconstitutional. Therefore, I decline to address Resolute's contention that the CPRIA violates the Appointments Clause of Article II of the Constitution of the United States.

Second, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service unconstitutionally applied the CPRIA by binding the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of the affirmative initial referendum vote. Resolute, relying on testimony by Sonia Jimenez, director of the Promotion and Economics Division, Agricultural Marketing Service,[26] and two statements by Mr. Ertman, counsel for the Administrator, asserts the record unmistakably reveals that the Agricultural Marketing Service treated the affirmative initial referendum vote as requiring the Agricultural Marketing Service to implement the Softwood Lumber Order. (Resolute's Appeal Pet. ¶¶ 16-22 at 6-8).

Ms. Jimenez testified that the Agricultural Marketing Service was

---

[25] Califano v. Sanders, 430 U.S. 99, 109 (1977); Pub. Utils. Comm'n of Cal. v. United States, 355 U.S. 534, 539 (1958); S. Minn. Beet Sugar Coop., 64 Agric. Dec. 580, 599 (U.S.D.A. 2005); Goetz, 61 Agric. Dec. 282, 287 (U.S.D.A. 2002); Berosini, 54 Agric. Dec. 886, 913 (U.S.D.A. 1995) (Order Lifting Stay); Bama Tomato Co., 54 Agric. Dec. 1334, 1342-43 (U.S.D.A. 1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); Lesser, 52 Agric. Dec. 155, 167-68 (U.S.D.A. 1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); Saulsbury Orchard, 47 Agric. Dec. 378, 379 (U.S.D.A. 1988); Palmer, 44 Agric. Dec. 248, 253 (U.S.D.A. 1985); Henner, 30 Agric. Dec. 1151, 1259 (U.S.D.A. 1971).

[26] Tr. at 29.

required by the CPRIA to issue the Softwood Lumber Order because a majority of those voting in the initial referendum, representing a majority of the volume of softwood lumber voted in the referendum, favored implementation of the Softwood Lumber Order.[27] Mr. Ertman stated, if a referendum conducted under the CPRIA passes, the order which is the subject of that referendum "goes into effect."[28]

Ms. Jimenez's and Mr. Ertman's failure to address the discretion that the Secretary of Agriculture must exercise under the CPRIA does not negate the Secretary of Agriculture's exercise of discretion both prior to the Softwood Lumber Order initial referendum and after the Softwood Lumber Order initial referendum. The Secretary of Agriculture, prior to publishing any proposed order, must determine that the proposed order is consistent with, and will effectuate the purpose of, the CPRIA, as follows:

> **§ 7413. Issuance of orders**
>
> . . . .
> **(b) Procedure for issuance**
>
> . . . .
> **(2) Consideration of proposed order**
>
> If the Secretary determines that a proposed order is consistent with and will effectuate the purpose of this subchapter, the Secretary shall publish the proposed order in the Federal Register and give due notice and opportunity for public comment on the proposed order.

7 U.S.C. § 7413(b)(2).

Moreover, prior to publication of a final order, the Secretary of Agriculture must determine that the final order is in conformity with the

---

[27] Tr. at 56, 130-31, 287.

[28] Tr. at 865. Resolute also references another purported statement by Mr. Ertman in which Mr. Ertman states a referendum that passes is an "operative event;" however, I find Mr. Ertman's purported statement is a question Mr. Ertman posed to a witness (Tr. at 852).

terms, conditions, and requirements of the CPRIA and consistent with, and will effectuate the purpose of, the CPRIA, as follows:

> **§ 7413. Issuance of orders**
>
> . . . .
> **(b) Procedure for issuance**
>
> . . . .
> **(4) Preparation of final order**
>
> After notice and opportunity for public comment under paragraph (2) regarding a proposed order, the Secretary shall take into consideration the comments received in preparing a final order. The Secretary shall ensure that the final order is in conformity with the terms, conditions, and requirements of this subchapter.
>
> **(c) Issuance and effective date**
>
> If the Secretary determines that the final order developed with respect to an agricultural commodity is consistent with and will effectuate the purpose of this subchapter, the Secretary shall issue the final order. . . .

7 U.S.C. § 7413(b)(4), (c). Therefore, as a matter of law, issuance of proposed orders and final orders under the CPRIA is within the discretion of the Secretary of Agriculture.

On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order.[29] Prior to publication of the October 1, 2010, proposed Softwood Lumber Order, the Secretary of Agriculture determined the proposed Softwood Lumber Order was consistent with, and would effectuate the purpose of, the CPRIA.[30]

---

[29] 75 Fed. Reg. 61,002-25 (Oct. 1, 2010); RX 12.

[30] *See* the discussion of the authority for the October 1, 2010, proposed Softwood Lumber Order (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2-3).

On April 22, 2011, the Agricultural Marketing Service published another proposed Softwood Lumber Order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order.[31] Prior to the publication of this second proposed Softwood Lumber Order, the Secretary of Agriculture determined the April 22, 2011, proposed Softwood Lumber Order is consistent with, and would effectuate the purpose of, the CPRIA.[32]

On August 2, 2011, after an affirmative referendum vote, the Agricultural Marketing Service published a final rule establishing the Softwood Lumber Order.[33] As required by 7 U.S.C. § 7413(b)(4)-(c), prior to publication of a final order, the Secretary of Agriculture determined the final order was in conformity with the terms, conditions, and requirements of the CPRIA and consistent with, and effectuated the purpose of, the CPRIA.[34]

Thus, despite Ms. Jimenez's testimony and Mr. Ertman's statement regarding the effect of an affirmative initial referendum vote, the Secretary of Agriculture had complete discretion over the issuance of the October 1, 2010, proposed Softwood Lumber Order, the April 22, 2011, proposed Softwood Lumber Order, and the August 2, 2011, final Softwood Lumber Order.

Further still, if at any time the Secretary of Agriculture determines an order obstructs or does not tend to effectuate the purpose of the CPRIA, the Secretary of Agriculture is required to suspend or terminate the order:

> **§ 7421. Suspension or termination**
>
> **(a) Mandatory suspension or termination**

---

31 76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16.

32 *See* the discussion of the authority for the April 22, 2011, proposed Softwood Lumber Order (76 Fed. Reg. 22,757 (Apr. 22, 2011); RX 16 at 1-2).

33 76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35.

34 *See* the discussion of the authority for the August 2, 2011, Softwood Lumber Order (76 Fed. Reg. 41,186 (Aug. 2, 2011); RX 35 at 2).

> The Secretary shall suspend or terminate an order or a provision of an order if the Secretary finds that an order or a provision of an order obstructs or does not tend to effectuate the purpose of this subchapter, or if the Secretary determines that an order or a provision of an order is not favored by persons voting in a referendum conducted under section 7417 of this title.

7 U.S.C. § 7421(a). Thus, I affirm the ALJ's rejection of Resolute's claim that the Agricultural Marketing Service unconstitutionally applied the CPRIA by binding the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of the affirmative initial referendum vote.

Third, Resolute contends the ALJ erroneously concluded the Softwood Lumber Order was approved by a majority of those persons voting for approval who also represent a majority of the volume of softwood lumber, as provided in 7 U.S.C. § 7417(e)(3). Resolute asserts approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber in the United States market. (Resolute's Appeal Pet. ¶¶ 26-30 at 9-11).

The ALJ rejected Resolute's assertion that approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber. Instead, the ALJ concluded a "majority" of persons, as contemplated by the CPRIA, means a majority of persons to be subject to an assessment who voted and a "majority of the volume" of softwood lumber, as contemplated by the CPRIA, means a majority of the volume of softwood lumber to be subject to an assessment that was voted.[35]

The Secretary of Agriculture has discretion under the CPRIA to

[35] ALJ's Decision and Order ¶ 13 at 8.

choose which of three options to use to determine approval of an order, as follows:

> **§ 7417. Referenda**
>
> . . . .
> **(e) Approval of order**
>
> An order may provide for its approval in a referendum—
>
> (1) by a majority of those persons voting;
>
> (2) by persons voting for approval who represent a majority of the volume of the agricultural commodity; or
>
> (3) by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.

7 U.S.C. § 7417(e). The Agricultural Marketing Service chose to provide for approval of the Softwood Lumber Order in accordance with 7 U.S.C. § 7417(e)(3), namely, approval by a majority of those persons voting for approval who also represent a majority of the volume of the agricultural commodity.[36]

Only persons who would be subject to assessment if the order is approved may vote in an initial referendum.[37] The Softwood Lumber Order provides that domestic manufacturers who ship less than 15 million board feet of softwood lumber within the United States in a fiscal year and importers who import less than 15 million board feet of softwood lumber into the United States in a fiscal year are exempt from assessment under the Softwood Lumber Order.[38] Moreover, no person is required to pay an assessment on the first 15 million board feet of softwood lumber otherwise subject to assessment in a fiscal year.[39] To eligible to vote in the Softwood Lumber Order initial referendum

---

[36] 76 Fed. Reg. 46,185, 46,193 (Aug. 2, 2011); RX 35 at 1, 9; Tr. at 637.
[37] 7 U.S.C. § 7417(a)(1).
[38] 7 C.F.R. § 1217.53(a)(1)-(a)(2).
[39] 7 C.F.R. § 1217.52(b).

softwood lumber domestic manufacturers and importers had to have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period, January 1, 2010, through December 31, 2010.[40] Thus, the total volume of softwood lumber in the United States market is not relevant to the Softwood Lumber Order initial referendum.

Congress specifically addressed the "majority" issue in 7 U.S.C. § 7417(e)(3) by combining the language "by a majority of those persons voting for approval" with the language "who also represent a majority of the volume of the agricultural commodity." Thus, approval of an order under the option in 7 U.S.C. § 7417(e)(3) is contingent upon approval by a majority of persons voting in the referendum who would be subject to assessment if the order is approved and who also represent a majority of the volume of the agricultural commodity voted in the referendum that would be subject to assessment if the order is approved. Therefore, I reject Resolute's contention that approval in accordance with 7 U.S.C. § 7417(e)(3) requires the Agricultural Marketing Service to determine the total volume of softwood lumber in the United States market in order to determine whether the persons voting for approval also represent a majority of the total volume of softwood lumber in the United States market.

Fourth, Resolute contends the ALJ erroneously concluded the Agricultural Marketing Service exempted a *de minimis* quantity of softwood lumber from the Softwood Lumber Order, as authorized by 7 U.S.C. § 7415(a)(1). Resolute asserts the Agricultural Marketing Service exempted the majority of softwood lumber producers and importers from the Softwood Lumber Order without determining, as required by the CPRIA, that the total volume of softwood lumber exempted from the Softwood Lumber Order was a *de minimis* quantity of softwood lumber otherwise covered by the Softwood Lumber Order. (Resolute's Appeal Pet. ¶¶ 31-37 at 11-13).

As an initial matter, I reject Resolute's assertion that the Agricultural Marketing Service "exempted the majority of softwood lumber producers and importers from the [Softwood Lumber Order]."[41] Even those

[40] 76 Fed. Reg. 22,757 (Apr. 22, 2011); RX 16 at 1.
[41] Resolute's Appeal Pet. ¶ 31 at 11.

domestic manufacturers who ship less than 15 million board feet of softwood lumber within the United States in a fiscal year and those importers who import into the United States less that 15 million board feet of softwood lumber in a fiscal year and are exempt from paying assessments, must comply with the Softwood Lumber Order to obtain the exemption. Specifically, these manufacturers and importers must apply annually to the Softwood Lumber Board for a certificate of exemption from paying assessments under the Softwood Lumber Order.[42]

Moreover, the CPRIA does not require the Secretary of Agriculture to determine that the total volume of softwood lumber exempted from the Softwood Lumber Order is a *de minimis* quantity of softwood lumber otherwise covered by the Softwood Lumber Order, as Resolute contends. Instead, the CPRIA gives the Secretary of Agriculture complete discretion to exempt any *de minimis* quantity of an agricultural commodity which would otherwise be covered by an order, as follows:

> **§ 7415. Permissive terms in orders**
>
> **(a) Exemptions**
>
> An order issued under this subchapter may contain—
> (1) authority for the Secretary to exempt from the order any de minimis quantity of an agricultural commodity otherwise covered by the order[.]

7 U.S.C. § 7415(a)(1). As stated in the April 22, 2011, proposed rule and referendum order, the CPRIA does not define the term "de minimis quantity," and the Secretary of Agriculture has discretion to determine what constitutes a "de minimis quantity":

> Section 516(a)(1) of the [CPRIA] provides authority for the Secretary to exempt from an order any de minimis quantity of an agricultural commodity otherwise covered by the order. However, the [CPRIA] does not define the term de minimis and USDA is not limited to using the definition of de minimis as specified in another law or

[42] 7 C.F.R. § 1217.53(a)(1)-(a)(2).

> agreement. The de minimis quantity is defined for a particular program and industry. The [Blue Ribbon Commission] reviewed various options for the exemption and determined that 15 million board feet would be appropriate because such a level would still provide the Board with resources to have a program that could be successful. USDA concurs with thisexemption level because this level would exempt small operations that would otherwise be burdened by the assessment.

76 Fed. Reg. 22,772 (Apr. 22, 2011); RX 16 at 16.

Thus, the Secretary of Agriculture has complete discretion to determine the quantity that constitutes a *de minimis* quantity of softwood lumber and to exempt each domestic manufacturer and each importer from paying assessments on the first 15 million board feet of softwood lumber otherwise subject to assessment. I conclude the Agricultural Marketing Service complied with 7 U.S.C. § 7415(a)(1) when it exempted persons from paying assessments on the first 15 million board feet of softwood lumber otherwise subject to assessment, as follows:

> **§ 1217.52 Assessments.**
>
> . . . .
> (b) Subject to the exemptions specified in § 1217.53, each manufacturer for the U.S. market shall pay an assessment to the Board at the rate of $0.35 per thousand board feet of softwood lumber except that no person shall pay an assessment on the first 15 million board feet of softwood lumber otherwise subject to assessment in a fiscal year. Domestic manufacturers shall pay assessments based on the volume of softwood lumber shipped within the United States and importers shall pay assessments based on the volume of softwood lumber imported to the United States.

7 C.F.R. § 1217.52(b).

Fifth, Resolute contends the ALJ erroneously upheld the Agricultural

Marketing Service's use of the year 2010 as a representative period to determine who would be subject to an assessment under 7 U.S.C. § 7416 and thus eligible to participate in the Softwood Lumber Order initial referendum (Resolute's Appeal Pet. ¶¶ 38-40 at 13-14).

The Secretary of Agriculture has complete discretion to choose a representative period to determine who may be subject to assessments under an order and thus eligible to participate in an initial referendum, as follows:

> **§ 7417. Referenda**
>
> **(a) Initial referendum**
>
> **(1) Optional referendum**
>
> For the purpose of ascertaining whether the persons to be covered by an order favor the order going into effect, the order may provide for the Secretary to conduct an initial referendum among persons to be subject to an assessment under section 7416 of this title who, during a representative period determined by the Secretary, engaged in—
>
> (A) the production or handling of the agricultural commodity covered by the order; or
>
> (B) the importation of the agricultural commodity.

7 U.S.C. § 7417(a)(1). Ms. Jimenez explained the reasons for choosing January 1, 2010, through December 31, 2010, as the representative period, as follows:

> [BY DR. FELDMAN:]
>
> Now there was also a decision, was there not, about a representative period?
>
> [BY MS. JIMENEZ:]

THE WITNESS: Correct.

Q And who decided the representative period?

A The Department.

Q And what went into determining the representative period?

A We tried to use the most recent year or period of 12 months that we have good information for.

Q So what does "representative" mean in that definition? Does it just mean recent?

A We usually use, right, the most recent 12-month period or any period that would give us a good idea of what the industry looks like, the most recent data possible.

* * *

Q Okay. So by representative period the Department does not mean a period that's normal, is that correct?

A The Department tries to find a period where we can get the best available data that we can for the industry that represents what's going in the industry at the time.

Q . . . . So you've decided that it's representative because you can get data?

A We usually use 12-month period and we try to make it as close as possible to the referendum, so it is as representative of the industry to the time that we are conducting the referendum.

Q At the time you're conducting the referendum?

> A Right.
>
> Q So it has no connection to being representative of economic conditions or of the state of the industry, it's only the most recent period prior to the referendum for which you can assemble the data?
>
> A It shows what the industry looks like for that period so it does represent the state of the industry, the most recent state of the industry before the referendum.

Tr. at 142, 146-47. I find the Agricultural Marketing Service's choice of the full calendar year, for which the Agricultural Marketing Service had data, immediately prior to the Softwood Lumber Order initial referendum was reasonable and entirely within the discretion of the Secretary of Agriculture. Therefore, I reject Resolute's contention that the ALJ erroneously upheld the Agricultural Marketing Service's use of the year 2010 as a representative period to determine who would be subject to assessments under 7 U.S.C. § 7416 and thus eligible to participate in the Softwood Lumber Order initial referendum.

Sixth, Resolute contends the ALJ failed to address Resolute's claim that the Agricultural Marketing Service sent referendum ballots to only 311 domestic manufacturers and importers, instead of the 466 entities the Agricultural Marketing Service determined were eligible to vote in the Softwood Lumber Order initial referendum (Resolute's Appeal Pet. ¶¶ 41-44 at 14-15).

I agree with Resolute that the ALJ failed to address Resolute's claim that the Agricultural Marketing Service sent referendum ballots to only 311 domestic manufacturers and importers instead of the 466 entities the Agricultural Marketing Service purportedly determined were eligible to vote. However, I decline to remand this proceeding to the ALJ to address Resolute's claim. The record establishes the Agricultural Marketing Service determined 311 domestic manufacturers and importers were eligible to vote in the Softwood Lumber Order initial referendum, not 466, as claimed by Resolute.

The Agricultural Marketing Service explained the criterion for eligibility to vote in the Softwood Lumber Order initial referendum, informed the public how ballots would be distributed, and urged each eligible entity not receiving a ballot to request a ballot, as follows:

> **DATES**: The voting period is May 23 through June 10, 2011. To be eligible to vote, softwood lumber domestic manufacturers and importers must have domestically manufactured and/or imported 15 million board feet or more of softwood lumber during the representative period from January 1 through December 31, 2010. Ballots will be mailed to all known domestic manufacturers and importers of softwood lumber on or before May 16, 2011. Ballots must be received by the referendum agents no later than the close of business 4:30 p.m. (Eastern Standard Time) on June 10, 2011.
>
> . . . .
>
> **FOR FURTHER INFORMATION CONTACT**: Maureen T. Pello, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 831, Beavercreek, Oregon 97004; telephone: (503) 632-8848; facsimile (503) 632-8852; or electronic mail: *Maureen.Pello@ams.usda.gov.*
>
> . . . .
>
> Maureen T. Pello of the USDA, AMS, Research and Promotion Branch is designated as the referendum agent to conduct the referendum. Prior to the first day of the voting period, the referendum agents will mail the ballots to be cast in the referendum and voting instructions to all eligible voters. Any domestic manufacturer or imporer [sic] who does not receive a ballot should contact the referendum agent cited in the **FOR FURTHER INFORMATION CONTACT** section no later than one week before the end of the voting period.

76 Fed. Reg. 22,757, 22,775 (Apr. 22, 2011); RX 16 at 1, 19 (emphasis in original). Using the criterion explained in this rulemaking document, the Agricultural Marketing Service determined 311 entities were eligible

to vote in the Softwood Lumber Order initial referendum. In response to questioning by Resolute's counsel regarding the number of entities eligible to vote, Ms. Jimenez addressed Resolute's claim that 466 entities were eligible to vote in the initial referendum, as follows:

> BY DR. FELDMAN:
>
> Q Now of the 466, the 466, we got that number simply by subtracting the number of importers that were estimated as ineligible by virtue of importing fewer than 15 million board feet and subtracting the number of domestic manufacturers who were deemed to be shipping less than 15 million board feet and then adding the two differences, and that gave us 466, is that correct?
>
> [BY MS. JIMENEZ:]
>
> A Correct.
>
> Q Okay. And that 466 number, then, at least on the basis of those data, ought to have been the eligible voting pool, is that correct?
>
> A No, that is not correct.
>
> Q Why is that not correct?
>
> A Because that number comes from the Reg Flex for an average of three years, I said that many times, of data. That was not the same data that we used to actually determine eligibility to vote for the referendum.
>
> Q And by what order or magnitude do you think that number is inaccurate?
>
> A We sent out 311 ballots, which means there were 311 people eligible to vote for the referendum.
>
> Q Based on what data?

> A On the data that we collected from Random Lengths, the eight grading agencies, the proponent group, and we made all the calls to determine which of those people were eligible to vote, and by Customs data for 2010.

Tr. at 324-26. The Agricultural Marketing Service notified interested persons of the criterion for determining eligibility to vote and the availability of ballots through Federal Register publications, outreach efforts, and press releases.[43] I find no evidence to support Resolute's claim that 466 entities were eligible to vote in the Softwood Lumber Order initial referendum.

Seventh, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service failed to adopt standards to ensure that the vote in the Softwood Lumber Order initial referendum was free from bias (Resolute's Appeal Pet. ¶¶ 45-47 at 16-17).

The CPRIA sets forth the manner of conducting referenda, as follows:

> **§ 7417. Referenda**
>
> . . . .
> **(g) Manner of conducting referenda**
>
> **(1) In general**
>
> A referendum conducted under this section shall be conducted in the manner determined by the Secretary to be appropriate.
>
> **(2) Advance registration**
>
> If the Secretary determines that an advance registration of eligible voters in a referendum is necessary before the voting period in order to facilitate the conduct of the

[43] RX 12-RX 13, RX 16-RX 18, RX 20-RX 34.

> referendum, the Secretary may institute the advance registration procedures by mail, or in person through the use of national and local offices of the Department.
>
> **(3) Voting**
>
> Eligible voters may vote by mail ballot in the referendum or in person if so prescribed by the Secretary.
>
> **(4) Notice**
>
> Not later than 30 days before a referendum is conducted under this section with respect to an order, the Secretary shall notify the agricultural commodity industry involved, in such manner as determined by the Secretary, of the period during which voting in the referendum will occur. The notice shall explain any registration procedures established under this subsection.

7 U.S.C. § 7417(g).

On October 1, 2010, the Agricultural Marketing Service published a proposed rule inviting comments on procedures for conducting an initial referendum to determine whether the proposed Softwood Lumber Order is favored by domestic manufacturers and importers of softwood lumber.[44] On April 22, 2011, the Agricultural Marketing Service published a proposed rule and referendum order in which the Agricultural Marketing Service announced that the Agricultural Marketing Service would be conducting a referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the Softwood Lumber Order, as proposed.[45] The Agricultural Marketing Service also issued a final rule establishing procedures for conducting the referendum.[46] These procedures fully comport with the CPRIA and the evidence establishes that the Agricultural Marketing Service conducted

[44] 75 Fed. Reg. 61,025-30 (Oct. 1, 2010); RX 13.
[45] 76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16 at 1-28.
[46] 76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17.

the referendum in accordance with the published procedures.

Nonetheless, Resolute contends the ALJ's rejection of Resolute's claim that the Agricultural Marketing Service conducted the referendum in an arbitrary and capricious manner is error because Dr. Anna Greenberg, a witness qualified by the ALJ as an expert in survey and census research methodology,[47] concluded that the Agricultural Marketing Service did not implement standards to ensure a vote free from bias.[48]

As an initial matter, an administrative law judge is not bound by conclusions of a witness whom the administrative law judge qualifies as an expert, and the ALJ was free to reach her own conclusion regarding the adequacy of the Softwood Lumber Order initial referendum. Moreover, Dr. Greenberg's conclusion was based on the premise that the Softwood Lumber Order initial referendum was a census.[49] The ALJ rejected Dr. Greenberg's premise[50] and Dr. Greenberg's conclusion.

A census is an official count of people made for the purpose of compiling social and economic data and a referendum is the process of referring an issue for approval by popular vote.[51] The record establishes that the Softwood Lumber Order initial referendum was not conducted for the purpose of compiling social and economic data, but, instead, was a process for referring the proposed Softwood Lumber Order for approval (or disapproval) by popular vote; therefore, I find the ALJ's rejection of Dr. Greenberg's conclusion was not error.

Resolute also contends the Softwood Lumber Order initial referendum was not conducted in accordance with Office of Management and Budget Guidelines related to data collection and the ALJ erroneously failed to address this contention. I agree with Resolute that the ALJ did not address Resolute's contention that the Softwood Lumber Order initial referendum was not conducted in accordance with

---

[47] The ALJ accepted Dr. Greenberg as an expert in census survey and voting methodology (Tr. at 802).
[48] Resolute's Appeal Pet. ¶ 45 at 16.
[49] Tr. at 803-04.
[50] ALJ's Decision and Order ¶ 25 at 17.
[51] BLACK'S LAW DICTIONARY 253, 1393-94 (9th ed. 2009).

Office of Management and Budget Guidelines. However, I decline to remand this proceeding to the ALJ to address Resolute's contention. The record establishes that the Office of Management and Budget Guidelines referenced by Resolute relate to data collection, not referenda.[52]

Eighth, Resolute contends the ALJ erroneously rejected Resolute's claim that the Agricultural Marketing Service's endorsement of the Blue Ribbon Commission's misleading statements violates the Administrative Procedure Act (Resolute's Appeal Pet. ¶¶ 48-49 at 17-18).

The ALJ found that promotional materials prepared and distributed by the Blue Ribbon Commission, a proponent of the Softwood Lumber Order, contained statements that are wrong.[53] The ALJ did not explicitly reject Resolute's contention that the Agricultural Marketing Service wrongfully implemented the Softwood Lumber Order when the Agricultural Marketing Service knew, or should have known, that, during the rulemaking proceeding, the Blue Ribbon Commission disseminated false information to promote the Softwood Lumber Order. However, based on the ALJ's disposition of the proceeding, I agree with Resolute that the ALJ implicitly rejected Resolute's contention.

As an initial matter, Resolute does not cite any evidence supporting its contention that the Agricultural Marketing Service endorsed misleading statements by the Blue Ribbon Commission. Further, Resolute does not cite any provision of the Administrative Procedure Act that requires an agency conducting a rulemaking proceeding to refute misleading statements by proponents or opponents of the rulemaking proceeding.

If the Secretary of Agriculture determines a proposed order is consistent with, and will effectuate the purpose of, the CPRIA, the Secretary of Agriculture must publish the proposed order in the Federal Register and give opportunity for public comment on the proposed order.[54] After notice and opportunity for public comment, the Secretary of Agriculture is required to take into consideration the comments

---

[52] Resolute's Appeal Pet. ¶ 47 at 16-17.
[53] ALJ's Decision and Order ¶ 29 at 20.
[54] 7 U.S.C. § 7413(b)(2).

received in preparing a final order.[55] However, the Administrative Procedure Act does not require an administrative agency to consider or to address lobbying efforts by proponents or opponents of a proposed order. Therefore, I conclude the Agricultural Marketing Service was not required by the Administrative Procedure Act to reject misleading statements made by the Blue Ribbon Commission during the rulemaking proceeding, as Resolute contends.

Ninth, Resolute contends *Resolute Forest Products*, 72 Agric. Dec. 330 (U.S.D.A. 2013) (Ruling on Certified Question), is error (Resolute's Appeal Pet. ¶¶ 50-62 at 18-22).

In *Resolute Forest Products*, 72 Agric. Dec. 330 (U.S.D.A. 2013) (Ruling on Certified Question), I concluded Resolute's application for a subpoena *duces tecum* did not show the relevancy of, the materiality of, or the necessity for the production of documents described in Resolute's application, as required by 7 C.F.R. § 900.62(b), and concluded the ALJ must quash the subpoena *duces tecum* issued pursuant to Resolute's application. For the reasons cited in *Resolute Forest Products*, 72 Agric. Dec. 330 (U.S.D.A. 2013) (Ruling on Certified Question), I reject Resolute's contention that the ruling is error, and I decline to vacate *Resolute Forest Products*, 72 Agric. Dec. 330 (U.S.D.A. 2013) (Ruling on Certified Question), and remand the proceeding to the ALJ.

Findings of Fact

1. Resolute is a corporation incorporated under the laws of the State of Delaware.

2. Resolute imports softwood lumber into the United States and is subject to the Softwood Lumber Order (Tr. at 792).

3. The Blue Ribbon Commission is a committee of 21 chief executive officers and heads of businesses that domestically manufacture and import softwood lumber (75 Fed. Reg. 61,002 (Oct. 1, 2010); RX 12 at 2).

[55] 7 U.S.C. § 7413(b)(4).

4. In February 2010, the Blue Ribbon Commission submitted a proposed softwood lumber industry research and promotion program to the Secretary of Agriculture (75 Fed. Reg. 61,005 (Oct. 1, 2010); RX 12 at 5).

5. On October 1, 2010, the Agricultural Marketing Service published in the Federal Register a proposed rule inviting comments on a proposed Softwood Lumber Order and a proposed rule inviting comments on procedures for conducting an initial referendum to determine whether domestic manufacturers and importers of softwood lumber favor implementation of the proposed Softwood Lumber Order (75 Fed. Reg. 61,002-30 (Oct. 1, 2010); RX 12-RX 13).

6. On April 22, 2011, the Agricultural Marketing Service published in the Federal Register a proposed rule and referendum order in which the Agricultural Marketing Service addressed the 55 comments received in response to the October 1, 2010, proposed Softwood Lumber Order referenced in Finding of Fact number 5 and announced that the Agricultural Marketing Service would be conducting an initial referendum from May 23, 2011, through June 10, 2011, to determine whether eligible domestic manufacturers and importers favor implementation of the proposed Softwood Lumber Order (76 Fed. Reg. 22,757-84 (Apr. 22, 2011); RX 16).

7. On April 22, 2011, the Agricultural Marketing Service issued a final rule establishing procedures for conducting the Softwood Lumber Order initial referendum (76 Fed. Reg. 22,752-56 (Apr. 22, 2011); RX 17).

8. On August 2, 2011, after the Softwood Lumber Order initial referendum in which 67 percent of those voting representing 80 percent of the volume of the softwood lumber represented in the referendum approved the implementation of the softwood lumber program, the Agricultural Marketing Service published in the Federal Register a final rule establishing the Softwood Lumber Order (76 Fed. Reg. 46,185-46,202 (Aug. 2, 2011); RX 35).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. The Judicial Officer has no authority to declare the CPRIA unconstitutional.

3. The Agricultural Marketing Service did not bind the Secretary of Agriculture, without discretion, to implement the Softwood Lumber Order on the basis of an affirmative referendum vote.

4. The Softwood Lumber Order was approved by a majority of those persons voting who also represent a majority of the volume of softwood lumber, as provided in 7 U.S.C. § 7417(e)(3).

5. The Agricultural Marketing Service exempted a de minimis quantity of softwood lumber otherwise covered by the Softwood Lumber Order from assessments under the Softwood Lumber Order, as authorized by 7 U.S.C. § 7415(a)(1).

6. The Secretary of Agriculture has complete discretion to choose a "representative period," as that term is used in 7 U.S.C. § 7417(a)(1), to determine who may be subject to assessment under an order and thus eligible to participate in an initial referendum.

7. The Softwood Lumber Order initial referendum was conducted in accordance with 7 U.S.C. § 7417(g).

8. The Softwood Lumber Order initial referendum was not a census.

9. An administrative law judge is not bound by the conclusions of a witness whom the administrative law judge qualifies as an expert.

10. Office of Management and Budget Guidelines related to data collection are not relevant to the Softwood Lumber Order initial referendum.

11. The Agricultural Marketing Service was not required by the Administrative Procedure Act to refute misleading statements made during the rulemaking proceeding by proponents and opponents of the Softwood Lumber Order.

12. The ruling in *Resolute Forest Products*, 72 Agric. Dec. 330 (U.S.D.A. 2013) (Ruling on Certified Question), is correct as a matter of law.

13. The Softwood Lumber Order is in conformity with the terms, conditions, and requirements of the CPRIA, as required by 7 U.S.C. § 7413(b)(4).

14. The Softwood Lumber Order is consistent with, and will effectuate the purpose of, the CPRIA, as required by 7 U.S.C. § 7413(c).

For the foregoing reasons, the following Order is issued.

ORDER

1. The relief requested by Resolute is denied.

2. Resolute's Amended Petition, filed June 22, 2012, is dismissed with prejudice.

This Order shall become effective upon service on Resolute.

RIGHT TO JUDICIAL REVIEW

Resolute has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which district Resolute resides or carries on business. A complaint for the purpose of review of the Order in this Decision and Order must be filed not later than 20 days from the date of entry of the Order.[56] Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.[57]

—

[56] 7 U.S.C. § 7418(b)(1).
[57] 7 U.S.C. § 7418(b)(2).

AGRICULTURAL MARKETING ACT

COURT DECISION

COMPASSION OVER KILLING v. FOOD AND DRUG ADMINISTRATION, ET AL.
No. 13-cv-013850VC
Court Decision.
Filed Dec. 23, 2014.

[Cite as: Not Reported in F.Supp.3d, 2014 WL 7336231 (D.N.D. Cal. 2014)].

AMA – OFPA – Administrative Procedure Act – Agency discretion – Agricultural Marketing Service, authority of – Egg Products Inspection Act – Food Safety Inspection Service, authority of – Labeling – National Organic Program – Rulemaking.

United States District Court,
N.D. California.

Court denied plaintiffs' motion for summary judgment and granted defendants' cross-motion for summary judgment, finding that agencies' decisions to not to initiate rulemaking to adopt egg-labeling requirements was not arbitrary or capricious. The Court ruled the Agricultural Marketing Service (AMS) lacked authority under the Agricultural Marketing Act and Organic Foods Production Act to require egg producers to label cartons in a particular method. The Court also held that, because the Egg Products Inspection Act grants the Food Safety Inspection Service (FSIS) only very limited authority to regulate the labeling of domestic shell eggs, FSIS's determination that it lacked the authority to initiate rulemaking on the subject was neither arbitrary nor capricious.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS'CROSS-MOTION FOR SUMMARY JUDGMENT

VINCE CHHABRIA, United States District Judge,
delivered the opinion of the Court.

AGRICULTURAL MARKETING ACT

INTRODUCTION

A coalition of individuals and animal rights organizations has filed this lawsuit, seeking a court order forcing the federal government to adopt regulations requiring egg producers to label their egg cartons according to the way they treat their hens. The Court declines to order the federal government to do this.

BACKGROUND

Most eggs sold in the United States come from hens raised in "battery cage systems," where each hen is confined in a small cage that prevents the hen from moving freely. A small proportion eggs come from farms using "cage free" and "free range" production methods. The plaintiffs, a coalition of individuals and animal welfare organizations, contend that, aside from the obvious differences in how humanely hens are treated on farms using battery cages, compared to hens raised using cage free and free range methods, eggs from caged hens are nutritionally inferior and carry a greater risk of salmonella contamination.

The plaintiffs further contend that labeling on many producers' egg cartons do not reflect the reality that the eggs are produced using battery cages. Indeed, the labeling on egg cartons often suggests that the hens are treated much more humanely. For example, some labels on cartons of eggs from hens in battery cages include images suggesting that the hens are raised in outdoor conditions with the space to move freely. The plaintiffs contend that egg producers have a strong incentive to engage in this misleading labeling because more than 80 percent of consumers "prefer, and are willing to pay for, eggs that they perceive as coming from humanely treated hens." Docket No. 35, p. 4.

Between 2006 and 2013, the plaintiffs submitted petitions to the Food and Drug Administration ("FDA"), the Federal Trade Commission ("FTC"), and two agencies within the United States Department of Agriculture ("USDA")—the Agriculture Marketing Service ("AMS") and the Food Safety Inspection Service ("FSIS"). Each petition requested that the relevant agency initiate rulemaking to revise existing labeling requirements or impose new regulations requiring egg producers to identify on the label the method used in producing the eggs. Each agency

denied the respective petition, and the plaintiffs filed this suit, alleging that each agency's denial was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). The parties have filed cross-motions for summary judgment.

DISCUSSION

Under the APA, an agency decision may be disturbed only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is highly deferential to the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The Court must uphold the agency's action so long as it is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n, Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

1. The Plaintiffs' Petition to the FDA

The FDA is responsible for administering the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. ("FDCA"), which prohibits the sale of misbranded food items. Under the Act, a food item is misbranded if its label is false or misleading. The Act provides:

> If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article....

21 U.S.C. § 321(n).

The plaintiffs' petition requested that the FDA promulgate new regulations (or revise its existing regulations) to require that all eggs be labeled as "free range," "cage free," or "eggs from caged hens" according to the conditions in which the birds were kept during the production process. FDA 001700. The petition argued that eggs from caged hens are nutritionally inferior to eggs from pastured hens, FDA 001719–22, eggs from caged hens carry a significantly higher risk of salmonella contamination than eggs from uncaged hens, FDA 001755–58, that consumers care about production methods and rely on the labeling on egg cartons to make purchasing decisions, and that many egg producers use labeling that misleads consumers about whether the eggs come from caged hens. FDA 001701–05.

The FDA gave three reasons for denying the plaintiffs' petition. First, it found that it was not authorized under the FDCA to regulate egg labeling based only upon consumer interest in animal welfare (as opposed to reasons relating to safety or nutrition). Second, the FDA found that the petition provided insufficient evidence of material differences in nutritional content and food safety that could be attributed solely to the use of cages in egg production. Finally, it found that even setting aside these legal and scientific issues with the plaintiffs' petition, the plaintiffs' proposed rulemaking was not a priority given the constraints on the agency's resources. As a result, it declined to engage in the requested rulemaking.

The Court need only address the FDA's third, independent reason for denying the plaintiffs' petition. "[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007). An agency's refusal to promulgate a rule is susceptible to only "extremely limited and highly deferential" judicial review. *Id.* at 527–28 (internal quotation marks omitted). "Such a refusal is to be overturned only in the rarest and most compelling of circumstances." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987) (internal quotation marks omitted). Here, the FDA detailed the agency's competing priorities given its limited resources and explained it had determined that the plaintiffs' proposed rulemaking was not the best use of its limited resources. Given the high level of deference accorded this

type of decision, the Court cannot say that the FDA's refusal was arbitrary and capricious.

This is in contrast to cases where an agency is mandated by Congressional statute to adopt regulations on a particular topic. For example, in *Massachusetts*, the Supreme Court rejected the EPA's argument that even if it had the statutory authority to promulgate the requested rule, it would decline to do so on prudential grounds. But the Court's ruling was based on the text of the Clean Air Act, which provided that the EPA "shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Massachusetts*, 549 U.S. at 528 (emphasis added). While the EPA was authorized under the Act to exercise judgment in determining whether an air pollutant caused or contributed to air pollution that may endanger the public health or welfare, once the agency determined that a particular pollutant did in fact pose such a danger, the Act required that the EPA take action. *Id.* at 533. In contrast to the Clean Air Act, the FDCA includes no such mandate for agency action, and the plaintiffs offer no argument that the FDA's rulemaking authority under the Act is not entirely discretionary.

The plaintiffs respond that the FDA failed to properly address the merits of their arguments for the adoption of a regulation, and therefore the Court should, at the very least, remand the petition to the agency for reconsideration. But there is no indication the FDA somehow misunderstood the plaintiffs' petition. And there is no basis for refusing to credit the FDA's statement that its discretionary decision was independent of its decision on the merits. The FDA stated that, even if it set aside its disagreement with plaintiffs as to the legal and scientific basis for the rulemaking, it would choose to focus on other priorities. That is, even if the FDA concluded it had authority under the FDCA to issue the requested regulation, and even if it found that the plaintiffs' petition provided sufficient evidence of material differences in nutritional content and food safety resulting from the use of cages in egg production, it would choose not to expend agency resources on the plaintiffs' petition. Under these circumstances, there would be no reason

to remand the matter to the FDA to reconsider the merits of the plaintiffs' argument. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("[W]e have no basis for reordering agency priorities. The agency is in a unique—and authoritativ—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.").

2. The Plaintiffs' Petition to the FTC

The FTC is authorized under the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, ("FTCA") to prescribe rules "with respect to unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(A). However, the FTC may only issue a notice of proposed rulemaking "where it has reason to believe that the unfair or deceptive acts or practices ... are prevalent." *Id.* § 57a(b)(3).

The FTC has issued policy statements in an effort to clarify its enforcement policy over deceptive and unfair acts. These statements explain that the FTC "will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC 552295–0865. It will find a practice is unfair if the practice causes an "unjustified consumer injury." For the FTC to declare a practice unfair, the injury: (1) must be substantial; (2) must not be outweighed by any offsetting consumer or competitive benefits; and (3) must be one consumers could not reasonably have avoided. 15 U.S.C. § 45(n).

In their petition to the FTC, the plaintiffs argued both that the terms "free range" and "cage free," as they are currently used by egg producers, suggest to consumers more humane treatment than what the producers actually provide, and that representations and imagery used on the labels of eggs laid by caged hens creates the misleading impression that the eggs were produced under free-range or cage-free conditions. As with their petition to the FDA, the plaintiffs requested that the FTC initiate a rulemaking to address the resulting consumer deception by requiring all eggs to be labeled as either "free range," "cage free," or

"eggs from caged hens," and providing specific definitions for these terms.

In considering whether the plaintiffs' petition established that egg producers currently engage in deceptive labeling practices, the FTC accepted that claims about the production methods of eggs are material to consumers' egg purchasing decisions. However, the FTC found that the plaintiffs' petition provided insufficient evidence by which it could conclude that consumers are deceived by egg producers' current labeling practices. The FTC also found that the evidence in plaintiffs' petition was insufficient for it to conclude that the use of terms such as "All Natural" and "Animal Friendly" on the labels of eggs from caged hens created an impression that the eggs were produced without the use of cages. The FTC further concluded that the plaintiffs had provided insufficient evidence that any misleading practice was "prevalent."

Like the FDA, the FTC concluded that the issue did not warrant an exercise of its discretion to promulgate a regulation. FTC 567831–0006. This determination was made against the background of the FTC's stated preference to combat this type of deceptive practice through individual enforcement actions rather than the adoption of generally applicable regulations, as well as concerns about the resource commitment necessary to promulgate a regulation. And for this reason—as with the FDA— the Court cannot disturb the FTC's discretionary decision to refrain from promulgating a rule, even if reasonable minds could differ about the impact and prevalence of the potentially deceptive labels. Simply put, the FTC considered the merits of the plaintiffs' petition and concluded it contained nothing to convince the agency that egg producers' current labeling practices create such severe or widespread issues that it should engage in the costly and time-consuming process of rulemaking, rather than addressing any issues through case-by-case enforcement.[1] FTC 567831–0008. Because the decision whether to

[1] The plaintiffs argue that it is unreasonable for the FTC to demand additional evidence when the FTC's broad investigatory powers put the agency in the best position to gather such evidence. Docket No. 35 at 18. But the fact that the FTC is well equipped to conduct an investigation into the plaintiffs' claims does not obligate it to do so. Ultimately, as with the FDA's denial, the FTC's decision not to initiate the requested rulemaking—including its decision not to conduct further investigation into whether the complained-of labeling

promulgate rules addressing unfair or deceptive acts is left to the discretion of the agency, 15 U.S.C. § 57a(a)(1), the denial of the plaintiff's petition was neither arbitrary nor capricious. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

3. The Plaintiffs' Petition to AMS

In their petition to AMS, the plaintiffs requested that AMS issue regulations mandating that eggs offered for retail sale bear labels designating the method of production for those eggs. The petition stated that AMS has the authority to promulgate such regulations under the Agricultural Marketing Act of 1946 and the Organic Foods Production Act of 1990. AMS denied the petition on the ground that neither statue gives AMS the authority to promulgate the regulations requested by the plaintiffs. Defs.' Opp. at 33.

The AMA gives AMS the authority

> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, ... to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire[.]

7 U.S.C. § 1622(h)(1). However, this authority is expressly limited by the fact that "no person shall be required to use the service authorized by this subsection." *Id.* Therefore, AMS is correct that it lacks authority under this statute to force egg producers to label their cartons in a certain way.

---

practices were in fact deceptive—was based on the agency's discretion as to how it marshals its resources.

The plaintiffs respond that AMS "possesses the expertise and institutional will to regulate animal husbandry related labeling requirements in order to eliminate consumer confusion." Pls.' Reply at 20. The plaintiffs point to the USDA grade mark and Process Verified Programs, both of which are services offered by AMS that involve regulation of labeling claims for agricultural products. But, in keeping with § 1622(h)(1), participation in both of these programs is voluntary, meaning that neither program provides a basis for AMS to issue the mandatory labeling regulation the plaintiffs requested in their petition. The Organic Food Production Act authorizes AMS to establish the National Organic Program, under which the AMS regulates food labeling. 7 U.S.C. § 6503. Under the National Organic Program, AMS is authorized to define what constitutes an organic product and determine when a product may be labeled with a USDA "organic" seal. The National Organic Program regulations provide standards for animal welfare that must be met for an egg producer to use the organic seal on its label, including the requirement that the egg-laying hens have access to the outdoors, fresh air, clean water for drinking, and direct sunlight. *See* 7 C.F.R. § 205.239. But as with the programs AMS administers under the AMA, participation in the organic program is voluntary; the regulatory requirements only apply to egg producers who wish to label their eggs as organic.

Finally, the plaintiffs argue that even if AMS has no authority to establish a mandatory nationwide labeling program, AMS is obliged to consider other options by which it could address the concerns raised in plaintiffs' petition for rulemaking, rather than denying the petition outright. But the plaintiffs' petition repeatedly emphasized the need for a mandatory labeling program— indeed, the petition disavowed that a voluntary program could adequately address the plaintiffs' concerns. AMS 0026. Given the petition's focus on the need for a regulation mandating method-of-production labels for all egg producers, and given that AMS lacked the authority to promulgate such a regulation, its decision to deny the petition in its entirety was not arbitrary or capricious.

4. The Plaintiffs' Petition to FSIS

As with the plaintiffs' petition to AMS, their petition to FSIS requested that the agency promulgate a regulation mandating that eggs offered for retail sale bear labels designating the method of production for those eggs. The petition identified the Egg Products Inspection Act as the source of FSIS's authority to issue such a regulation. But that statute primarily gives FSIS authority over the regulation of egg products; that is "dried, frozen, or liquid eggs, with or without added ingredients." 21 U.S.C. § 1033(f). Shell eggs fall within a different definition. *See* 21 U.S.C. § 1033(g). So although the Act authorizes FSIS to broadly regulate false or misleading labeling for egg products, 21 U.S.C. § 1036, it provides only very limited authorization for regulation of labeling for shell eggs. Specifically, 21 U.S.C. § 1034(e)(1) provides that the agency shall ensure that "shell eggs destined for the ultimate consumer ... contain labeling that indicates that refrigeration is required," and 21 U.S.C. § 1046(a) provides for certain labeling requirements for imported eggs and egg products.

The plaintiffs point to the Act's Congressional statement of findings, which states that "[i]t is essential, in the public interest, that the health and welfare of consumers be protected by the adoption of measures prescribed herein for assuring that eggs and egg products ... [are] properly labeled and packaged," 21 U.S.C. § 1031, and to the Act's declaration of policy, which declares a Congressional policy to "prevent the movement or sale for human food, of eggs and egg products which are adulterated or misbranded[.]" 21 U.S.C. § 1032. The plaintiffs argue that these broad pronouncements, coupled with the provision that "[t]he Secretary shall promulgate such rules and regulations as he deems necessary to carry out the purposes or provisions of this chapter," 21 U.S.C. § 1043, give the FSIS authority to promulgate the regulation the plaintiffs request. But the preliminary statements of findings and policy simply set out the general basis for the Act's specific grants of authority to regulate. As such, these sections do not themselves confer any authority on FSIS. If they did, the statute's narrower grant of regulatory authority would be rendered superfluous. And given the very limited authority provided to FSIS under the act to regulate the labeling of domestic shell eggs, the agency's determination that it was without authority to engage in the requested rulemaking was neither arbitrary nor capricious.

CONCLUSION

Courts must afford an agency's discretionary decision not to initiate rulemaking the highest possible level of deference. In light of this standard, the Court cannot say that any of the respective denials of the plaintiffs' petitions were arbitrary and capricious. Accordingly, the plaintiffs' motion for summary judgment is denied. The defendants' cross-motion is granted in full.

IT IS SO ORDERED.

___

ANIMAL WELFARE ACT

COURT DECISIONS

RAY v. VILSACK.
No. 5:12-CV-212-BO.
Court Decision.
Filed July 24, 2014.

[Cite as: Slip Copy, 2014 WL 3721357 E.D.N.C. (2014)].

AWA – Animal welfare – Cease and desist – Consent decision – License, reinstatement of – License, suspension of –Mootness – Standing – Summary judgment.

United States District Court,
E.D. North Carolina,
Eastern Division.

Court granted Defendant's motion for summary judgment, holding that the case was moot and, therefore, the Court lacked jurisdiction to examine the merits of the action. The Court rendered the proceeding moot on the basis that a consent decision had been entered in an administrative action brought by USDA while the federal case was pending. The Court also found that the consent decision, which had been "obtained through USDA's enforcement powers," afforded greater relief than what could have been granted in the pending case.

ORDER

TERRENCE W. BOYLE, District Judge.

This matter is before the Court on the parties' cross motions for summary judgment [DE 63 and 64] and plaintiffs' motion for leave to file surreply [DE 70]. A hearing was held on these matters on July 21, 2014 in Elizabeth City, North Carolina at 2:00 p.m. For the reasons stated herein, plaintiffs' motion for summary judgment is DENIED, defendants' motion for summary judgment is GRANTED, and plaintiffs' motion for leave to file is DENIED AS MOOT.

Background

On April 19, 2012, plaintiffs filed a complaint challenging the defendants' decision to issue Animal Welfare Act ("AWA") licenses to roadside zoo and animal dealer Jambbas Ranch Tours, Inc. ("Jambbas") in contravention of the AWA 7 U.S.C. § 2133. Plaintiffs contend that because Jambbas could not demonstrate that it was in compliance with the AWA before defendant renewed Jambbas's license that the agency's licensing decision was not in accordance with the plain language of the AWA and therefore must be set aside under the Administrative Procedure Act ("APA") 5 U.S.C. § 706(2)(A). On July 23, 2012, plaintiffs filed a first amended complaint. On July 25, 2012, defendants filed a motion to dismiss. On January 22, 2013, the Court denied the motion to dismiss. Defendants filed the administrative record ("AR")[1] on March 15, 2013 and supplemented the record on March 29 and April 12, 2013. On October 8, 2013, the Court ordered the defendants to supplement the AR and allowed plaintiffs to file a supplemental complaint against all defendants. On January 7, 2014, a consent decision was filed in defendants' administrative enforcement proceeding against Jambbas. [*See* DE 74]. The consent decision suspended Jambbas's license for a period of four months and continuing thereafter until Jambbas can demonstrate that it is in compliance with the AWA and the United States Department of Agriculture ("USDA") regulations and standards. As of July 18, 2014, Jambbas had not requested the USDA to perform the required inspection to demonstrate compliance and therefore its license was still suspended as of that date.

Discussion

I. Cross Motions for Summary Judgment

A. Standing

[1] The Administrative Record is found on the electronic docket under separate case number 5:13–MC–76–BO.

In order to establish Article III standing, a plaintiff must show "(1) it has suffered an injury in fact; (2) there exists a causal connection between the injury and conduct complained of; and (3) a favorable judicial ruling will likely redress the injury." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (quotation omitted).

Defendants challenge only the redressability prong of the standing requirements. As this Court earlier held, "[i]t suffices for redressability purposes that a favorable ruling will result in the plaintiffs' injuries 'hav [ing] less probability of occurring." [DE 52 at 4] (quoting *Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001)). Plaintiffs have sufficiently established that their injuries are likely to be redressed by a favorable ruling as the animals would be less likely to be treated in a manner that is in violation of the AWA. Accordingly, they have standing as of the time this suit was initiated.

B. Mootness

Article III of the United States Constitution limits federal court jurisdiction to actual "cases" and "controversies" and requires that a dispute remains "live" and that litigants maintain a "personal stake" in the outcome throughout the course of litigation. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395–96 (1980). "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 397 (quotation omitted). It is well-settled that "[i]f full relief is accorded by another tribunal—whether judicial administrative, arbitral, or a combination—a proceeding seeking the same relief is moot. Mootness also results if another tribunal affords relief greater than that sought in the pending action." 13B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533.2.1 (3d ed. 2013) (collecting cases).

i. *The matter before the Court is moot.*

Defendants raise the issue of mootness in their motion for summary judgment. Colonel Ray and Rikki Harrison, both named plaintiffs in this case, were also parties to a state court action which concluded in August 2012 with a permanent injunction by consent directing the transfer of ownership and possession of "Ben the Bear" from Jambbas to the

Performing Animal Welfare Society. [AR 49–71]. Concerns about "Ben the Bear" were a centerpiece of the plaintiffs' allegations of standing and injury in fact, and the state judgment they obtained moots that aspect of their claim.

The government also argues that the administrative action brought by the USDA against Jambbas moots the remainder of plaintiffs' claims. Jambbas and the USDA entered into a consent order in this action and, although plaintiffs were not a party to the action, the defendants argue that this consent order, obtained through the USDA's enforcement powers, accomplishes more than any relief plaintiffs could obtain through a favorable judgment in this case. The consent order suspends Jambbas's license for a period of at least four months "and continuing thereafter until [Jambbas] can demonstrate to [USDA's Animal and Plant Health Inspection Service ("APHIS")] that it is in compliance with the [AWA], regulations and standards." [DE 65–1 at ¶ 5].

The consent order effectively provides the same relief plaintiffs would obtain by the nonrenewal of Jambbas's license. Jambbas will not be able to operate as a dealer or exhibitor for the entire duration of the license suspension, the same as if the license were not renewed. *See* 9 C.F.R. § 2.10(c). Further, the license suspension will not be lifted until at least four months have passed and Jambbas thereafter passes an inspection demonstrating full compliance with the AWA. [DE 65–1]. Even assuming that Jambbas's license were not to be renewed, Jambbas would have to meet this same demonstration of compliance in order to obtain reinstatement of its license, *see* 9 C.F.R. § 2.3(b), but there would be no requirement that it wait four months or any set period of time before applying for reinstatement. *See* 9 C.F.R. § 2.5(c).

Additionally, the consent order provides much more relief that plaintiffs would be able to obtain from this Court. The consent order affirmatively requires that Jambbas cease and desist from further violations of the AWA, including without limitation (i) failing to maintain an adequate program of veterinary care; (ii) failing to remove excreta from animal enclosures and sanitize the rabbit cages at least once every 30 days; (iii) failing to keep clean and sanitized food and water receptacles; and (iv) failing to provide shelter adequate to environmental

conditions or to maintain its facilities in good repair. [DE 65–1 at ¶ 1]. The consent order also levies monetary penalties and imposes suspended penalties that could be owed if Jambbas is found to have violated the regulations at any time within the next two years including additional civil penalties under 7 U.S.C. § 2149(c) for knowingly disobeying the consent decision's cease and desist order. Finally, the consent order prohibits Jambbas from owning or acquiring any inherently dangerous animals or primates, or from exhibiting more than 30 animals of any other species at any given time. [DE 65–1 at ¶ 2–3]. Thus Jambbas has had to divest itself of many of the animal species that plaintiffs would like to see relocated to a better environment and reduce its animal inventory to a more manageable level that should positively correspond to an increase in the level of care provided to the remaining animals.[2] Jambbas is also no longer in possession of the more exotic and difficult to keep species listed in plaintiffs' complaint, including bear, alligator, raccoon, fox, elk, and pheasant.[3]

In response to defendants' argument that this matter is now moot, plaintiffs argue that defendants have not met their "heavy burden" to persuade the Court that the "challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), INC.,* 528 U.S. 167, 189 (2000) (citation omitted). Plaintiffs contend that the voluntary conduct of the defendants by entering into a consent order in their administrative action against Jambbas cannot moot the claims before this Court because defendants have not and cannot show that the challenged conduct cannot "reasonably be expected to recur." *Id.*

Plaintiffs are correct that the USDA intends to continue its policy of rubberstamping AWA license renewal applications. However, the connection between all of the steps Jambbas must take before reactivation of its license is too tenuous to conclude that the USDA will, in the future, rubberstamp Jambbas's license renewal despite its being in violation of the AWA, and regulations and standards.

---

[2] In May 2011, Jambbas had 138 animals in its inventory, as of February 2014, Jambass had reduced its inventory to 76 animals. [DE 65–2].

[3] Jambbas's animal inventory as of February 2014 consisted of 23 goats, 18 sheep, 11 cows, 6 bison, 6 rabbits, 5 dogs, 2 blackbuck, 2 deer, 2 pigs, and 1 cavy. [DE 65–2].

First, plaintiffs' assertion relies on the presumption that Jambbas will apply to have its license restored and will successfully demonstrate the compliance necessary to reactivate its license. Jambbas is a third-party to this suit and has its own decisions to make regarding the expense of compliance, the risk it takes in the chance of increased penalties should it later fail to comply, and its normal business operation decisions that will impact whether or not it seeks to reactivate its license. Although plaintiffs suggest that Jambbas's past revenue streams practically ensure that it will attempt to have its license reinstated, the Court is not convinced. Indeed, Jambbas has allowed two months to pass after the expiration of its four month suspension under the consent order without attempting to have APHIS perform the prerequisite inspection in order to reactivate its license. [DE 74]. Ostensibly a four month time period would have allowed Jambbas to make the necessary corrections in order to pass an inspection and reactivate its license. Thus it is not clear that Jambbas will ever reapply for its license, and, if it fails to apply for reinstatement, the possibility of the USDA rubberstamping Jambbas's renewal application in the future is eliminated.[4]

Second, even if Jambbas were to get its license reinstated, it now has significant financial incentive to comply with the AWA, and the USDA's regulations and standards. Third, by prohibiting Jambbas from obtaining some of the more difficult animal species to care for, the consent order further reduces the likelihood that Jambbas will fail to comply in the future. Fourth, by limiting the number of animals it can exhibit, the consent order further supports the likelihood that Jambbas will be able to properly care for the animals that it does exhibit. In short, defendants

[4] Although offered in the context of standing, the Supreme Court's discussion of standing when plaintiffs challenge the legality of the governments regulation or lack of regulation of someone else in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561–62 (1992), is instructive. In such a circumstance, as here, "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* at 562. Although it might have been reasonable to assume that absent the consent order, Jambbas would have continued to operate and apply for license renewals, the consent order has disrupted the calculus here as to render entirely unpredictable Jambbas's future actions.

have met their burden of showing that the challenged conduct cannot be reasonably expected to recur and, in doing so, have convinced this Court that the matter before it is now moot.

ii. *The matter before the Court does not fall under the exception to mootness for actions that are capable of repetition yet evading review.*

Plaintiffs contend that if the Court finds their claims moot, as it has, the case falls within the exception to mootness for actions that are capable of repetition yet evading review. This exception "applies when (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Lux v. Judd,* 651 F.3d 396, 401 (4th Cir. 2011) (quotation omitted).

However, plaintiffs mischaracterize the nature of the action that moots their claim. Plaintiffs are correct in that the challenge to license renewals would not be mooted by the expiration of a year's passage and subsequent renewal or denial of the renewal of the license. *See Kramer v. Mosbacher,* 878 F.2d 134, 136–37 (4th Cir. 1989) (challenge to yearly catch limits was not mooted by the conclusion of the fishing year because the yearly reevaluation of catch limits presented circumstances which were too short to be fully litigated prior to their cessation or expiration). This is not the case here. What has rendered plaintiffs' claims moot is the consent order entered in the administrative action brought by the USDA against Jambbas. Indeed, this case has progressed for several years without a mootness problem up until the present time. The entry of a consent order in this discreet instance does not mean that the USDA's policy of rubberstamping license renewals under the AWA is capable of repetition yet evading review. Instead it means that this case can no longer be the vehicle for such a challenge as the immediate goals of plaintiffs have been achieved here. Jambbas's license has been suspended and it cannot reactivate the license until it has demonstrated, through inspection, that it is in compliance with the AWA. Further its ability to keep certain types of animals has been eliminated and the overall number of animals it can exhibit, and therefore must care for, has been reduced. As explained *supra* Part I.B.i, there is not a reasonable expectation that

the complaining party will be subject to the same action again as applied to the license renewal of Jambbas.

Accordingly, this case does not fall under the mootness exception and this Court lacks jurisdiction to consider the merits. Therefore the Court must grant defendants' motion for summary judgment and dismiss the case without reaching the merits of plaintiffs' claims.

II. Motion for Leave to File Surreply

As the Court has not reached the merits of this action and plaintiffs' proposed surreply addresses the merits determination of another district court, this Court has no need to consider the surreply in its decision. Accordingly plaintiffs' motion for leave to file surreply is denied as moot.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is GRANTED and plaintiffs' motion for summary judgment is DENIED. The matter before the Court is MOOT and the Court lacks jurisdiction to consider the merits of this action. Accordingly, this matter is DISMISSED AS MOOT. Plaintiffs' motion for leave to file surreply is DENIED AS MOOT. The Clerk is directed to enter judgment accordingly and to close the file.

SO ORDERED.

___

GREENLY v. UNITED STATES DEPARTMENT OF AGRICULTURE.*

No. 13-2882.
Court Decision.
Filed Aug. 22, 2014.

AWA – Cease and desist – Civil penalty – License, revocation of – Motion to dismiss – Petition for review.

[Cite as: 576 Fed. Appx. 649 (8th Cir. 2014)].

United States Court of Appeals, Eighth Circuit.

Court denied Plaintiffs' petition for review of two orders issued by the Department, finding that substantial evidence supported an order revoking Plaintiff's AWA license and an order directing Plaintiffs to cease and desist from violating the AWA. The Court also granted Department's motion to dismiss Plaintiff's petition for review of an order terminating Plaintiff's AWA license and disqualifying Plaintiff from applying for a new license for two years.

Before WOLLMAN, GRUENDER, and SHEPHERD, Circuit Judges.

PER CURIAM.

Lee Marvin Greenly and his company, Minnesota Wildlife Connection, Inc., petition for review of two orders of the Secretary of the United States Department of Agriculture. We conclude that substantial evidence supports the Secretary's order revoking Greenly's license under the Animal Welfare Act (AWA), directing him and Minnesota Wildlife Connection to cease and desist from violating the AWA, and assessing a civil penalty of $11,725, *see Cox v. USDA,* 925 F.2d 1102, 1104 (8th Cir. 1991) (standard of review), and we therefore deny the petition for review of the revocation order. *See* 8th Cir. R. 47B.

---

* This case was not selected for publication in the Federal Reporter. *See* Fed Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. *See also* Eighth Circuit Rules 28A, 32.1a. (Find CTA8 Rule 28A and Find CTA8 Rule 32.1A).

We also grant the Secretary's motion to dismiss Greenly's petition for review of a second order terminating Greenly's license and disqualifying him from seeking a new one for two years.

___

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: LANCELOT KOLLMAN, a/k/a LANCELOT RAMOS.
Docket No. 13-0293.
Decision and Order.
Filed July 23, 2014.

AWA – Due process – License application, denial of.

William J. Cook, Esq. for Petitioner.
Colleen A. Carroll, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

Lancelot Kollman submitted to the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], an application dated May 20, 2013 for an exhibitor's license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]. By letter dated July 2, 2013, APHIS denied Mr. Kollman's Animal Welfare Act license application on the ground that Mr. Kollman had previously held an Animal Welfare Act license that the Secretary of Agriculture revoked effective October 19, 2009.

On July 22, 2013, Mr. Kollman instituted this proceeding by filing a Petition for Review and Request for Hearing [hereinafter Petition] in accordance with the regulations promulgated 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]. Mr. Kollman seeks reversal of APHIS's denial of his May 20, 2013, Animal Welfare Act license application.

On August 12, 2013, APHIS filed Respondent's Response to Request

for Hearing stating this proceeding is appropriate for adjudication by way of summary judgment or decision on the record.

On February 7, 2014, APHIS filed Respondent's Motion for Summary Judgment, and, on March 14, 2014, Mr. Kollman filed Petitioner's Verified Memorandum in Opposition to Respondent's Motion for Summary Judgment and Alternative Cross Motion for Summary Judgment.

On April 3, 2014, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision and Order Granting Summary Judgment[1] in which the ALJ: (1) found that Mr. Kollman previously held Animal Welfare Act license number 58-C-0816; (2) found that the Secretary of Agriculture revoked Mr. Kollman's Animal Welfare Act license; (3) found that APHIS denied Mr. Kollman's May 20, 2013 Animal Welfare Act license application for good cause; (4) entered summary judgment in favor of APHIS; and (5) affirmed APHIS's denial of Mr. Kollman's May 20, 2013 Animal Welfare Act license application.[2]

On May 8, 2014, Mr. Kollman filed Petitioner's Petition for Appeal of Order Granting Summary Judgment [hereinafter Appeal Petition], and on May 27, 2014, APHIS filed Respondent's Response to Petition for Appeal. On May 30, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Decision

1. Statutory and Regulatory Framework

The Animal Welfare Act authorizes the Secretary of Agriculture to issue licenses to dealers and exhibitors, upon application, in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133) and to promulgate such rules, regulations, and orders as the Secretary of Agriculture may deem necessary in order to effectuate the

[1] The ALJ filed the April 3, 2014 Decision and Order Granting Summ. J. with the Hearing Clerk on April 4, 2014.
[2] ALJ's Decision and Order Granting Summ. J. at 6.

purposes of the Animal Welfare Act (7 U.S.C. § 2151).

The Regulations preclude issuance of an Animal Welfare Act license to any person who has had an Animal Welfare Act license revoked, as follows:

> **§ 2.10 Licensees whose licenses have been suspended or revoked.**
>
> . . . .
> (b) Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed.
>
> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
> . . . .
> (3) Has had a license revoked or whose license is suspended, as set forth in § 2.10[.]
>
> 9 C.F.R. §§ 2.10(b), .11(a)(3).

2. Discussion

The ALJ correctly concluded that the sole issue in this proceeding is whether APHIS properly denied Mr. Kollman's May 20, 2013 Animal Welfare Act license application. APHIS denied Mr. Kollman's application on the ground that Mr. Kollman previously held an Animal Welfare Act license (Animal Welfare Act license number 58-C-0816), which the Secretary of Agriculture revoked effective October 19, 2009,[3] and Mr. Kollman admits he formerly held Animal Welfare Act license number 58-C-0816 which the Secretary of Agriculture revoked effective

[3] Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1093 (U.S.D.A. 2007) (Decision as to Lancelot Kollman Ramos), *aff'd sub nom.* Ramos v. U.S. Dep't of Agric., 322 F. App'x 814 (11th Cir. 2009).

October 19, 2009.[4] The Regulations provide that an Animal Welfare Act license will not be issued to an applicant who has had an Animal Welfare Act license revoked.[5] Therefore, I adopt as the final order in this proceeding the ALJ's April 3, 2014 Decision and Order Granting Summary Judgment in which the ALJ found the material facts in this proceeding are not in dispute, entered a summary judgment in favor of APHIS, and affirmed APHIS's denial of Mr. Kollman's May 20, 2013 Animal Welfare Act license application.

A. *Mr. Kollman's Petition*

Mr. Kollman raises five issues in his Appeal Petition. First, Mr. Kollman, citing 9 C.F.R. § 2.11(b), contends he is entitled to a hearing regarding APHIS's denial of his May 20, 2013 Animal Welfare Act license application (Appeal Pet. at 9-10).

The Regulations do not entitle an applicant to a hearing but merely provide that an applicant whose Animal Welfare Act license application has been denied may request a hearing, as follows:

> **§ 2.11 Denial of initial license application.**
>
> . . . .
> (b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application, unless the order provides otherwise.

9 C.F.R. § 2.11(b). Mr. Kollman admits and the record clearly establishes that Mr. Kollman is an applicant who previously held an

[4] Pet. ¶¶ 2-3 at 1-2.
[5] 9 C.F.R. §§ 2.10(b), .11(a)(3).

Animal Welfare Act license which the Secretary of Agriculture revoked effective October 19, 2009. The Regulations provide that an Animal Welfare Act license will not be issued to an applicant who has had a license revoked;[6] therefore, APHIS's denial of Mr. Kollman's May 20, 2013 Animal Welfare Act license application was proper, and there are no genuine issues of material fact to be heard.

The Rules of Practice do not specifically provide for the use or exclusion of summary judgment; however, I have consistently held that hearings are futile and summary judgment is appropriate in proceedings in which there is no factual dispute of substance.[7]Therefore, I reject Mr. Kollman's contention that he is entitled to a hearing.

Second, Mr. Kollman contends he was denied due process in the administrative proceeding that resulted in revocation of his Animal Welfare Act license (Animal Welfare Act license number 58-C-0816). Mr. Kollman bases his contention that he was denied due process on the fact that the decision that resulted in revocation of his Animal Welfare Act license was a default decision. (Appeal Pet. at 10).

Mr. Kollman's contention that he was denied due process in *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (U.S.D.A. 2007) (Decision as to Lancelot Kollman Ramos), *aff'd sub nom. Ramos v. U.S. Dep't of Agric.*, 322 F. App'x 814 (11th Cir. 2009), is an attempt to relitigate an issue that was previously adjudicated. In *Octagon Sequence of Eight, Inc.*, AWA Docket No. 05-0016, Mr. Kollman failed to file an answer denying or otherwise responding to the allegations of the complaint. The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to deny or otherwise respond to an allegation of a complaint shall be deemed, for purposes of the proceeding, an admission of the allegation. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the

---

[6] 9 C.F.R. § 2.11(a)(3).

[7] *See* Knaust, 73 Agric. Dec. 92, 98 (U.S.D.A. 2014); Pine Lake Enters., Inc., 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); Bauck, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 104 (U.S.D.A. 2009). *See also* Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, I adopted the material allegations of the complaint that related to Mr. Kollman as findings of fact and issued *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (U.S.D.A. 2007) (Decision as to Lancelot Kollman Ramos), pursuant to the default provisions of the Rules of Practice.

Subsequently, Mr. Kollman filed a petition for rehearing in which he contended he had been denied due process. Citing *United States v. Hulings*, 484 F. Supp. 562 (D. Kan. 1980), I held the application of the default provisions of the Rules of Practice did not deprive Mr. Kollman of his rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[8]

On appeal, Mr. Kollman raised the same due process issue he raised before me in his petition for rehearing. The United States Court of Appeals for the Eleventh Circuit affirmed *Octagon Sequence of Eight, Inc.*, 66 Agric. Dec. 1093 (U.S.D.A. 2007) (Decision as to Lancelot Kollman Ramos), and rejected Mr. Kollman's contention that he had been denied due process, as follows:

> . . . . Upon review of the overall fairness of the proceedings in this case, the Judicial Officer's Decision and Order did not violate the principles of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the AWA, and the USDA's own rules.

Ramos v. U.S. Dep't of Agric., 322 F. App'x 814, 824 (11th Cir. 2009). Therefore, I reject Mr. Kollman's contention that he was denied due process in the administrative proceeding that resulted in revocation of his Animal Welfare Act license (Animal Welfare Act license number 58-C-0816).

[8] Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1283, 1288 (U.S.D.A. 2007) (Order Den. Pet. for Reh'g as to Lancelot Kollman Ramos).

Third, Mr. Kollman contends the Secretary of Agriculture is not authorized by the Animal Welfare Act to issue regulations which make revocation of an Animal Welfare Act license permanent with no opportunity for reinstatement (Appeal Pet. at 11-12).

The Animal Welfare Act provides the Secretary of Agriculture with broad authority to promulgate regulations as the Secretary deems necessary to effectuate the purposes of the Animal Welfare Act, as follows:

> **§ 2151. Rules and regulations**
>
> The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. § 2151. Mr. Kollman does not cite and I cannot locate any provision in the Animal Welfare Act that limits the Secretary of Agriculture's authority to promulgate regulations which make revocation of an Animal Welfare Act license permanent with no opportunity for reinstatement. Therefore, I reject Mr. Kollman's contention that the Secretary of Agriculture is not authorized by the Animal Welfare Act to issue regulations which make revocation of an Animal Welfare Act license permanent with no opportunity for reinstatement.

Fourth, Mr. Kollman contends there is nothing in the record suggesting he is not qualified to hold an Animal Welfare Act license (Appeal Pet. at 12-13).

Mr. Kollman admits and the record establishes that Mr. Kollman previously held an Animal Welfare Act license that the Secretary of Agriculture revoked. The Regulations provide that an Animal Welfare Act license will not be issued to any applicant who has had an Animal Welfare Act license revoked[9] and any person whose Animal Welfare Act license has been revoked shall not be licensed.[10] Therefore, I reject Mr. Kollman's contention that there is nothing in the record suggesting he is not qualified to hold an Animal Welfare Act license.

---

[9] 9 C.F.R. § 2.11(a)(3).
[10] 9 C.F.R. § 2.10(b).

Fifth, Mr. Kollman contends 9 C.F.R. § 2.10(c) does not prohibit him from exhibiting animals as an employee of another person who holds an Animal Welfare Act exhibitor's license (Appeal Pet. at 13-16).

As an initial matter, Mr. Kollman's contention that 9 C.F.R. § 2.10(c) does not prohibit him from exhibiting animals as an employee of another person who holds an Animal Welfare Act license is not relevant to APHIS's denial of Mr. Kollman's May 20, 2013, Animal Welfare Act license application. Nonetheless, as Mr. Kollman requests an order allowing him to "present animals as an employee for a licensed exhibitor,"[11] I address Mr. Kollman's contention.

The Regulations prohibit any person whose Animal Welfare Act license has been revoked from exhibiting any animal, as follows:

> **§ 2.10 Licensees whose licenses have been suspended or revoked.**
>
> . . . .
> (c) Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation.

9 C.F.R. § 2.10(c). The plain language of 9 C.F.R. § 2.10(c) bars any person whose Animal Welfare Act license has been revoked from engaging in five enumerated activities with respect to animals. This bar applies without limitation to any person whose Animal Welfare Act license has been revoked and that person's employment by another person who holds an Animal Welfare Act license is not relevant to the applicability of the bar. Therefore, I decline to issue an order allowing Mr. Kollman to exhibit animals as an employee of another person who holds an Animal Welfare Act license.

Based upon my review of the record, I find no change or modification

[11] Pet. at 9.

of the ALJ's April 3, 2014 Decision and Order Granting Summary Judgment is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision and order as the final order in a proceeding, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> . . . .
> (i) *Decision of the judicial officer on 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.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 3, 2014 Decision and Order Granting Summary Judgment is adopted as the final order in this proceeding.

___

In re: JAMES G. WOUDENBERG, d/b/a R & R RESEARCH.
Docket No. 12-0538.
Decision and Order.
Filed September 12, 2014.

AWA – Administrative procedure – Cats, live random source – Certification – Dealer – Disqualification of Judge – Dogs, live random source – Extension of time – Purpose of AWA – Witness statements.

Sharlene Deskins, Esq. for Complainant.
Nancy L. Kahn, Esq. for Respondent.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On July 20, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about April 18, 2008, June 3, 2008, June 10, 2008, August 28, 2008, and November 4, 2008, in willful violation of 9 C.F.R. § 2.132(a), James G. Woudenberg obtained at least four dogs and one cat from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of dogs or cats.[1] On August 9, 2012, Mr. Woudenberg filed Respondent's Answer to Complaint [hereinafter Answer] in which Mr. Woudenberg denied the material allegations of the Complaint and requested an oral hearing.

On July 10-11, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Detroit, Michigan. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Nancy L. Kahn, Foster, Swift, Collins & Smith, PC, Farmington Hills, Michigan, represented Mr. Woudenberg. The Administrator called six witnesses and Mr. Woudenberg called two witnesses.[2] The Administrator introduced 30 exhibits which were received in evidence and are identified as CX 1-CX 30. Mr. Woudenberg introduced 15 exhibits which were received in evidence and are identified as RX 1, RX 4-RX 5, RX 11, RX 13, RX 17, RX 19-RX 20, RX 24, RX 27-RX 28, RX 30, and RX 32-RX 34.

---

[1] Compl. ¶ II(A)-(E) at 2.

[2] References to the transcript of the July 10-11, 2013, hearing are designated as "Tr." and the page number.

On December 20, 2013, after the parties submitted post hearing briefs, the ALJ issued a Decision and Order in which the ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Woudenberg violated 9 C.F.R. § 2.132(a) and dismissed the Complaint with prejudice.[3]

On March 19, 2014, the Administrator filed Complainant's Appeal Petition [hereinafter the Administrator's Appeal Petition] and, on April 17, 2014, the Administrator filed Complainant's Brief in Support of Its Appeal Petition [hereinafter the Administrator's Appeal Brief]. On May 13, 2014, Mr. Woudenberg filed Respondent's Brief in Opposition to Complainant's Appeal Petition.

On June 3, 2014, the Hearing Clerk transmitted to the Office of the Judicial Officer what the Hearing Clerk purported to be the record of the proceeding. In early August 2014, I reviewed the Hearing Clerk's transmittal and determined that Mr. Woudenberg's exhibits and the Administrator's exhibits had not been transmitted to the Office of the Judicial Officer. I then requested that the Hearing Clerk transmit Mr. Woudenberg's exhibits and the Administrator's exhibits to the Office of the Judicial Officer. On August 8, 2014, the Hearing Clerk informed me that, after a search of the records maintained by the Office of the Hearing Clerk, he was unable to locate the exhibits in question. However, the Hearing Clerk had obtained copies of the exhibits from Ms. Deskins, counsel for the Administrator, and provided the Office of the Judicial Officer with copies of Mr. Woudenberg's exhibits and the Administrator's exhibits.

On August 15, 2014, after a second unsuccessful search of the Hearing Clerk's records, I conducted a conference call with Ms. Deskins and Ms. Kahn, counsel for Mr. Woudenberg, to discuss the manner in which the Hearing Clerk had acquired copies of the exhibits.[4] During the conference call, Ms. Kahn agreed to examine the copies of the exhibits that Ms. Deskins provided to the Hearing Clerk to determine if Mr. Woudenberg had any objection to the substitution of the copies of

[3] ALJ's Decision and Order at 29.

[4] Sherida Hardy, the legal assistant employed by the Office of the Judicial Officer, also participated on the conference call.

the exhibits provided by Ms. Deskins for the exhibits the ALJ had filed with the Hearing Clerk.

On August 15, 2014, the Hearing Clerk mailed to Ms. Kahn copies of the exhibits which had been provided by Ms. Deskins. Mr. Woudenberg did not object to the substitution of the copies of the exhibits provided by Ms. Deskins for the exhibits the ALJ had filed with the Hearing Clerk.

Decision

1. *Statutory and Regulatory Framework*

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

> **§ 2131. Congressional statement of policy**
>
> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—
>
> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
>
> (2) to assure the humane treatment of animals during transportation in commerce; and
>
> (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
>
> The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals

> by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131.

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133) and defines the term "dealer," as follows:

> **§ 2132. Definitions**
>
> When used in this chapter—
> . . . .
> (f) 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, except that this term does not include—
>
> (i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or
>
> (ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year[.]

7 U.S.C. § 2132(f).

The Secretary of Agriculture is authorized to promulgate regulations in order to effectuate the purposes of the Animal Welfare Act (7 U.S.C. § 2151). The Regulations restrict the sources from which a dealer may obtain dogs and cats, as follows:

§ 2.132 Procurement of dogs, cats, and other animals; dealers.

(a) A class "B" dealer may obtain live random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

. . . .

(d) No dealer or exhibitor shall knowingly obtain any dog, cat, or other animal from any person who is required to be licensed but who does not hold a current, valid, and unsuspended license. No dealer or exhibitor shall knowingly obtain any dog or cat from any person who is not licensed, other than a pound or shelter, without obtaining a certification that the animals were born and raised on that person's premises and, if the animals are for research purposes, that the person has sold fewer than 25 dogs and/or cats that year, or, if the animals are for use as pets, that the person does not maintain more than three breeding female dogs and/or cats.

9 C.F.R. § 2.132(a), (d).

The Regulations define the term "random source," as follows:

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context

> otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.
>
> . . . .
>
> *Random source* means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

9 C.F.R. § 1.1.

2. *Discussion*

Mr. Woudenberg admits he is located in Michigan and operates under the business name R & R Research. Mr. Woudenberg also admits he is a dealer and a class "B" licensee under the Animal Welfare Act and holds Animal Welfare Act license number 34-B-0001. (Answer ¶¶ (A)-(B)). The preponderance of the evidence establishes that, on or about the dates alleged in the Complaint, four individuals donated five live animals to Mr. Woudenberg. Specifically, on or about April 18, 2008, Gilbert Beemer donated a dog to Mr. Woudenberg (CX 1); on or about June 3, 2008, Mr. Beemer donated a dog to Mr. Woudenberg (CX 2); on or about June 10, 2008, Max Hawley donated a dog to Mr. Woudenberg (Tr. at 154-56; CX 12); on or about August 28, 2008, Sandra Castle donated a cat to Mr. Woudenberg (Tr. at 40-42; CX 18); and on or about November 4, 2008, Katherine Snyder donated a dog to Mr. Woudenberg (Tr. at 137-38; CX 25).

At the time of their respective donations, Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder each completed and signed a personal animal release form for each animal he or she donated to Mr. Woudenberg (Tr. at 42-43, 139, 156; CX 1-CX 2, CX 12, CX 18, CX 25). The personal animal release form was created by Mr. Woudenberg and, at all times material to this proceeding, Mr. Woudenberg required each person who surrendered animals to him to complete and sign the form, which

reads as follows:

> R & R RESEARCH
> 19256 W. KENDAVILLE RD., HOWARD CITY, MICHIGAN 49329
> (231) 937-5680
>
> PERSONAL ANIMAL RELEASE
>
> Name_____
> Date_____
> Address_____
> _____
> Phone # _____
> Driv. Lic. # _____
> License Plate#_____
>
> *OWNER STATEMENT: "I Certify that I have bred, raised, and do own the animal(s) listed below, and I understand that they may be used in research or testing."*
>
> *Owner's signature* _____
>
> List of Animals received
>
> USDA#SEX DESCRIPTION/BREED
>
> Rec'd by_____

Carrie Bongard is a licensed veterinary technician who has worked for the United States Department of Agriculture as an animal care inspector since 2002 (Tr. at 58-59). Ms. Bongard's job duties require her to inspect dealers' facilities in Michigan, including Mr. Woudenberg's facility (Tr. at 59-60). Ms. Bongard's inspections of dealers include a review of records of acquisition and disposition of animals. Ms. Bongard traces the source of animals donated to Mr. Woudenberg by reviewing certifications signed by donors and documenting her findings.

(Tr. at 61-62, 128-30; CX 4, CX 13, CX 19, CX 24).

Ms. Bongard could not specifically recall conducting the trace backs that she recorded on the four dogs and the cat in question in this proceeding, but she spoke with Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder and made notes of her discussions. Ms. Bongard's notes reflect that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder told Ms. Bongard that they had not raised from birth the animals they donated to Mr. Woudenberg. (CX 4, CX 13, CX 19, CX 24). Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder each admitted his or her owner statement was false in that each of the animals identified on the personal animal release forms in question had been acquired from a previous owner rather than bred and raised by Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder, as stated on the personal animal release forms (Tr. at 43, 138-39, 156; CX 4-CX 7, CX 13-CX 15, CX 19-CX 21, CX 24, CX 28). When Ms. Bongard learned that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder had donated animals that they had not raised from birth to Mr. Woudenberg, Ms. Bongard cited Mr. Woudenberg for violating 9 C.F.R. § 2.132(a) (RX 1 at 6; CX 3).

A preponderance of the evidence establishes Mr. Woudenberg asks each donor whether the donated animal was born and raised on the donor's premises, and, if the donor responds in the negative, Mr. Woudenberg rejects the animal (Tr. at 425-26). If the donor responds in the affirmative, Mr. Woudenberg gives the donor a personal animal release form to complete and sign. Mr. Woudenberg verifies the information on the personal animal release form by comparing it with the donor's driver's license. If a personal animal release form is incomplete or if the information does not match the donor's identification, Mr. Woudenberg does not accept the donation. (Tr. at 230-33, 240, 341-43, 365-67, 385-88; RX 20). Mr. Woudenberg did not doubt that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder raised the animals they donated, as Mr. Woudenberg's business is located in a rural area where many residents raise animals (Tr. at 366-67; RX 20).

The record contains no evidence that the donors in question were "dealers," as that term is defined in the Animal Welfare Act and the Regulations, who were required to obtain Animal Welfare Act licenses, or that the donors in question worked for, operated, or were in any way

connected with animal pounds or animal shelters.

The Administrator's Appeal Brief

The Administrator raises five issues in the Administrator's Appeal Brief. First, the Administrator contends the ALJ erroneously found the Administrator failed to prove that Mr. Woudenberg violated 9 C.F.R. § 2.132(a), as alleged in the Complaint (Administrator's Appeal Br. at 3-9).

The Regulations provide that a class "B" dealer may obtain live random source dogs and cats only from three sources: (1) another dealer licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; and (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an animal pound or animal shelter (9 C.F.R. § 2.132(a)).

Mr. Beemer donated two live dogs to Mr. Woudenberg, Mr. Hawley donated one live dog to Mr. Woudenberg, Ms. Snyder donated one live dog to Mr. Woudenberg, and Ms. Castle donated one live cat to Mr. Woudenberg. Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder admit they did not breed and raise the dogs and the cat in question. Therefore, I conclude, Mr. Woudenberg obtained live random source dogs from Mr. Beemer, Mr. Hawley, and Ms. Snyder and obtained a live random source cat from Ms. Castle.[5] None of these donors were dealers licensed under the Animal Welfare Act and none of these donors worked for, operated, or were in any way connected with an animal pound or animal shelter. Therefore, I conclude the Administrator proved by a preponderance of the evidence that Mr. Woudenberg violated 9 C.F.R. § 2.132(a) by obtaining four live random source dogs and a live random source cat from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of live random source dogs and cats.

The ALJ dismissed the Complaint based upon her conclusions that

[5] The term "random source" means dogs and cats obtained from animal pounds, animal shelters, auction sales, or any person who did not breed and raise the dogs and cats on his or her premises (9 C.F.R. § 1.1).

Mr. Woudenberg complied with 9 C.F.R. § 2.132(d) (ALJ Decision and Order at 20)[6] and that, pursuant to 9 C.F.R. § 2.132(d), a class "B" dealer may obtain random source dogs and cats from a person who does not hold an Animal Welfare Act license (ALJ Decision and Order at 28).[7] While I agree with the ALJ that Mr. Woudenberg complied with 9 C.F.R. § 2.132(d), I do not agree that 9 C.F.R. § 2.132(d) permits a class "B" dealer to obtain random source dogs and cats from a person who does not hold an Animal Welfare Act license. In other words, I conclude 9 C.F.R. § 2.132(d) does not add a permitted source of live random source dogs and cats to those permitted sources listed in 9 C.F.R. § 2.132(a)(1)-(3). The basis for my conclusion is that, by definition, a dog or cat that is bred and raised on the premises of the person from whom the class "B" dealer obtains the dog or cat is not a "random source" dog or cat. *See* 9 C.F.R. § 1.1.

The donors in question were not licensed under the Animal Welfare Act and were not required to be licensed under the Animal Welfare Act. Mr. Woudenberg obtained the necessary certification from each donor that his or her donated animal was bred and raised by the donor. While each of the completed and signed certifications was false, I find very little evidence that Mr. Woudenberg knew or should have known that the certifications provided by Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder were false. Further, the evidence establishes that Mr. Woudenberg took precautions to verify the accuracy of the certifications prior to accepting the animals in question. Under the circumstances established in this proceeding, I find Mr. Woudenberg complied with 9 C.F.R. § 2.132(d), even though each certification was false.

However, Mr. Woudenberg's compliance with 9 C.F.R. § 2.132(d) does not negate Mr. Woudenberg's violation of 9 C.F.R. § 2.132(a).

---

[6] The ALJ states: "The regulation [(9 C.F.R. § 2.132(d))] prohibits Respondent from knowingly accepting animals from unlicensed sources without obtaining a certification [that the animals were born and raised on that person's premises]. Respondent secured the requisite certifications. Therefore, Respondent did not violate [9] C.F.R. [§ 2].132(d), or by imputation, violate [9] C.F.R. § [2].132(a)."

[7] The ALJ states: "Class 'B' dealers may accept random source animals from other dealers, from shelter[s] and pounds, and from unlicensed individuals who have bred and raised the animals and who sell or donate up to 25 animals in a year. 9 C.F.R. § [2].132(a)-(d)."

Compliance with 9 C.F.R. § 2.132(d) only requires that a dealer obtain a certification from the person surrendering the animal that the animal was born and raised on that person's premises, namely, a certification that the animal is not a random source animal. In other words, it is possible, as occurred in this proceeding, for a dealer to obtain a random source animal from a person who falsely or mistakenly certifies that the animal is not a random source animal and to comply with 9 C.F.R. § 2.132(d). However, if the person from whom the class "B" dealer obtains that random source animal is not a permitted source of random source animals under 9 C.F.R. § 2.132(a), the dealer is in violation of 9 C.F.R. § 2.132(a), despite having complied with 9 C.F.R. § 2.132(d).

Second, the Administrator asserts he did not name Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder as respondents in the Complaint and the issue of their violation of the Animal Welfare Act was not before the ALJ. The Administrator requests that I strike the ALJ's conclusion that there is no evidence to support findings that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder violated the Animal Welfare Act. (Administrator's Appeal Br. at 2 n.1).

As an initial matter, I agree with the Administrator that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder are not named respondents in the Complaint and the issue of their violation of the Animal Welfare Act was not before the ALJ. However, I find nothing in the ALJ's Decision and Order indicating the ALJ was under the misapprehension that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder are respondents in this proceeding or that the ALJ dismissed the Complaint based upon the ALJ's conclusion that the Complaint contained unsupported allegations that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder violated the Animal Welfare Act.

Third, the Administrator states the ALJ erroneously denied the Administrator's motion that the ALJ withdraw from the proceeding (Administrator's Appeal Br. at 2 n.2).

The Rules of Practice provide that any party to a proceeding may request that an administrative law judge withdraw from the proceeding, as follows:

§ 1.144 Judges.

. . . .
(b) *Disqualification of Judge*.
(1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

7 C.F.R. § 1.144(b)(1).

The Administrator, by motion made to the ALJ, requested that the ALJ withdraw from the proceeding on the ground that the ALJ was personally biased against the Administrator and Ms. Deskins. The Administrator cites the ALJ's conduct and the ALJ's inappropriate comments during the first day of the hearing, July 10, 2013, as evidence of the ALJ's personal bias. (Tr. at 310-11). However, the Administrator fails to describe the ALJ's conduct which supports the Administrator's allegation of ALJ bias. Moreover, while Ms. Deskins stated "[y]our comments yesterday at many times were inappropriate" (Tr. at 310-11), the Administrator specifically references only one "comment"[8] as support for the Administrator's contention that the ALJ was personally biased against the Administrator and Ms. Deskins (Tr. at 313). The ALJ's instruction, cited by the Administrator as evidence of ALJ bias, followed a discussion of the requirements of the Jencks Act in which the ALJ concluded the discussion by instructing: "Say no more, Ms. Deskins, nothing more." (Tr. at 201). The instruction was not directed to the Administrator. Moreover, while the instruction was directed to Ms. Deskins, the context establishes that the instruction was merely meant to bring the discussion of the requirements of the Jencks Act to a close and to maintain order during the hearing. I do not find the instruction evidences personal bias on the part of the ALJ; therefore, I decline to reverse the ALJ's denial of the Administrator's motion that the ALJ withdraw from the proceeding.

[8] I find that the "comment" referenced by the Administrator is actually an instruction.

Fourth, the Administrator contends the ALJ erroneously found the Administrator failed to comply with a proper request for production of Harry G. Dawson's witness statement pursuant to 7 C.F.R. § 1.141(h)(1)(iii) and, based upon this finding, erroneously struck Mr. Dawson's testimony (Administrator's Appeal Br. at 9-16).

The Rules of Practice provide for the production of witness statements, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
> (h) *Evidence*—(1) *In general.*
> . . . .
> (iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii).

The Administrator asserts the ALJ requested production of Mr. Dawson's witness statement on behalf of Mr. Woudenberg and contends the ALJ erroneously failed to deny the request because the request was made by the ALJ rather than by a party to the proceeding (Administrator's Appeal Br. at 11).

The Rules of Practice specifically provide that a "party," other than the complainant, may request production of the statement of any witness called by the complainant (7 C.F.R. § 1.141(h)(1)(iii)). I find no provision allowing an administrative law judge to make the request on behalf of a party. However, I reject the Administrator's assertion that the ALJ requested production of Mr. Dawson's witness statement on behalf

of Mr. Woudenberg, and I find Ms. Kahn made the request at issue, as follows:

> [BY MS. KAHN:]
>
> Q When you do an investigation such as this one does your role include looking at the regulations and deciding whether a violation has occurred or do you just go out and get specific facts?
>
> [BY MR. DAWSON:]
>
> A I gather the facts, interview people, authenticate documents, prepare a report and submit that as an investigative report.
>
> . . . .
>
> Q Is there a report like that for this case, did you make any investigative report separate and apart from these affidavits and the documents that we have been given by the complainant regarding this case?
>
> A Yes.
>
> Q Do you have a copy with you today?
>
> A I don't.
>
> Q Is there any reason why that can't be produced by the U.S.D.A.?

Tr. at 192-93.

The Administrator also contends the ALJ erroneously failed to deny Mr. Woudenberg's request for Mr. Dawson's witness statement as untimely because the request was not made immediately after Mr. Dawson's direct examination (Administrator's Appeal Br. at 10).

A request for a witness statement pursuant to 7 C.F.R. § 1.141(h)(1)(iii) must be made at the proper time, but neither the Jencks Act nor the Rules of Practice require that the request be made immediately at the close of direct examination. Although a request for a witness statement, pursuant to 7 C.F.R. § 1.141(h)(1)(iii), should be denied if it comes too early or too late, a request made during the course of cross-examination is timely.[9] Here, the request was made during the course of Ms. Kahn's cross-examination of Mr. Dawson; therefore, I find Mr. Woudenberg's request for Mr. Dawson's witness statement was timely, and I reject the Administrator's contention that the ALJ erroneously failed to reject Mr. Woudenberg's request as untimely.

The Administrator contends the ALJ erroneously refused the Administrator's offer to provide Mr. Dawson's investigative report to the ALJ for an *in camera* examination to determine which, if any, of the documents in the investigative report were producible under 7 C.F.R. § 1.141(h)(1)(iii) (Administrator's Appeal Br. at 11-13).

The record establishes that the Administrator offered to provide Mr. Dawson's investigative report to the ALJ, but the ALJ refused the Administrator's offer (Tr. at 197-201); however, the record does not establish that the Administrator's offer at this point in the hearing, was for the purposes of an *in camera* examination in accordance with the procedures articulated in *Machado*, 42 Agric. Dec. 820, 852-57 (U.S.D.A. 1983) (Decision and Remand Order as to Respondent Cozzi). Subsequently, the ALJ agreed to conduct an *in camera* examination of Mr. Dawson's investigative report and Ms. Deskins stated the Administrator was not asking for an *in camera* examination (ALJ's Decision and Order at 23; Tr. at 256-57). In light of the ALJ's agreement to conduct an *in camera* examination of Mr. Dawson's investigative report and the Administrator's refusal to provide the investigative report to the ALJ for an *in camera* examination, I decline to disturb the ALJ's ruling striking Mr. Dawson's testimony.

Fifth, the Administrator contends the ALJ erroneously failed to assess Mr. Woudenberg a civil penalty and erroneously failed to revoke Mr. Woudenberg's Animal Welfare Act license (Administrator's Appeal Br.

[9] Machado, 42 Agric. Dec. 820, 844 (U.S.D.A. 1983) (Decision and Remand Order as to Respondent Cozzi).

at 16-17).

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

> [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.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[10]

The purpose of assessing a civil penalty is not to punish the violator, but to deter the violator, as well as others, from similar behavior.[11] When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors:

---

[10] Perry, 72 Agric. Dec. 635, 680-81 (U.S.D.A. 2013) (Decision as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.); Greenly, 72 Agric. Dec. 603, 626 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly and Minn. Wildlife Connection, Inc.), *aff'd per curiam*, No. 13-2882 (8th Cir. Aug. 22, 2014); Mazzola, 68 Agric. Dec. 822, 849 (U.S.D.A. 2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); Pearson, 68 Agric. Dec. 685, 731 (U.S.D.A. 2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

[11] Zimmerman, 56 Agric. Dec. 433, 461 (U.S.D.A. 1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (U.S.D.A. 1998).

(1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[12]

I find Mr. Woudenberg operates a small business. Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) did not result in injury or harm to the animals and did not present a risk of injury or harm to the animals. Moreover, the record contains no evidence that the five random source animals which were donated to Mr. Woudenberg had been stolen. Therefore, I do not find Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) grave.

The record establishes that Mr. Woudenberg made a good faith attempt to comply with 9 C.F.R. § 2.132. Moreover, I do not find that Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) were willful violations.[13] The record establishes that Mr. Woudenberg obtained a written certification from the owner of each donated animal stating the donated animal was bred and raised by the owner, namely, not a random source animal. Mr. Woudenberg did not know or have reason to know that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder falsely certified that the animals they donated to Mr. Woudenberg were not random source animals. Moreover, Mr. Woudenberg took precautions to ensure that the certifications were accurate. Therefore, I conclude Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) were not intentional and did not result from Mr. Woudenberg's careless disregard of regulatory requirements. Had Mr. Beemer's, Mr. Hawley's, Ms. Castle's, and Ms. Snyder's certifications been accurate, Mr. Woudenberg would not only have been in compliance with 9 C.F.R. § 2.132(d), but also, would not have violated 9 C.F.R. § 2.132(a), which only applies when a class "B" dealer obtains live random source dogs and cats.

---

[12] 7 U.S.C. § 2149(b).

[13] An act is willful if the violator intentionally does an act which is prohibited or intentionally fails to do an act which is required, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. Ash, 71 Agric. Dec. 900, 913 (U.S.D.A. 2012); Bauck, 68 Agric. Dec. 853, 860-61 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); D&H Pet Farms, Inc., 68 Agric. Dec. 798, 812-13 (U.S.D.A. 2009); Bond, 65 Agric. Dec. 92, 107 (U.S.D.A. 2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); Stephens, 58 Agric. Dec. 149, 180 (U.S.D.A. 1999); Arab Stock Yard, Inc., 37 Agric. Dec. 293, 306 (U.S.D.A. 1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

I do not find assessment of a civil penalty or revocation of Mr. Woudenberg's Animal Welfare Act license justified by the facts. I find, under the circumstances in this proceeding, the issuance of a cease and desist order against Mr. Woudenberg is sufficient to ensure Mr. Woudenberg's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

Respondent's Brief in Opposition to Complainant's Appeal Brief

In addition to his response to the Administrator's Appeal Brief, Mr. Woudenberg raises one issue in Respondent's Brief in Opposition to Complainant's Appeal Brief. Mr. Woudenberg contends the Administrator was required to file an appeal petition within 30 days after the Hearing Clerk served the Administrator with the ALJ's Decision and Order and the Administrator failed to file a timely appeal petition (Respondent's Brief in Opposition to Complainant's Appeal Brief at 22-23).

The Rules of Practice provide that a party may file an appeal petition within 30 after receiving service of an administrative law judge's written decision, as follows:

> **§ 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, . . . 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.

7 C.F.R. § 1.145(a). The record does not establish the date the Hearing Clerk served the Administrator with the ALJ's December 20, 2013, Decision and Order; however, I infer the Hearing Clerk served the Administrator with the ALJ's Decision and Order on or before

January 13, 2014, based upon the Administrator's January 13, 2014, motion to extend the time for filing an appeal petition.[14]

I granted the Administrator's January 13, 2014, motion for an extension of time and extended the time for filing an appeal petition to March 21, 2014.[15] The Administrator filed the Administrator's Appeal Petition on March 19, 2014, two days prior to the expiration of the extended time for filing the Administrator's Appeal Petition, but after the 30-day period for filing an appeal petition in 7 C.F.R. § 1.145(a).

Mr. Woudenberg, citing *Reinhart v. U.S. Department of Agriculture*, 39 F. App'x 954 (6th Cir. 2002), contends the time for seeking review of an administrative order is mandatory and jurisdictional and the time for filing an appeal petition may not be extended beyond the period provided in 7 C.F.R. § 1.145(a). Mr. Woudenberg argues any appeal petition filed after the period provided in 7 C.F.R. § 1.145(a) is late-filed irrespective of any order by the Judicial Officer purportedly extending the time for filing the appeal petition.

As an initial matter, *Reinhart v. U.S. Department of Agriculture*, 39 F. App'x 954 (6th Cir. 2002), is inapposite. *Reinhart* does not concern an appeal of an administrative law judge's decision to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a), but, instead, concerns the appeal of the Judicial Officer's decision in *Reinhart*, 59 Agric. Dec. 721 (U.S.D.A. 2000), to the United States Court of Appeals for the Sixth Circuit, pursuant to 15 U.S.C. § 1825(b)(2). Moreover, the Rules of Practice specifically provide that the time for filing any document or paper required or authorized to be filed under the Rules of Practice may be extended, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (f) *Extensions of time*. The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or

[14] Complainant's Motion for Extension of Time.
[15] Order Extending Time for Filing Complainant's Appeal Pet.

> the Judicial Officer as provided in § 1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). Therefore, I reject Mr. Woudenberg's contention that the time for filing an appeal petition may not be extended beyond the period provided in 7 C.F.R. § 1.145(a), and I reject Mr. Woudenberg's contention that the Administrator's Appeal Petition was late-filed.

Findings of Fact

1. Mr. Woudenberg is an individual with a mailing address in Michigan, who, at all times material to this proceeding, operated under the business name R & R Research.

2. At all times material to this proceeding, Mr. Woudenberg operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Woudenberg was a "class 'B' licensee," as that term is defined in the Regulations.

4. At all times material to this proceeding, Mr. Woudenberg held Animal Welfare Act license number 34-B-0001.

5. On or about April 18, 2008, Mr. Woudenberg obtained a live dog from Mr. Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the dog.

6. On or about June 3, 2008, Mr. Woudenberg obtained a live dog from Mr. Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the dog.

7. On or about June 10, 2008, Mr. Woudenberg obtained a live dog from Mr. Hawley, who signed a certification that he had bred and raised the dog.

8. On or about August 28, 2008, Mr. Woudenberg obtained a live cat from Ms. Castle, who signed a certification that she had bred and raised the cat.

9. On or about November 4, 2008, Mr. Woudenberg obtained a live dog from Ms. Snyder, who signed a certification that she had bred and raised the dog.

10. At no time material to this proceeding, was Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, required to obtain an Animal Welfare Act license.

11. At no time material to this proceeding, did Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder hold an Animal Welfare Act license.

12. At no time material to this proceeding, did Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder work for or operate an animal pound or animal shelter.

13. None of the animals that Mr. Woudenberg obtained from Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder, as described in Findings of Fact numbers 5 through 9, had been born and raised on Mr. Beemer's, Mr. Hawley's, Ms. Castle's, or Ms. Snyder's premises.

14. Mr. Woudenberg personally accepted the animals identified in Findings of Fact numbers 5 through 9 and confirmed the identities of the donors named in Findings of Fact numbers 5 through 9.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. At all times material to this proceeding, Mr. Woudenberg was a "dealer," as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Woudenberg was a "class 'B' licensee," as that term is defined in the Regulations.

4. Class "B" dealers may obtain live random source dogs and cats only from: (1) another dealer who is licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; and (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an animal pound or animal shelter (9 C.F.R. § 2.132(a)).

5. As Mr. Woudenberg obtained the four dogs and the cat that are the subject of this proceeding from persons who did not breed and raise them on their premises, the dogs and the cat are "random source" animals, as that term is defined in 9 C.F.R. § 1.1.

6. None of the donors of the four dogs and the cat in question was: (1) a dealer licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; or (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an animal pound or animal shelter.

7. Mr. Woudenberg obtained live random source dogs and cats from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of random source dogs and cats, in violation of 9 C.F.R. § 2.132(a).

8. An order directing Mr. Woudenberg to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Woudenberg, his 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. In particular, Mr. Woudenberg shall cease and desist from obtaining live

random source dogs and cats from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of live random source dogs and cats.

This Order shall become effective upon service of this Order on Mr. Woudenberg.

RIGHT TO JUDICIAL REVIEW

Mr. Woudenberg has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Woudenberg must seek judicial review within 60 days after entry of the Order in this Decision and Order.[16]

___

[16] 7 U.S.C. § 2149(c).

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: CRAIG PERRY, AN INDIIDUAL d/b/a PERRY'S EXOTIC PETTING ZOO, AND PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION.
Docket No. 12-0645.
Decision and Order.
Filed July 17, 2014.

EAJA – Administrative procedure – Animal welfare – Applicants, eligibility of – Application, contents of – Application, time for filing – Attorney fees – Awards, standards for – Documentation of fees and expenses – Finality of adjudication – Joint exhibition of animals – Remand.

Larry Thorson, Esq. for Applicants.
Colleen Carroll, Esq. for APHIS.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Procedural History

On January 17, 2012, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter Applicants] instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R.§§ 1.180-.203) [hereinafter EAJA Rules of Practice] by filing an Application for Award of Attorney's Fees and Expenses [hereinafter First EAJA Application]. On February 3, 2012, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], filed a motion to strike the Applicants' First EAJA Application as premature because the adversary adjudication for which the Applicants seek attorney fees and other expenses[1] had not become final and unappealable.[2]

[1] The adversary adjudication for which the Applicants seek attorney fees and other expenses is *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

On February 6, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued an Order Deferring to Judicial Officer whereby the ALJ referred the proceeding to the Office of the Judicial Officer for consideration and decision. On May 23, 2012, I issued a Remand Order stating, as follows:

> The EAJA Rules of Practice provide that the Judicial Officer's jurisdiction is triggered when an Equal Access to Justice Act applicant or agency counsel seeks review of an adjudicative officer's initial decision on the fee application (7 C.F.R. § 1.201(a)). As there has been no request for review of an initial decision on the Applicants' EAJA Application, I have no jurisdiction over this Equal Access to Justice Act proceeding and I remand the proceeding to the ALJ for further proceedings in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.

Remand Order at 2 (footnote omitted).

Terranova Enterprises, Inc., 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), became final and unappealable on September 17, 2012. On September 27, 2012, the ALJ granted the Applicants' First EAJA Application, awarded attorney fees and other expenses in the amount of $16,548.83 to Larry J. Thorson, and suggested that the Applicants should have filed a renewed application for attorney fees and other expenses,[3] as follows:

> I would have welcomed a renewed application for attorneys' fees and costs, particularly considering USDA's objections on the ground that Mr. Thorson's application was pre-maturely filed. I note that in light of

---

[2] Complainant's Motion to Strike Application Filed by Respondents Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc., for Award of Attorney's Fees and Expenses.

[3] Miscellaneous Decision and Order Amending the Caption and Granting Attorney Fees and Costs to Larry Thorson, Esq., Counsel for Perry Respondents [hereinafter ALJ's Decision as to the First EAJA Application].

> the assessment of a civil penalty, Mr. Thorson may have concluded that his application would be denied. However, as discussed infra., the failure to prevail on one allegation does not totally preclude an award of fees and costs.

ALJ's Decision as to the First EAJA Application at 3, n.2.

On October 11, 2012, the Applicants filed Renewed Application for Award of Attorney's Fees and Expenses [hereinafter Second EAJA Application].[4] On November 2, 2012, prior to the expiration of APHIS's time for filing an answer in response to the Applicants' Second EAJA Application,[5] the ALJ dismissed the Second EAJA Application stating, as follows:

> By Order issued September 27, 2012, I awarded fees and costs upon the application of Larry Thorson, Esq., counsel for Respondents Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. On October 11, 2012, Mr. Thorson renewed his application for fees, which had been filed earlier in 2012. Since I already issued an Order awarding fees on the earlier application, the later filed renewed application is moot, and therefore, is hereby DISMISSED.

Miscellaneous Decision and Order Dismissing Renewed Appl. for Attorney's Fees and Costs [hereinafter ALJ's Decision as to the Second EAJA Application] (emphasis in original).

On November 5, 2012, APHIS appealed the ALJ's Decision as to the First EAJA Application.[6] On November 30, 2012, the Applicants filed a response to APHIS's appeal of the ALJ's Decision as to the First EAJA

---

[4] The Second EAJA Application is not merely a renewal of the First EAJA Application. The Applicants request an award of $17,648 for attorney fees and $603.83 for other expenses in the First EAJA Application (First EAJA Application at 2). The Applicants request an award of $18,540 for attorney fees and $603.83 for other expenses in the Second EAJA Application (Second EAJA Application at 4).

[5] *See* 7 C.F.R. § 1.195(a).

[6] Agency's Pet. for Appeal; and Request to Amend Caption.

Application[7] and appealed the ALJ's Decision as to the Second EAJA Application.[8] On December 18, 2012, APHIS filed a response to the Applicants' appeal of the ALJ's Decision as to the Second EAJA Application.[9]

On February 22, 2013, I issued a Second Remand Order in which I vacated the ALJ's Decision as to the First EAJA Application and the ALJ's Decision as to the Second EAJA Application and remanded the proceeding to the ALJ to consider the Applicants' Second EAJA Application, concluding as follows:

> The adversary adjudication for which the Applicants seek attorney fees and other expenses, *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ___ (July 19, 2012), did not become final and unappealable until September 17, 2012. Therefore, the Applicants' First EAJA Application, which was filed on January 17, 2012, 8 months before *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ___ (July 19, 2012), became final and unappealable, was prematurely filed and is dismissed. The Applicants' Second EAJA Application which was filed on October 11, 2012, 24 days after *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ___ (July 19, 2012), became final and unappealable, was timely filed. Therefore, the ALJ's Decision as to the First EAJA Application in which the ALJ granted the Applicants' premature First EAJA Application is vacated, the ALJ's Decision as to the Second EAJA Application in which the ALJ dismissed the Applicants' timely filed Second EAJA Application is vacated, and the proceeding is remanded

[7] Applicant's [sic] Resp. and Resistance to Agency's Pet. for Appeal and Mem. of Points and Authorities.

[8] Applicants' Pet. for Appeal from Miscellaneous Decision and Order Dismissing Renewed Application for Attorney's Fees and Costs.

[9] Agency Resp. to Pet. for Appeal.

> to the ALJ to consider the Applicants' Second EAJA Application.

Second Remand Order at 4-5 (footnote omitted).

On February 28, 2013, the ALJ granted the Applicants' Second EAJA Application and awarded attorney fees and other expenses in the amount of $16,548.83 to Mr. Thorson.[10]

On March 14, 2013, APHIS filed Agency's Petition for Appeal of Decision and Order on Remand [hereinafter Appeal Petition]. On April 19, 2013, the Applicants filed Applicant's [sic] Response and Resistance to Agency's Petition for Appeal and Memorandum of Points. On May 14, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

APHIS contends on appeal that the ALJ did not afford APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application, as required by 7 C.F.R. § 1.195(a) (Appeal Pet. at 13-15). The record establishes that the ALJ issued the ALJ's Decision as to the Second EAJA Application and the ALJ's Decision on Remand as to the Second EAJA Application prior to the expiration of the time for APHIS's filing an answer in response to the Second EAJA Application. Therefore, I considered remanding this proceeding to the ALJ to provide APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application. However, given the torturous course of this proceeding, the numerous filings by APHIS and the Applicants in which they clearly articulate their positions in this proceeding, and the ALJ's Decision on Remand as to the Second EAJA Application, I conducted a telephone conference on July 8, 2014, with Mr. Thorson, counsel for the Applicants, and Ms. Colleen A. Carroll, counsel for APHIS, to determine if the parties were willing to forego further proceedings before the ALJ.[11] Mr. Thorson and Ms. Carroll agreed that I should forego further proceedings before the ALJ and issue a final agency decision.

---

[10] Decision and Order on Remand Granting Attorney Fees and Costs to Larry Thorson, Esq., Counsel for Perry Resp'ts [hereinafter ALJ's Decision on Remand as to the Second EAJA Application].

[11] Ms. Sherida Hardy, Legal Assistant, Office of the Judicial Officer, was also on the conference call.

Based upon a careful consideration of the record, I issue this final decision awarding the Applicants attorney fees and other expenses incurred in connection with *Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

Discussion

The Equal Access to Justice Act requires an agency that conducts an adversary adjudication to award fees and other expenses to a prevailing party other than the United States, as follows:

> **§ 504. Costs and fees of parties**
>
> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

A prevailing party must submit an application for fees and other expenses to the agency from which the party seeks fees and other expenses within 30 days after a final disposition of the adversary adjudication.[12] The date of a final disposition is defined, as follows:

[12] 5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a).

§ 1.193 Time for filing application.

. . . .
(b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b).

An award of attorney fees and other expenses is appropriate if: (1) the applicant is a prevailing party, other than the United States, in an adversary adjudication; (2) the agency's position in the adversary adjudication was not substantially justified; (3) the applicant has not unduly or unreasonably protracted the adversary adjudication; and (4) the award sought is not rendered unjust due to special circumstances. The ALJ found the Applicants were prevailing parties in an adversary adjudication, APHIS's position in the adversary adjudication was not substantially justified, and no special circumstances rendered the award sought unjust. The ALJ awarded Mr. Thorson attorney fees and other expenses incurred in connection with *Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), 71 Agric. Dec. 876 (U.S.D.A. 2012), in the amount of $16,548.83.[13]

While APHIS concedes the Applicants were prevailing parties in a significant and discrete substantive portion of the adversary adjudication in question (Appeal Pet. at 15 n.28, 18), APHIS raises 10 issues on appeal and requests that I reverse the ALJ's Decision on Remand as to the Second EAJA Application.

First, APHIS contends the ALJ erroneously failed to adopt the case caption which I ordered adopted in a Ruling Granting Motion to Amend Case Caption (Appeal Pet. at 12).

On February 1, 2013, I issued an order stating a cursory review of

[13] ALJ's Decision on Remand as to the Second EAJA Application.

Terranova Enterprises, Inc., 71 Agric. Dec. 867 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), reveals that Mr. Thorson was not a party to that proceeding, but, instead, served as counsel to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., who were parties in that adversary adjudication and granting APHIS's request to amend the caption of this proceeding to read, as follows:

In re:	)	EAJA Docket No. 12-0645
	)	
Craig Perry, an individual, d/b/a	)	
Perry's Exotic Petting Zoo; and	)	
Perry's Wilderness Ranch & Zoo,	)	
Inc., an Iowa corporation,	)	
	)	
Applicants	)	

Ruling Granting Motion to Amend Caption at 3.

Despite that ruling, the ALJ's Decision on Remand as to the Second EAJA Application is captioned, as follows:

Docket No. 12-0645

In re:

Application for Attorney's Fees and Costs
of LARRY THORSON, ESQ., counsel
for Respondents CRAIG PERRY, an individual doing
business as PERRY'S EXOTIC PETTING
ZOO; PERRY'S WILDERNESS RANCH
& ZOO, INC., an Iowa corporation,

Applicant.

I find the ALJ's failure to amend the case caption harmless error. Nonetheless, I amend the case caption to reflect the fact that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc. are the Applicants in this proceeding.

Second, APHIS contends the ALJ erroneously awarded attorney fees and other expenses to Mr. Thorson (Appeal Pet. at 12).

The Equal Access to Justice Act provides that fees and other expenses shall be awarded to a prevailing party, other than the United States, in an adversary adjudication.[14] Similarly, the EAJA Rules of Practice provide the applicant must be a party to the adversary adjudication for which the applicant seeks attorney fees and other expenses under the Equal Access to Justice Act, as follows:

> **§ 1.184 Eligibility of applicants.**
>
> (a) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must meet one of the following conditions:
>
> (1) The applicant must be a prevailing party to the adversary adjudication for which it seeks an award; or
>
> (2) The applicant must be a party to an adversary adjudication arising from an agency action to enforce the party's compliance with a statutory or regulatory requirement in which the demand by the agency was substantially in excess of the decision of the adjudicative officer and the demand is unreasonable when compared with such decision under the facts and circumstances of the case.

7 C.F.R. § 1.184(a).

The adversary adjudication for which the Applicants in this proceeding seek attorney fees and other expenses under the Equal Access to Justice Act is *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.). Mr. Thorson was not a party, but, instead, served as counsel to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., who

[14] 5 U.S.C. § 504(a)(1).

were parties in that adversary adjudication. I find the ALJ's award of attorney fees and other expenses to Mr. Thorson, error.[15] Therefore, I award attorney fees and other expenses to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., rather than to Mr. Thorson.

Third, APHIS contends the ALJ erroneously failed to conduct further EAJA proceedings as ordered by the Judicial Officer in the Second Remand Order and set forth in the EAJA Rules of Practice. Specifically, APHIS contends the ALJ did not consider the Applicants' Second EAJA Application and the ALJ failed to afford APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application. (Appeal Pet. at 13-15).

On February 22, 2013, I remanded this proceeding to the ALJ for further proceedings regarding the Applicants' Second EAJA Application in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.[16] I find APHIS's contention that the ALJ failed to consider the Applicants' Second EAJA Application mere speculation. However, I agree with APHIS's contention that the ALJ issued the ALJ's Decision as to the Second EAJA Application and the ALJ's Decision on Remand as to the Second EAJA Application before APHIS filed an answer in response to the Second EAJA Application and before the expiration of the time for filing an answer in response to the Second EAJA Application. Generally, I would remand this proceeding to the ALJ to provide APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application, as provided in 7 C.F.R. § 1.195(a); however, pursuant to the agreement of the parties during the July 8, 2014, telephone conference described in this Decision and Order, *supra*, I do not remand this proceeding to the ALJ.

Fourth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application based upon the Applicants' failure to identify the APHIS position that the Applicants allege was not

---

[15] *See* Astrue v. Ratliff, 560 U.S. 586, 591-93 (2010) (holding an Equal Access to Justice Act award is made to a litigant not to the litigant's attorney); FDL Tech., Inc. v. United States, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (stating an award under the Equal Access to Justice Act is made to the prevailing party, not to the prevailing party's attorney); Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1509, 1511 (11th Cir. 1988) (same).

[16] Second Remand Order at 6.

substantially justified, as required by 7 C.F.R. § 1.190(a) (Appeal Pet. at 16).

The EAJA Rules of Practice require that an applicant identify the United States Department of Agriculture position which the applicant alleges was not substantially justified or show that the United States Department of Agriculture demand was excessive and unreasonable, as follows:

> **§ 1.190 Contents of application.**
>
> (a) An application for an award of fees and expenses under EAJA shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:
>
> (1) Show that the applicant has prevailed and identify the position of the Department that the applicant alleges was not substantially justified and shall briefly state the basis for such allegation; or
>
> (2) Show that the demand by the Department in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

7 C.F.R. § 1.190(a).

The Applicants identify the APHIS position which they allege was not substantially justified, as follows:

> 3. The position of the USDA was not substantially justified in bringing Mr. Perry and/or Perry's Wilderness Ranch & Zoo, Inc. d/b/a Perry's Exotic Petting Zoo into this matter.

Second EAJA Application ¶ 3 at 2. The Applicants' identification of the APHIS position which the Applicants allege was not substantially justified is marked by perplexing brevity, and I find no brief statement of the basis for the Applicants' allegation in the Applicants' Second EAJA Application. However, the Applicants incorporate into the Second EAJA Application all of the arguments in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), as follows:

> 1. This Court is familiar with the relevant facts and proceedings. To the extent that facts, law, procedural developments, trial transcript, exhibits, arguments, or circumstances other than those specifically cited in this application may be relevant, the Perry Respondents incorporate these by reference and ask the Court to note the same.

Second EAJA Application ¶ 1 at 1.

The Applicants' arguments in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), clearly identify the APHIS position which the Applicants allege was not substantially justified and clearly provide the basis for the Applicants' allegation. Therefore, I find the Applicants complied with the requirements of 7 C.F.R. § 1.190(a) by incorporating the arguments presented in the underlying adversary adjudication into the Applicants' Second EAJA Application.

Fifth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application because the Applicants failed to provide a net worth exhibit, as required by 7 C.F.R. § 1.191(a) (Appeal Pet. at 16-17).

The EAJA Rules of Practice require an applicant for fees and expenses to provide an exhibit showing the net worth of the applicant, as follows:

§ 1.191 Net worth exhibit.

> (a) An applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1.184 of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

7 C.F.R. § 1.191(a).

The Applicants state Mr. Perry's net worth did not exceed $2,000,000 and Perry's Wilderness Ranch & Zoo, Inc.'s net worth did not exceed $7,000,000 at the time APHIS initiated *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).[17] In support of these assertions, the Applicants submitted Mr. Perry's affidavit[18] in which Mr. Perry attests that, at the time APHIS initiated the adversary adjudication in question, his net worth was well under $2,000,000; Perry's Wilderness Ranch & Zoo, Inc., had a net worth well under $7,000,000; and Mr. Perry was Perry's Wilderness Ranch & Zoo, Inc.'s only employee.

The ALJ could have required the Applicants to file additional information to determine their eligibility for an award. Instead, the ALJ found Mr. Perry's affidavit sufficient to determine the Applicants' eligibility for an Equal Access to Justice Act award, as follows:

> . . . . I credit the affidavits [sic] accompanying the application that attest that Respondent Craig Perry's net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents [sic]

[17] Second EAJA Application ¶ 6 at 2-3.
[18] Aff. of Craig Perry in Support of Award of Attorney's Fees, dated October 9, 2012.

> did not have a net worth in excess of seven million dollars.

ALJ's Decision on Remand as to the Second EAJA Application at 3. The Applicants correctly note APHIS does not contradict the statements in Mr. Perry's affidavit but merely contend the Applicants failed to attach a net worth exhibit to the Second EAJA Application.[19]

Based upon the ALJ's finding that Mr. Perry's affidavit is credible, the fact that Mr. Perry's affidavit is uncontroverted, the already protracted history of this proceeding, and the agreement of the parties, during the July 8, 2014, telephone conference described in this Decision and Order, *supra*, to forego further proceedings before the ALJ, I decline to remand this proceeding to the ALJ to require the Applicants to file additional information regarding the net worth of the Applicants. Moreover, I find no basis on which to disturb the ALJ's determination that, at the time APHIS initiated *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), Mr. Perry's net worth did not exceed $2,000,000, and Perry's Wilderness Ranch & Zoo, Inc.'s net worth did not exceed $7,000,000.

Sixth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application because the Applicants' Second EAJA Application was not accompanied by full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c) (Appeal Pet. at 17).

The EAJA Rules of Practice require documentation of fees and expenses, as follows:

> **§ 1.192 Documentation of fees and expenses.**
>
> (a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

[19] Applicant's [sic] Resp. and Resistance to Agency's Pet. for Appeal and Mem. of Points at 4.

> (b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing on behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.
>
> (1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.
>
> (2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.
>
> (c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c).

The Applicants attached to the Second EAJA Application a full documentation of the fees and expenses for which the Equal Access to Justice Act award is sought. The documentation states the actual time expended and the hourly rate at which Mr. Thorson computed attorney fees and describes the specific services performed by Mr. Thorson and the other expenses. In support of this documentation, the Applicants submitted Mr. Thorson's affidavit[20] in which Mr. Thorson attests to accuracy of the documentation of the fees and expenses and the hourly rate at which he computed attorney fees in *Terranova Enterprises, Inc.*,

[20] Aff. of Larry J. Thorson, dated October 10, 2012.

71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.). Therefore, I find the Applicants' Second EAJA Application was accompanied by full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c).

Seventh, APHIS contends the ALJ erroneously found APHIS's position in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), was not substantially justified (Appeal Pet. at 17-21).

The EAJA Rules of Practice provide that a prevailing party may receive an award, unless the position of the United States Department of Agriculture was substantially justified, as follows:

> **§ 1.185 Standards for awards.**
>
> (a) Prevailing party. (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Department was substantially justified. The position of the Department includes, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the position of the Department was substantially justified is on the agency.

7 C.F.R. § 1.185(a).

APHIS bears the burden of proving that its position in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), was substantially justified. In order to meet its burden of proof, APHIS must

show that its position had a reasonable basis in both law and fact.[21] APHIS's failure to prevail in the underlying adversary adjudication does not create a presumption that APHIS's position was not substantially justified.[22]

The alleged violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], on which Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., prevailed in the adversary adjudication concerned the care of elephants exhibited at the Iowa State Fair by Terranova Enterprises, Inc., and Douglas Keith Terranova [hereinafter Terranova Respondents] in August 2008. APHIS took the position in the adversary adjudication that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc. jointly exhibited the elephants with the Terranova Respondents and were, therefore, jointly liable with the Terranova Respondents for violations of the Animal Welfare Act.

I have long held, when two or more persons exhibit animals jointly, they all can be liable for violations of the Animal Welfare Act that arise out of that exhibition and it is not necessary that their relationship meet the requirements for a partnership or joint venture.[23] Therefore, I

---

[21] *See* Pierce v. Underwood, 487 U.S. 552, 565 (1988) (holding a substantially justified position is one that would satisfy a reasonable person and must have a reasonable basis in law and fact); Harmon v. United States, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, well founded in law and fact, and solid); Frey v. CFTC, 931 F.2d 1171, 1174 (7th Cir. 1991) (stating the standard for "substantial justification," within the meaning of the Equal Access to Justice Act, is one of simple reasonableness; to avoid an award of fees the agency must prove that the proceeding had a reasonable basis in law and fact); Derickson Co. v. NLRB, 774 F.2d 229, 232 (8th Cir. 1985) (holding the test of substantial justification is a practical one, namely, whether the agency's position was reasonable both in law and fact); Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1308 (8th Cir.) (stating the test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

[22] Scarborough v. Principi, 541 U.S. 401, 415 (2004) (stating "substantially justified" is not to be read to raise a presumption that the government's position was not substantially justified simply because it lost the case); Harmon v. United States, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, even if it is not correct); S & H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982) (stating the burden of showing substantial justification for a case the government lost is not insurmountable).

[23] White, 49 Agric. Dec. 123, 154 (U.S.D.A. 1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of

conclude APHIS's position in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), had a reasonable basis in law.

The Administrator introduced very little evidence that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly engaged in the exhibition of elephants with the Terranova Respondents at the Iowa State Fair. In contrast, Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., clearly established that the Terranova Respondents owned and cared for the elephants in question; Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s employees and volunteers were prohibited from entering the Terranova Respondents' elephant area; and Mr. Perry and Perry's Ranch & Zoo, Inc., had no control or authority over the care of the Terranova Respondents' elephants. When I examine the administrative record as a whole, I find APHIS did not have a reasonable basis in fact for its position regarding Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s alleged joint exhibition of the Terranova Respondents' elephants at the Iowa State Fair.

In order to prove that its position in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), was substantially justified, APHIS must show that its position had a reasonable basis in both law and fact. As APHIS failed to prove that it had a reasonable basis in fact, I conclude APHIS's position in the adversary adjudication in question was not substantially justified.

Eighth, APHIS contends the ALJ erroneously failed to reduce the award of attorney fees to the Applicants because the request for attorney fees includes services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense in the adversary adjudication

---

the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); Post, 47 Agric. Dec. 542, 547 (U.S.D.A. 1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf.* McCall, 52 Agric. Dec. 986, 998 (U.S.D.A. 1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

(Appeal Pet. at 22). APHIS identifies two entries and portions of two other entries in the documentation of fees attached to the Applicants' Second EAJA Application that APHIS contends describe services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense (Appeal Pet. at 24, n.62).[24] In addition, APHIS contends none of the attorney fees for Mr. Thorson's communications with counsel for the Key Respondents[25] in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), could be related to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense (Appeal Pet. at 25).

The Applicants state all the attorney fees appearing on the documentation attached to the Second EAJA Application "were actually incurred by" Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., in connection with *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).[26] In addition, the Applicants submitted Mr. Thorson's affidavit[27] in which Mr. Thorson attests to the accuracy of the documentation of fees attached to the Second EAJA Application. I give more weight to the Applicants' statements and Mr. Thorson's affidavit than I give to APHIS's contention that four entries on the documentation of fees appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense, and APHIS's contention that Mr. Thorson's communications with counsel for the Key Respondents could not be related to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense. Therefore, I reject APHIS's contention that the ALJ erroneously failed to reduce the award of attorney fees to the Applicants based upon the contested entries on the documentation of fees attached to the Second EAJA Application.

---

[24] The services described in the four entries which APHIS contends include services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense, are for 2.5 hours of attorney services. Mr. Thorson billed the Applicants $400 for these services.

[25] Eugene "Trey" Key, III, and Key Equipment Co., Inc., d/b/a Culpepper & Merriweather Circus, were respondents in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.). I infer APHIS's reference to the "Key Respondents" is a reference to Mr. Key and Key Equipment Co., Inc.

[26] Second EAJA Application ¶ 7 at 3.

[27] *See supra* note 20.

Ninth, APHIS contends the ALJ erroneously failed to reduce the award of fees and other expenses to the Applicants because the Key Respondents unreasonably protracted *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), by advancing a challenge to the Secretary of Agriculture's confiscation authority in the wrong forum (Appeal Pet. at 22).

The EAJA Rules of Practice provide that an award to a prevailing party will be reduced or denied if an applicant has unduly or unreasonably protracted the proceeding, as follows:

> **§ 1.185 Standards for awards.**
>
> (a) Prevailing Party. (1) . . . .
>
> (2) An award to a prevailing applicant will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

7 C.F.R. § 1.185(a)(2).

The EAJA Rules of Practice clearly provide for a reduction or denial of an award if a prevailing applicant has unduly or unreasonably protracted the adversary adjudication. The Key Respondents are not applicants in this proceeding; Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., are the Applicants in this proceeding. Therefore, even if I were to find that the Key Respondents unduly or unreasonably protracted *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), I would not reduce or deny the award of fees and other expenses to the Applicants.

Tenth, APHIS contends the ALJ erroneously calculated the amount of the award. Specifically, APHIS contends the ALJ awarded Mr. Thorson attorney fees at the rate of $150 an hour, which exceeds the maximum hourly rate that can be awarded in this proceeding. (Appeal Pet. at

22-26).

The ALJ awarded Mr. Thorson attorney fees at the rate of $150 per hour, as follows:

> In addition, I must reduce Mr. Thorson's hourly rate for service. Although Mr. Thorson's rate is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of $150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of $16,548.83 ($150.00 x 106.30 hours + 603.83) is hereby awarded to Larry Thorson, Esq.

ALJ's Decision on Remand as to the Second EAJA Application at 3-4.

The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed $150 per hour, as follows:

> **§ 1.186 Allowable fees and expenses.**
>
> . . . .
> (b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed $150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of $150 became effective March 3, 2011.[28] The final rule explicitly states the maximum hourly attorney fees rate of $150 only applies to proceedings initiated on and

[28] 76 Fed. Reg. 11,667 (Mar. 3, 2011).

after the effective date of the final rule, as follows:

> SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from $125.00 to $150.00 for covered proceedings initiated on and after the effective date of this final rule.
>
> DATES: This final rule is effective March 3, 2011.
> . . . .
> SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from $125.00 to $150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

Kevin Shea, Acting Administrator, APHIS, initiated the adversary adjudication for which the Applicants seek attorney fees and other expenses, on July 23, 2009.[29] Therefore, the maximum hourly attorney fees rate of $150 set forth in current 7 C.F.R. § 1.186(b) is not applicable to this proceeding, and I find the ALJ erroneously awarded attorney fees at the rate of $150 an hour. Instead, I find the maximum hourly attorney fees rate of $125 is applicable to this proceeding.[30]

The Applicants seek a total award of $19,143.83 for 123.6 hours of attorney services and $603.83 for other expenses.[31] I agree with the Applicants that they are eligible for an award for 123.6 hours for attorney services and $603.83 for other expenses; however, I apply the maximum hourly attorney fees rate of $125 which is applicable to the adversary

[29] Terranova Enters., Inc., 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.)
[30] 7 C.F.R. § 1.186(b) (2010).
[31] Second EAJA Application ¶¶ 7-10 at 3.

adjudication for which the Applicants seek fees and other expenses. Accordingly, I award the Applicants $16,053.83 for fees and other expenses incurred by the Applicants in connection with *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. Craig Perry is an individual whose business address is in Iowa.

3. Perry's Wilderness Ranch & Zoo, Inc., is an Iowa corporation.

4. On July 23, 2009, Kevin Shea, Acting Administrator, APHIS, instituted an adversary adjudication, *Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, against Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.[32]

5. At the time APHIS initiated *Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, Mr. Perry had a net worth of less than $2,000,000.

6. At the time APHIS initiated *Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, Perry's Wilderness Ranch & Zoo, Inc., had a net worth of less than $7,000,000 and had fewer than 500 employees.

7. *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), became final and unappealable on September 17, 2012.

8. The Applicants' Second EAJA Application, which was filed on October 11, 2012, 24 days after *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), became final and unappealable, was timely filed.

[32] Terranova Enters., Inc., 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

9. The Applicants were prevailing parties in a significant and discrete substantive portion of *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

10. APHIS's position in *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), was not substantially justified.

11. The Applicants did not unduly or unreasonably protract *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).

12. There are no special circumstances that would make the award of fees or other expenses to the Applicants unjust.

13. The Applicants meet all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act.

14. The Applicants incurred attorney fees and other expenses in connection with *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), to which they are entitled to an award under the Equal Access to Justice Act totaling $16,053.83.

For the foregoing reasons, the following Order is issued.

ORDER

The Applicants are awarded $16,053.83 for attorney fees and other expenses incurred in connection with *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).[33]

RIGHT TO JUDICIAL REVIEW

The Applicants have the right to seek judicial review of the award of

[33] The process by which the Applicants may obtain payment of the award in this Order is set forth in 7 C.F.R. § 1.203.

attorney fees and other expenses in this Decision and Order.[34] Any appeal of the award of attorney fees and other expenses must be to the courts of the United States having jurisdiction to review the merits of *Terranova Enterprises, Inc.*, 71 Agric. Dec. 876 (U.S.D.A. 2012) (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.).[35] The Applicants must seek judicial review within 30 days after the determination of the award of attorney fees and other expenses in this Decision and Order.[36] The date of the determination of the award of attorney fees and other expenses in this Decision and Order is July 17, 2014.

___

[34] 7 C.F.R. § 1.202.

[35] 5 U.S.C. § 504(c)(2).

[36] 5 U.S.C. § 504(c)(2). *See also* Holzbau v. United States, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination or decision, not from the date the party receives a copy of the determination or decision); Sonicraft, Inc. v. NLRB, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).

In re: JENNIFER CAUDILL, AN INDIVIDUAL, A/K/A JENNIFER WALKER AND JENNIFER HERRIOTT WALKER.
Docket No. 13-0186.[1]
Decision and Order.
Filed September 12, 2014.

EAJA.

William J. Cook, Esq. for Applicant.
Colleen A. Carroll, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

On September 7, 2010, Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), initiated a license termination proceeding pursuant to the Animal Welfare Act (the Act or AWA), 7 U.S.C. § 2131, *et seq.*, by filing an "Order to Show Cause Why Animal Welfare Act Licenses 58-C-0947, 55-C-0146 and 58-C-0505 Should Not Be Terminated." The action named as Respondents Jennifer Caudill (also known as Jennifer Walker and Jennifer Herriott Walker) (Caudill), Brent Taylor (Taylor) and William Bedford (Bedford), individuals doing business as Allen Brothers Circus, and Mitchel Kalmanson (Kalmanson).[2]

AWA license 55-C-0146, held by Taylor and Bedford, was voluntarily terminated on May 12, 2012 whereupon APHIS moved to

[1] Although counsel filed the application using the docket number of the original license termination proceeding, as the application is governed by different statutory and regulatory provisions, the Hearing Clerk assigned the application a new docket number as reflected above.

[2] *In re*: Jennifer Caudill, an individual also known as Jennifer Walker and Jennifer Herriott Walker, Brent Taylor and William Bedford, individuals doing business as Allen Bros. Circus, and Mitchel Kalmanson, Docket No. 10-416

withdraw the Order to Show Cause as to Bedford and Taylor. An Order of Dismissal as to them was entered on June 15, 2012.[3]

Three days of trial for the remaining two Respondents were conducted in Tampa, Florida from June 11 to June 13, 2012. At the hearing, thirteen witnesses testified, thirty-five exhibits were introduced by the government, and eighteen exhibits were introduced by the Respondents. Post-hearing briefs were filed by all parties, and on September 24, 2012, I entered a Decision reversing the Administrator's determination that Kalmanson was unfit to be licensed and dismissing the license termination proceedings brought against him.[4] On October 12, 2013, the Judicial Officer granted an initial Request for Extension of Time for the filing an appeal in which the Administrator had requested that the time for filing of the Administrator's appeal of the Kalmanson decision be extended to thirty days following the entry of the Administrative Law Judge Decision as to Jennifer Caudill.

On February 1, 2013, I entered a Decision and Order as to Jennifer Caudill.[5] In that Decision, as previously done in the Kalmanson case, I reversed the determination made by the Administrator that Caudill was unfit to be licensed and dismissed the license termination proceedings that were brought against her. On February 27, 2013, the Administrator filed a Request for a Second Extension of Time for the filing of the Administrator's appeal of the Kalmanson decision. In his Order of March 4, 2013 denying the extension, the Judicial Officer noted that the Administrator had already had more than five months in which to prepare and file an appeal of my September 24, 2012 Decision as to Mr. Kalmanson and further noted that good reason for an additional extension of time had not been provided.[6] Following that denial, my September 24, 2012 Kalmanson Decision became final.

---

[3] Taylor, 71 Agric. Dec. 488 (U.S.D.A. 2012).

[4] Kalmanson, 71 Agric. Dec. 1007, 1016 (U.S.D.A. 2012); *appeal dism'd by Judicial Officer* (Order Den. Second Request for Extension of Time to Appeal the Decision as to Mitchel Kalmanson & Rulings Den. Mr. Kalmanson's Motions for Fees, Costs, Expenses, Sanctions, and a Monetary Advance) (March 4, 2013).

[5] Caudill, 72 Agric. Dec. 1056, (U.S.D.A. 2013); *On appeal, license terminated on other grounds*, Decision and Order, 2013 WL 604009.

[6] Judicial Officer's Order Den. Second Request for Extension of Time to Appeal the Decision as to Mitchel Kalmanson & Rulings Den. Mr. Kalmanson's Motions for Fees, Costs, Expenses, Sanctions, and a Monetary Advance (March 4, 2013).

The Administrator appealed my February 1, 2013 Caudill Decision to the Department's Judicial Officer. On April 29, 2014, during the pendency of that appeal and prior to a decision on the merits of the case by the Judicial Officer, the Administrator filed a Petition to Reopen the hearing in order to receive in evidence a letter dated November 13, 2013 sent from Elizabeth Goldentyer, D.V.M., Regional Director, Animal Care, APHIS to Ms. Caudill advising her that her AWA license number 58-C-0947 had been automatically terminated on its expiration date of October 16, 2013 because of non-payment of the annual license fee prior to the expiration date. The Administrator also requested that the Judicial Officer issue an order dismissing the proceeding. On May 2, 2014, the Hearing Clerk served Ms. Caudill with the Petition to Reopen and in the accompanying letter informed Ms. Caudill that she had ten days from the date of service within which to file a response to the petition. No response was received from Ms. Caudill, and on May 16, 2014, the Judicial Officer: (1) reopened the hearing; (2) received the November 13, 2013 letter into evidence; (3) found the license in question automatically was terminated pursuant to section 2.5 of the Regulations, 9 C.F.R. §§ 2.5(a)(3)-(4), (b); and (4) dismissed the pending proceedings as moot.[7] The time for appeal of his ruling has elapsed and it is now the final determination in that case.

Discussion

As an appeal was taken in the license termination case, the stay of the application for attorney's fees and costs required by section 1.193(c) took effect. 7 C.F.R. § 1.193(c). As a final determination has now been made, this matter is again before me for consideration of the application for attorney fees in the amount of $18,090.00, which has been submitted in this action by for services provided by William J. Cook, Esquire, as Caudill's attorney, and for the further sum of $2,648.55 for costs and expenses incurred. The record reflects that the application was served upon counsel for the Respondent; however, it is apparent that no agreement was reached between the Respondent and Mr. Cook concerning the attorney or costs and expenses. To the contrary, as apparently is routine practice by certain attorneys in the Department's

[7] Caudill, No. 10-0416, 73 Agric. Dec. 241 (U.S.D.A. 2014).

Office of General Counsel, rather than filing an answer, on March 29, 2013, the Administrator moved to strike the application as being premature, or in the alternative, requested stay of the proceedings. In the Agency Motion to Strike the Petitioner's Application, counsel suggests that the application was filed prematurely as a party may request attorney's fees and costs "**within 30 days after final disposition** of the proceeding by the Department." 7 C.F.R. § 1.193(a) (emphasis supplied). A careful reading of the regulation, however, reflects that counsel's argument ignores and fails to take into account the clear and unambiguous language of section 1.193(a), which without ambage reads in pertinent part:

> (a) An application may be filed **whenever the applicant has prevailed in the proceeding or in a significant or discrete substantive portion of the proceeding**, but in no case **later** than 30 days after final disposition….

7 C.F.R. § 1.193(a) (emphasis supplied).

I find that, while obviously not a final disposition of the case, prevailing before an administrative law judge following an oral hearing satisfies the requirement of prevailing in a significant or discrete substantive portion of the proceeding,[8] and I will decline to find the application to have been filed prematurely[9] or to strike the application.[10]

---

[8] *See* 7 C.F.R. § 1.193(b) ("For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts."

[9] *Cf.* Knapp, 72 Agric. Dec. 189 (U.S.D.A. 2013) (currently pending on appeal before the Court of Appeals for the Fifth Circuit). In that case, the Judicial Officer faulted the Chief Administrative Law Judge for opining that EAJA fees were warranted *prior* to the adverse party's applying for the fees and expenses under EAJA and a final determination had been made.

[10] In its "Agency Motion to Strike Application or Request to Stay Proceedings," the Department cites two cases to support its contention that Ms. Caudill's application for attorney's fees is "premature": *Aranov v. Napolitano,* 562 F.3d 84, 87 n.3 (1st Cir. 2009) and *Asakawa Farms*, 50 Agric. Dec. 1144, 1164 (U.S.D.A. 1991). It should be noted that both cases cited predate the Supreme Court opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), in which the Court surveyed its precedent on the issue of prevailing parties. Even were the

When costs of the action and attorney fees are awarded, the traditional and usual starting point for determining the amount of a reasonable attorney fee is an examination of the number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Reasonableness is required in both the number of hours billed and the rate sought and parties seeking an award "should submit evidence supporting the hours worked and the rates claimed." *Id.* at 433, 437. In the instant case, the application contains a detailed chronological listing of services performed by date together with a brief description of the service and the amount of time expended on each occasion.

Where, as in this case, the fees and costs are being paid pursuant to the Equal Access to Justice Act (EAJA) (*see* 7 C.F.R. § 1.182), three separate issues must be decided: (1) whether the Applicant is a prevailing party; (2) whether the Secretary's position was substantially justified; and if both prior conditions are met, (3) exactly what fees, costs and expenses submitted by the Applicant are allowable.

The framework for the analysis of a party's status as a "prevailing party" is set forth in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court surveyed its precedent on the issue of prevailing parties and made several observations. Initially, the Court noted that the term "prevailing party" is a legal term of art and that in accordance with both its precedent and Black's Law Dictionary a prevailing party is "one who has been awarded some relief by the court."

---

cases cited applicable to this case, the position by the agency taken conflicts with the Department's regulation which permits the filing of an application upon prevailing in the proceeding or in a significant or discrete substantive portion of the proceeding. 7 C.F.R. § 1.193(a). Further, the language attributed to *Aranov* inaccurately cites 5 U.S.C. § 504(a)(2) as that provision contains no mention of "may only," but rather indicates that the application shall be filed within 30 days of a final determination having been made.

Buckhannon, 532 U.S. at 603. The Court found that a party must "receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 604 (quoting *Hewitt v. Helms,* 482 U.S. 755, 760 (1987)). Even an award of nominal damages will suffice. *Id.* (citing *Farrar v. Hobby,* 506 U.S. 103 (1992)). Similarly, the Court looked at whether there was a court ordered change in the legal relationship of the parties. *Id. (*citing *Texas State Teacher's Ass'n. v. Garland Independent School District*, 489 U.S. 782 (1989). In the instant case, although the license was terminated for other unrelated reasons, as the determination of unfitness which was reversed is no longer being questioned, the requirement to be a prevailing party has been met.

By statute, no award can be given if "the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). The burden of proof is upon the Secretary. *Lundin v. Mecham,* 980 F.2d 1450, 1459 (D.C. Cir. 1992). The findings set forth in my decision in the termination action regarding the egregiously improper conduct of the Regional Director, Animal Care, APHIS need not be recounted in concluding that, although Ms. Caudill's license was in fact ultimately terminated, the Petitioner prevailed on the most serious issues raised in the Order to Show Cause. By requesting and securing dismissal based upon mootness and upon a regulatory provision unrelated to the allegations raised in the Order to Show Cause, Applicant possibly very wisely abandoned and hence has now waived any review of my reversal of the Administrator's determination that Caudill was unfit to be licensed. As I find that APHIS was not substantially justified in including allegations which have since been abandoned, the award of attorney's fees and expenses is warranted. *See Fox v. Vice*, No. 10-114, slip op. at 6 (2011). In *Fox,* the Supreme Court articulated a "but for" test, allowing that portion of the fees that the party would have incurred because of, but only because of, what in that action was termed a frivolous [non-prevailing] claim. *Id.* at 8.

Where a party prevails on some but not all issues, the award of attorney fees must be calculated so as to reflect only that portion of the billing which was successful. In this action, the termination of the license by reason of failing to remit the necessary annual license renewal fee is completely separate, independent from, and unrelated to the allegations contained in the Complaint which were resolved favorably to Ms. Caudill in my decision.

Counsel for the prevailing party is ethically obligated to make a good faith effort to exclude from any fee request such hours that are excessive, redundant, or otherwise unnecessary, using appropriate "billing judgment." *Hensley*, 461 U.S. at 434. It will be noted that Mr. Cook represented both Mr. Kalmanson and Ms. Caudill, and while the combined billing of both Petitioner and Mr. Kalmanson is not before me for examination or evaluation, there was no objection interposed by Applicant as to the number of hours billed or the expenses claimed which were itemized.[11] Further, it appears from Mr. Cook's affidavit that the Caudill expenses were segregated and that the required mandate has been adhered to.

In his application, Mr. Cook indicates that his "customary billing rate" is $350.00 per hour based upon the prevailing rate in the Tampa Bay area for the type of representation performed.[12] Under EAJA, the fees available to a prevailing party are "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried." *Oliveira v. United States*, 827 F.2d 735,744 (Fed. Cir. 1987). In setting an appropriate hourly rate, substantial discretion rests with courts and factors normally not considered include the difficulty of the issues, the ability of counsel, or the results received. *Pierce v. Underwood*, 487 U.S. 552, 572 (1988).[13] While it is clear that enhanced hourly rates are frequently awarded by Article III Courts using local, the Laffey, or other matrices, in the absence of a stipulation as to fees at a higher rate, the Department's well-established position on the maximum rate allowable which I am compelled to follow is currently limited to $150.00 per hour. Accordingly, a fee of $18,090.00 will be allowed for attorney fees and the amount of $2,648.55 will be allowed for costs and expenses.

Being sufficiently advised, it is **ORDERED** as follows:

---

[11] It similarly is noted that the application was not supplemented to reflect any additional time expended or expenses incurred after the filing of the application.

[12] *Cf.* Laffey matrix adopted by the Civil Division of the United States Attorney's Office for the District of Columbia, which provides an enhanced fee for professional services performed before that court.

[13] The Court in *Hensley*, however, considered the results achieved to be significant. *Hensley*, 461 U.S. at 436.

1. Attorney fees in the amount of $18,090.00 are awarded to William J. Cook, Esquire for his representation as attorney for Jennifer Caudill in the above-styled case.

2. The sum of $2,648.55 will be awarded for costs and expenses incurred.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

___

FOOD AND NUTRITION ACT

DEPARTMENTAL DECISION

DEPARTMENT OF HUMAN SERVICES, RHODE ISLAND v. FOOD AND NUTRITION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE.
Docket No. 14-0136.
Decision and Order.
Filed December 10, 2014.

FNA.

Gail A. Theirault, Esq. for Appellant.
Michael Knipe, Esq. for Appellant.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This action is an appeal of a Quality Control Claim in the amount of $683,350.00 for Fiscal Year 2013 (FY 2013) issued by the Food and Nutrition Service of the United States Department of Agriculture [hereinafter FNS" or "Appellee"] against the State of Rhode Island [hereinafter "Rhode Island" or "Appellant"] brought under Section 16(c)(8)(D)(i) of the Food and Nutrition Act of 2008, [hereinafter the "Act"], 7 U.S.C. § 2025. The Bill for Collection dated June 25, 2014 was assessed against the State of Rhode Island following release of the Department's official Supplemental Nutrition Assistance Program [hereinafter "SNAP"] overpayment, underpayment, and payment error rates for Federal Fiscal Year [hereinafter "FFY"] 2013 under the quality control (QC) provisions of Section 16(c) of the Act.

Procedural History

On June 26, 2014, Appellant filed its Notice of Appeal with the Hearing Clerk's Office of the United States Department of Agriculture

[hereinafter "USDA"]. On August 26, 2014, Appellant filed a "Motion for Extension of Time" in which to file its Petition for Appeal and on the same date I entered an Order granting Appellant's Motion for Extension of Time and allowing Appellant until September 15, 2014 to file its Petition for Appeal.

On September 15, 2014, Appellant filed a "Petition for Appeal of Penalty Error Rate and Supportive Evidence" asserting that it should be entitled to "good cause relief" from the penalty error rate for FFY 2013 and the corresponding Notice of Claim/Bill for Collection in the amount of $683,350.00 issued by Appellee. In its Petition Appellant requested an oral hearing pursuant to 7 C.F.R. § 283.4(g)(3).

On November 14, 2014, Appellee filed an "Answer to Appellant's Petition" admitting jurisdiction of the appeal was proper, admitting the facts listed on page one of Appellant's Petition for Appeal, stating its position and defenses to each of the allegations of the Petition for Appeal, and denying "all facts and allegations not specifically admitted."[1]

The record before me consists of the above-described documents and the parties' pleadings and attached exhibits. Appellant's Petition for Appeal contains Exhibits "A" through "E 1-7," hereinafter "RI-X-A" through "RI-X-E, 1-7" and Appellee's Answer to Appellant's Petition contains Exhibits "1" through "6," hereinafter "FNS-X-1" through "FNS-X-6". Upon review of the documents and arguments submitted by both parties, I find that an oral hearing in this matter is not necessary and will enter a Decision and Order based upon the record before me.

Background of the SNAP Program

SNAP, formerly known as the Food Stamp Program [hereinafter "FSP"],[2] is a Federal aid program designed to "alleviate . . . hunger and

[1] Answer to Appellant's Pet. at 1.

[2] *See* Affum v. United States, 566 F.3d 1150, 1154 (D.C. Cir. 2009) ("In 2008, Congress amended the Food Stamp Act, renaming it the Food and Nutrition Act and renaming the 'food stamp program' the 'supplemental nutrition assistance program' . . .") (citing Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4001, 122 Stat. 1651, 1853) (2008)).

malnutrition" among Americans by allowing "low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation." 7 U.S.C. § 2011. The program, which is administered by FNS,[3] allows low-income and no-income households to receive benefits that are to "be used only to purchase food from retail food stores which have been approved for participation in the supplemental nutrition assistance program." 7 U.S.C. § 2013(a); 7 C.F.R. § 271.3(a). The amount of benefits a recipient receives will vary and is dependent upon the household's size, income, and expenses. The Act authorizes the Secretary of Agriculture to pay each State agency[4] fifty percent (50%) of all administrative costs associated with administration of the program; meanwhile, the federal government funds one-hundred percent (100%) of the cost of the SNAP benefits.[5] 7 U.S.C. § 2025(a).

Programs to distribute commodities in kind, or in later programs the means to purchase commodities to the needy, appear to have grown out of initial outrage prompted by a well-intentioned, yet ill-advised 1933 initiative of the Agricultural Adjustment Administration to raise the wholesale price of agricultural produce by creating artificial scarcity. Under the program, planted fields were ploughed up[6] and left unharvested and six million (6,000,000) pigs were killed and their carcasses discarded. The resulting public outcry over the waste contributed to the establishment of the Federal Surplus Relief Corporation in October of 1933.[7] Later that year, the corporation

---

[3] Although FNS was established as an agency on August 8, 1969, many of the food programs it administers date back to the 1930s.

[4] The name of the state agency making the distribution varies but is usually the Division of Social Services or Child and Family Services.

[5] CONG. BUDGET OFFICE, THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 7 (2012), *available at* http://www.cbo.gov/sites/default/files/04-19-SNAP.pdf.

[6] Subsequent programs, such as those under the Land Bank, provided payments to farmers for not planting crops or for limiting the number of acres planted.

[7] Multiple "alphabet" agencies were established in the 1930s as part of President Roosevelt's New Deal, including the Federal Surplus Relief Corporation, Commodity Credit Corporation, Farm Credit Administration, and others. Most were merged into other government departments during World War II, and their functions continue today. The Federal Surplus Relief Corporation changed its name in 1935 to the Federal Surplus Commodities Corporation [hereinafter "FSCC"] and placed Secretary of Agriculture Henry A. Wallace (head of the Agricultural Adjustment Administration and Governor of the Farm Credit Administration) on its board. The FSCC then expanded it focus into the

diverted quantities of apples, beans, canned beef, and cotton to local relief organizations, and in December of 1933, the corporation distributed three million (3,000,000) tons of coal to the unemployed in Wisconsin, Minnesota, Michigan, North and South Dakota and Iowa. The following year, the corporation distributed 692,228,274 pounds of foodstuffs to the unemployed in thirty (30) U.S. states.[8]

The idea for the first FSP is generally credited to Secretary of Agriculture Henry A. Wallace and the program's first administrator, Milo Perkins. The life of that program was relatively short lived,[9] lasting only from May 16, 1939 to Spring of 1943, but it reached approximately 20 million (20,000,000) people in nearly half of the counties in the United States at a cost of two hundred sixty-two million dollars ($262,000,000). The initial program permitted individuals on relief to purchase orange stamps equal to their normal food expenditures; for every $1.00 worth of orange stamps purchased, $0.50 worth of blue stamps were received. Orange stamps could be used to buy any food; the blue stamps could be used to buy only food determined by the Department of Agriculture to be surplus.[10]

Eighteen years elapsed between the end of the first FSP and the enactment of Public Law 86-341 on September 21, 1959 which authorized the Secretary of Agriculture to operate a food stamp system through January 31, 1962. Although the authority existed, the Eisenhower Administration never used it, and it wasn't until President Kennedy took office before an Executive Order issued by him called for expanded food distribution.[11]

---

school lunch program and by 1939 had over 14,000 schools participating with nearly 900,000 children being fed daily. . GORDON W. GUNDERSON, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., *National School Lunch Program (NSLP)*, WHITEHOUSE.GOV (Jun. 17, 2014), http://www.fns.usda.gov/nslp/history_4.

8 "Relief Foods Total 692,228,274 Pounds," New York Times, October 18, 1934

9 The program ended "since the conditions that brought the program into being -- unmarketable food surpluses and widespread unemployment --no longer existed. U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., *Supplemental Nutrition Assistance Program ("SNAP"): A Short History of SNAP*, WHITEHOUSE.GOV (Nov. 20, 2014).

10 *Id.*

11 Executive Order No. 10914, 26 Fed Reg. 639 (Jan. 24, 1961).

The Pilot FSP, which lasted from May 29, 1961 until 1964, retained the requirement that food stamps be purchased but dropped the program feature of special stamps for surplus foods. At the behest of President Johnson, Congress passed the Food Stamp Act of 1964 making the FSP permanent.[12] Program participation grew rapidly, topping a half million (500,000) participants by April of 1965, one million (1,000,000) in March of 1966, two million (2,000,000) in October of 1967, and 15 million (15,000,000) in October of 1974.[13] Uniform standards of eligibility were established in 1971 by Public Law 91-671,[14] and the program was expanded to Guam, Puerto Rico, and the Virgin Islands. Additional expansion of the program was made by the Agriculture and Consumer Protection Act of 1973 (Pub. L. No. 93-86), and in 1974, Public Law 93-347 authorized the Department to pay fifty percent (50%) of the State's costs of administering the program and established the requirement for efficient and effective administration by the States.
With bi-lateral support in Congress, the Food Stamp Act of 1977 eliminated the requirement for individuals to purchase food stamps. Other provisions eliminated categorical eligibility; established statutory income eligibility guidelines at the poverty line; included provisions defining income and deductions and how resources would be valued; allowed cash change up to $0.99; set specific vendor requirements; added access provisions; and included integrity provisions, including fraud disqualifications.[15]

Because of its rapidly increasing costs, FSP came under increasing scrutiny in the 1980s and cutbacks were enacted in both 1981 and 1982.[16] By the latter half of the 1980s however, recognition of the existence of a severe domestic hunger problem prompted relief

---

12 Pub. L. No. 88-525, 78 Stat. 703 (1964)

13 *See supra* note 8. According to Congressional Budget Office figures, outlays for SNAP benefits more than doubled between 2007 and 2011 from $30 billion to $72 billion and in 2013, CNSNews reported that USDA indicated that the cost of SNAP benefits was $79,641,880 for 23,052,388 households, twenty percent (20%) of the 115,013,000 households reported by the Census Bureau. Matt Cover, *Senate-Passed Farm Bill Is 80 Percent Food Stamps*, CNSNEWS.COM (Jun. 28, 2012), http://cnsnews.com/news/article/senate-passed-farm-bill-80-percent-food-stamps (last visited Dec. 9, 2014).

14 Pub. L. No. 91-671, 84 Stat. 2048 (1971).

15 Pub. L. No. 95-113, 91 Stat. 958 (1977).

16 Pub. L. No. 97-253, 96 Stat. 772 (1982); Pub. L. No. 97-98, 95 Stat. 1282 (1981).

legislation in 1985 and 1987 that resulted in the elimination of sales tax on food stamp purchases, reinstatement of categorical eligibility; increased resource limits; eligibility for the homeless; and expansion of nutritional education.[17] The Hunger Prevention Act of 1988[18] and the Mickey Leland Memorial Domestic Hunger Relief Act of 1990[19] continued the hunger relief philosophy with additional program adjustments.

Driven by concerns of abuse of food stamps,[20] the 1988 legislation authorized one or more pilot programs to test whether the use of benefit cards or other electronic benefit systems could enhance the efficiency or effectiveness of program operations for both program administrators and recipients. The first electronic benefits transfer [hereinafter "EBT"] program had been successfully implemented in Reading, Pennsylvania as early as 1984 and was hailed as a promising tool for reducing both costs and fraud. The 1990 legislation established EBT as an issuance alternative and permitted the Department to conduct EBT demonstration projects. Additional support for the EBT initiative came from the Conference Report on Public Law 103-66, the Omnibus Budget Reconciliation Act of 1993[21] and a mandate to implement EBT was included in the Personal Responsibility and Work Opportunity Reconciliation Act.[22] Continuing emphasis on the EBT implementation followed in the Electronic Benefit Transfer Interoperability and Portability Act of 2000[23] and the Farm Security and Rural Investment Act of 2002.[24]

Increased commitment to Federal food assistance secured passage of the Food Conservation and Energy Act of 2008, (also known as the 2008

---

[17] Pub. L. No. 100-232, 101 Stat. 1566 (1987); Pub. L. No. 99-570, 100 Stat. 3374 (1986).

[18] Pub. L. No. 100-435, 102 Stat. 1645 (1988).

[19] Pub. L. No. 101-624, 104 Stat. 3783 (1990).

[20] In certain areas of the country, food stamp abuse became rampant. Food stamps could be sold at a discount by the recipients to ineligible individuals for cash and the stamps would then be used by the purchasers as a second form of currency. Criminal elements could either launder the stamps, redeeming them for cash or use them in stamp form to purchase an almost limitless variety of unauthorized items, to include illegal drugs.

[21] Pub. L. No. 103-66, 107 Stat. 312 (1993).

[22] Pub. L. No. 104-93, 110 Stat. 2105 (1996).

[23] Pub. L. No. 106-171, 114 Stat. 3 (2000).

[24] Pub. L. No. 107-171, 116 Stat. 134 (2002).

farm bill).[25] The law also changed the name of the Federal program to the Supplemental Nutrition Assistance Program and the name of the Food Stamp Act of 1977 to the Food and Nutrition Act of 2008.[26]

Discussion

1. *Supplemental Nutrition Assistance Program*

The Food and Nutrition Act of 2008 ("the Act") (7 U.S.C. §§ 2011 *et seq.*) applies to the adjudication of the instant proceeding. In addition to providing the benefits that are to "be used only to purchase food from retail food stores which have been approved for participation in the supplemental nutrition assistance program, the Act establishes a quality-control system for SNAP, which directs FNS to evaluate each State agency's payment accuracy based upon its error rates." 7 C.F.R. § 275.23(b). Payment error rate is structured as a two-year liability system that compares each State's performance to a national performance measure[27] [hereinafter "NPM"]. FNA § 16(c)(6)(A); 7 U.S.C. § 2025(c)(6)(A). A State will be deemed to be in "liability status" the first FFY in which FNS determines that a 95 percent (95%) statistical probability exists that the State's payment error rate exceeds 105 percent (105%) of the NPM. Liability status, in effect, serves to warn that if a State agency's performance error rate again exceeds the NPM in the subsequent FFY that State will be assessed a monetary liability amount.[28] A liability amount must be established when, for the second or subsequent FFY, FNS determines that there is a 95 percent (95%) statistical probability that a State agency's payment error rate exceeded 105 percent (105%) of the NPM for payment error rates. F.N.A. § 16(c)(1)(D); 7 U.S.C. § 2025(c)(1)(D). The Secretary and, by delegation, FNS are authorized to waive some or all of the liability amount, to require that up to 50 percent (50%) of the amount be newly invested in SNAP improvement activities by the State, to designate up to 50 percent

[25] Pub. L. No. 110-234, 122 Stat.923 (2008).
[26] Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. § 4001 (2008).
[27] The national performance measure ("NPM") is the sum of the products of each State agency's error rate multiplied by that State agency's proportion of the total value of national allotments, or SNAP household units, in that federal fiscal year. F.N.A. §16(c)(6)(A); 7 U.S.C. 2025(c)(6)(A). The NPM is not subject to administrative or judicial review. FNA 16 § (c)(6)(D); 7 U.S.C. § 2025(c)(6)(D).
[28] Answer to Appellant's Pet., p. 4.

(50%) to be held "at-risk" contingent upon the State's payment error performance the following year, or to take any combination of these actions. F.N.A. 16 § (c)(1)(D); 7 U.S.C. § 2025(c)(1)(D).[29]

The administrative review process for SNAP provides that "[a] State agency aggrieved by a claim shall have the option of requesting a hearing to present its positon in addition to a review of the record and any written submission presented by the State agency." 7 C.F.R. § 276.7(a)(2). Specifically, a State may seek review of its State agency's liability amount by filing an appeal which is heard by an independent and impartial Administrative Law Judge, who may consider all grounds, in whole or in part, that the State asserts for relief from the liability amount, including for "good cause." F.N.A. § 16(c)(7),(8); 7 U.S.C. § 2025(c)(7),(8); 7 C.F.R. § 275.23(f). Relevant to the case at bar, a State is entitled to seek relief from liability of all claims on the basis that the State agency "had good cause for not achieving the payment error rate tolerance" where the agency has shown "otherwise effective administration" of SNAP. 7 C.F.R. § 275.23.

"Good cause" is defined in 7 C.F.R. § 275.23(f):

> (f) Good cause. When a State agency with otherwise effective administration exceeds the tolerance level for payment errors as described in this section, the State agency may seek relief from liability claims that would otherwise be levied under this section on the basis that the State agency had good cause for not achieving the payment error rate tolerance. State agencies desiring such relief must file an appeal with the Department's Administrative Law Judge (ALJ) in accordance with the procedures established under part 283 of this chapter. Paragraphs (f)(1) through (f)(5) of this section describe the unusual events that are considered to have a potential for disrupting program operations and increasing error rates to an extent that relief from a resulting liability amount is appropriate. The occurrence of an event(s) does not automatically result in a determination of good

[29] These decisions are not subject to judicial review. F.N.A. § 16(c)(7)(C); 7 U.S.C. § 2025(c)(7)(C).

> cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event had an adverse and uncontrollable impact on program operations during the relevant period, and the event caused an uncontrollable increase in the error rate. Good cause relief will only be considered for that portion of the error rate /liability amount attributable to the unusual event…..

The record in the instant case indicates that on June 25, 2014, FNS notified Rhode Island by letter that it had committed an "excessive" error-rate percentage during FFY 2013, as provided by the quality-control provisions of section 16(c) of the Act. FNS-X-5, p. 1. Specifically, the letter advised that Rhode Island had an 8.25 percent (8.25%) error rate, a figure substantially greater than the NPM of 3.20 percent (3.20%) for FFY 2013. *Id.* Due to the fact that FFY 2013 marked Rhode Island's second year of liability status, Rhode Island became liable for both the liability amount for FFY 2013 and the "at-risk" dollar amount for FFY 2012. Answer to Appellant's Pet for Appeal, p. 2. In its Answer to Appellant's Petition for Appeal, without disclosing the specifics of the offer, FNS stated that it had "offered a settlement of [A]ppellant's FFY 2013 liability amount, but [A]ppellant declined the settlement offer." *Id.*

Pursuant to 7 U.S.C. § 2023(a)(6) and 7 C.F.R. § 283.4(a), on September 15, 2014 Rhode Island appealed the liability claim and its Bill for Collection in the amount of $683,350.00 that was claimed due by FNS. In its Petition for Appeal, Rhode Island asserts that it is entitled to good cause relief from its liability amount based upon caseload growth purportedly caused by high unemployment rates, poor economic conditions, staff shortages, and several storms. FNS filed an Answer on November 14, 2014 denying that Rhode Island is entitled to any relief from the liability amount and arguing that Rhode Island failed to establish the required direct causal connection between caseload growth and payment error rate as required by FNS regulations. Answer to Appellant's Pet. at 1-2.

2. *Opportunity for Hearing*

FOOD AND NUTRITION ACT

Pursuant to the Food and Nutrition Act and corresponding FNS regulations, a State agency that is "aggrieved" by a quality-control liability claim is entitled to administrative judicial review of such action. 7 U.S.C. §§ 2023(a)(1)(3)(6); 7 C.F.R. § 275.23(f). Section 2023 of the Act provides, in pertinent part:

> Determinations regarding [liability] claims . . . (including determinations as to whether there is good cause for not imposing all or a portion of the penalty) shall be made on the record after opportunity for an agency hearing . . . in which one or more administrative law judges appointed . . . shall preside over the taking of evidence.

7 U.S.C. § 2023(a)(6).

Neither the Act nor FNS regulations, however, require that the "agency hearing" be oral. *Id.* To the contrary, support for the proposition that hearings are not always required is found in 7 C.F.R. §276.7(h) which provides:

> (h) Scheduling and conducting hearings- *When a hearing is afforded***,** the Appeals Board or hearing officer has up to 60 days from receipt of State agency's information….to schedule and conduct the hearing. (emphasis added).

In addition to the above conditional language, FNS regulations further direct that an Administrative Law Judge shall, upon a party's motion, schedule a hearing "*[i]f any material issue of fact is joined by the pleadings*." 7 C.F.R. § 283.15(b) (emphasis added). Case law affirms that an oral hearing is necessary only in cases that present an issue of material fact.[30] As held in *Joe Phillips & Associates, Inc. v. U.S. Dep't of Agric.*,

[30] *See, e.g.*, Carpenito Bros. v. U.S. Dep't of Agric., 851 F.2d 1500, 1500 (D.C. Cir. 1988) ("As we only recently stated, a hearing is not necessary in the absence of any genuine dispute of material fact.") (citations omitted); Veg-Mix, Inc. v. U.S. Dep't of Agric., 832 F.2d 601, 607-08 (D.C. Cir. 1987) ("[A]n agency may ordinarily dispense with a hearing when no genuine dispute exists."); Cmty. Nutrition Inst. v. Young, 773 F.2d 1356, 1364 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123, 106 S.Ct. 1642, 90

"*even when a statute generally prescribes a hearing*, no hearing is required where no genuine issue of material fact exists." 50 Agric. Dec. 847, 851 (U.S.D.A. 1991) (citing *United States v. Consolidated Mines & Smelting Co.*, 445 F.2d 432, 453 (9th Cir. 1971)) (emphasis added).[31] "In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks." *Id.*

The policy encouraging Administrative Law Judges to forego oral hearings in cases that present no genuine issues of material fact is soundly based upon the mandate of judicial efficiency and, more specifically, a desire to avoid litigation that would serve no useful purpose.[32] As the prior decisions have indicated, "[c]ommon sense suggests the futility of hearings when there is no factual dispute of substance." *In re: Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1615 (U.S.D.A. 1993). "[T]he right of opportunity for hearing does not require a procedure that will be empty song and show, signifying

---

L.Ed.2d 187 (1986) ("A request for hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held.") (citation omitted).

[31] *See also* United States v. Cheramie Bo-Truc #5, Inc., 538 F.2d 696, 698 (5th Cir. 1976) ("A long line of cases establishes the rule that even when a statute mandates an adjudicatory proceeding, neither the statute, nor due process, nor the APA requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed."); *accord* Indep. Bankers Ass'n of Ga. v. Bd. of Governors of Fed. Reserve Sys., 516 F.2d 1206, 1220 (D.C. Cir. 1975). In *Cheramie Bo-Truc #5, Inc.*, the Fifth Circuit Court of Appeals declined to follow the "long line of cases" that had refrained from hearings on the basis that, in that instant case, "the agency [had] summarily disregarded a controlling statute that clearly mandate[d] a hearing." *Cheramie Bo-Truc #5, Inc.*, 538 F.2d at 698-99. The facts of *Cheramie Bo-Truc #5, Inc.* are distinguishable from the case at bar in that controlling statute here, 7 U.S.C. § 2023, does not "clearly mandate a hearing." *Id.*

[32] *See* Pets Calvert Co., 2010 WL 2771783, at *2 (U.S.D.A. 2010) ("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."); *In re:* Levinson, 2006 WL 2685397, at **2-5 (U.S.D.A. 2006) (affirming Chief Administrative Law Judge's denial of oral hearing and refusing oral argument before Judicial Officer on basis that "the issues are not complex and oral argument would appear to serve no useful purpose."); *In re:* Moore Marketing Int'l, Inc., 46 Agric. Dec. 961, 961 (U.S.D.A. 1987) (where USDA Judicial Officer ruled on Certified Question that a decision should be entered on the pleadings revoking the respondent's license under the Animal Welfare Act) ("It has been held in many prior cases . . . that this Department is not interested in respondent's excuses for its failures to pay. Accordingly, *a hearing would serve no useful purpose*, and the decision based on the pleadings. . . should be entered revoking respondent's license.") (emphasis added).

nothing." *Citizens for Allegan County, Inc. v. Federal Power Comm'n*, 414 F.2d 1125, 1128 (D.C. Cir. 1969). Such is the situation in the present case, where "all material issues are resolved on the face of relevant documents." *Joe Phillips & Associates, Inc.*, 50 Agric. Dec. at 851-52. *See also Citizens for Allegan County, Inc.*, 414 F.2d at 1128 ("The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law."). For an Administrative Law Judge to hold an oral hearing where a Petition for Appeal and Answer provide sufficient undisputed facts for him to enter a judgment on the pleadings and exhibits alone would prove nugatory and discredit the stature of administrative proceedings.[33]

FNS regulations governing the administrative review process also indicate a preference for judicial efficiency. 7 C.F.R. § 276.7 provides, in relevant part, that the presiding Administrative Law Judge "shall have full authority to ensure a fair and impartial proceeding, avoid delays, maintain order and decorum, receive evidence, examine witnesses, and *otherwise regulate the course of the hearing*." 7 C.F.R. § 276.7(h)(2) (emphasis added). In granting Administrative Law Judges the discretion to "regulate the course of the hearing" as they deem appropriate and by referencing the avoidance of delays and maintenance of "order and decorum," it appears that FNS regulation grants Administrative Law Judges the option to conduct a hearing solely on the record if doing so would constitute a "fair and impartial proceeding." This is consistent with case law regarding the Department's Rules of Practice Governing Formal Adjudicatory Proceedings and Instituted by the Secretary Under Various Statutes [hereinafter "Rules of Practice"] (7 C.F.R. §§ 1.130-1.151) and the authority of an Administrative Law Judge to enter summary judgment decisions.[34] For example, in *Bargery*, this

[33] *See* Joe Phillips & Assoc., Inc. v. U.S. Dep't of Agric., 50 Agric. Dec. 847, 851-52 (U.S.D.A. 1991) ("To argue that the Constitution requires the performance of meaningless tasks trivializes our great charter and erodes its power to command obedience and respect.").

[34] *See, e.g.*, Eysaman, 70 Agric. Dec. 347, 350 (U.S.D.A. 2011) ("An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there I no genuine issue as to any material fact.") (citing *Veg-Mix, Inc.*, 832 F.2d at 607). Although the Rules of Practice "do not specifically provide for a motion for summary judgment" yet do "prohibit motions for summary judgment based on the pleadings," the Administrative

Department held that "when facts established in a collateral proceeding show that there is no material issue of fact, a decision without a hearing—*in effect a summary judgment*—can be issued." 61 Agric. Dec. 772, 772 (U.S.D.A. 2002) (emphasis added).

3. *No Genuine Issue of Material Fact Exists in the Present Case*

As previously discussed, FNS regulations allow State agencies to "seek relief from liability claims" assessed for payment error rates "on the basis that the State agency had good cause for not achieving the payment error rate tolerance." 7 C.F.R. § 275.23(f). There are five "unusual events" that State agencies "may use as a basis for requesting good cause relief": (1) natural disasters and civil disorders; (2) strikes; (3) caseload growth; (4) program changes; and (5) significant circumstances beyond the control of the State agency. 7 C.F.R. §§ 275.23(f)(1),(2),(3),(4),(5). These five grounds, however, constitute exceptions to a State agency's "*otherwise effective administration*" of SNAP. 7 C.F.R. § 275(f) (emphasis added). The regulations provide:

> The occurrence of an event(s) does not automatically result in a determination of good cause for an error rate in excess of the national performance measure. The State agency must demonstrate that the event *had an adverse and uncontrollable impact* on program operations during the relevant period, *and the event caused an uncontrollable increase* in the error rate.

Id. (emphasis added).

Here, Rhode Island argues that it should be relieved of its liability amount for good cause on the basis of caseload growth pursuant to 7 C.F.R. § 275(f)(3). Specifically, Rhode Island argues that its SNAP caseload has experienced "sharp and impactful growth" in the "past five years" as a result of: (1) "[c]ontinued increase in Rhode Island's unemployment rate;" (2) "Rhode Island's rapid and steep economic downturn during the national recession;" and (3) "[d]ecrease in

---

Procedure Act, which controls administrative law judge proceedings, "does not preclude summary judgments." Bargery, 61 Agric. Dec. 772, 773 (U.S.D.A. 2002) (internal citations omitted).

Appellant's staffing in comparison to previous years in which the State was experiencing better economic growth, thereby affecting the Appellant's case management capacity." Appellant's Pet. for Appeal, p. 2. While these misfortunes may in fact be legitimate causes of SNAP caseload growth, Rhode Island is only entitled to good-cause relief if it demonstrates how those factors actually impacted and caused excessive payment error rates. *See* 7 C.F.R. §§ 275(f), (f)(3).

Rhode Island not only failed to establish how its caseload growth had an "adverse and uncontrollable impact" on operation of its SNAP program and that the caseload growth "caused an uncontrollable increase" in its payment error rate as required by 7 C.F.R. § 275(f); it also failed to demonstrate that but for the "unusual event" of caseload growth its administration of SNAP has been "otherwise effective." *See* 7 C.F.R. § 275(f); Appellant's Pet. for Appeal, pp. 2-7. The "otherwise effective" administration requirement is a threshold prerequisite provided in the first sentence of the "good cause" regulation, 7 C.F.R. § 275(f). As Rhode Island has a lengthy recent history of deficient SNAP administration performance,[35] it is not entitled to relief from liability. The material fact that Rhode Island consistently failed to effectively administer SNAP cannot be denied in the present case. The State agency's continuing inefficiency must be considered as a matter *res ipsa loquitur,* manifest from the pleadings, and to hold a hearing on this non-issue would be pointless. Rhode Island clearly is not entitled to relief from its liability amount.

Even had Rhode Island satisfied the "otherwise effective administration" of SNAP good-cause prerequisite of 7 C.F.R. § 275(f), it would nevertheless be ineligible for relief on the grounds of caseload growth because it has failed to demonstrate that such growth had an "adverse and uncontrollable impact on program operations" and "caused an uncontrollable increase" in its error rate for FFY 2013. *See* 7 C.F.R. § 275(f). As FNS correctly notes in its Answer, Rhode Island's Petition for Appeal is essentially an ambagious and prolix account of how increasing

[35] The record reflects that from FFY 2009 through FFY 2013 Rhode Island's payment error rate exceeded the NPM four (4) times. FFY 2009 was the only year in which Rhode Island's error rate was below the NPM. *See* FNS-X-1 through FNS-X-5. From FFY 2010 to FFY 2013, Rhode Island's payment errors generated a total cost of $1,597,139.00. *See* FNS-X-2 through FNS-X-5.

unemployment rates, poor economic conditions due to a national recession, and severe storms affected SNAP caseload growth and the measures it has taken to improve SNAP administration in the future. *See* Appellant's Pet for Appeal, pp. 2-10; Answer to Appellant's Pet., p. 9. Rather than establish a nexus between caseload growth and payment error rate as required by FNS regulation, Rhode Island essentially offers a plethora of rudimentary and conclusory justifications for its excessive error rates.[36] In so doing, Rhode Island failed to meet its burden of quantitatively demonstrating how and to what extent SNAP caseload growth contributed to its payment error rates. Perhaps most troubling, Rhode Island failed to provide any analysis—or even make reference to—a causal relationship between its caseload growth and payment error rate. *See* Appellant's Pet. for Appeal, pp. 2-10; Answer to Appellant's Pet. for Appeal, p. 9.

Rhode Island's argument for a good-cause waiver is further weakened by the undisputed fact that, between July 1, 2012 and June 30, 2013, the State agency was responsible for administering 3,714 SNAP cases—thus experiencing a mere 9.02 percent (9.02%) increase statewide. Appellant's Pet. for Appeal, p. 4. When addressing "significant growth" in SNAP caseload, 7 C.F.R. § 275(f)(3) provides that 15 percent (15%) [or more] growth during a FFY would constitute an unusual event to qualify for good-cause relief. Rhode Island's 9.02 percent (9.02 %) caseload growth obviously falls short of the 15 percent (15%) caseload growth increase that FNS regulation envisions as "significant."

[36] *Inter alia*, Appellant claims that "because of the steep, rapid and persistent recessionary economic decline in Rhode Island, [Appellant's] attempt to add staff has been affected because of positions lost through attrition and inter-departmental hiring," which has caused "strain" on Appellant's "case management capacity." Appellant's Pet. for Appeal at 5. Appellant apparently fails to recognize that neither lack of resources nor ordinary administrative difficulties contributing to excessive error rates is a basis for good cause relief. *See* Answer to Appellant's Pet. for Appeal at 14; 56 Fed. Reg. 1,578, 1,582 (Jan. 16, 1991) (to be codified at 7 C.F.R. pt. 275) ("The failure of State and local governments to provide sufficient financial and other resources to manage the Food Stamp Program under normal circumstances does not constitute a basis for good cause relief from quality control liabilities."); ("It has already been noted that FNS does not intend to grant relief for the effects of normal levels of management difficulties . . ."); H.R. REP. NO. 96-788, at 907 (1980), *reprinted in* 1980 U.S.C.C.A.N. 843 ("Good cause would not encompass any state failure to act upon necessary legislative changes or to obtain budget authorization or needed staff or other resources, since those failures are clearly within state control.").

Accordingly, even had Rhode Island met its burden of establishing how caseload growth caused uncontrollable and adverse effects on SNAP administration and on its FFY 2013 payment error rates, it is readily apparent that its actual percentage of growth is not "significant" enough to warrant good-cause relief.

Based upon the foregoing, an oral hearing on this matter is not necessary. Rhode Island fails to merit good-cause relief on the grounds of its caseload growth because, as the record clearly indicates, in addition to failing to experience a caseload growth meeting the threshold set forth in the regulation, Rhode Island failed to establish how its SNAP caseload growth increase affected its FFY 2013 payment error rates as required by both the Food and Nutrition Act and corresponding FNS regulations.

Findings of Fact

1. Appellant, the Department of Human Services for the State of Rhode Island, administers the State of Rhode Island's Supplemental Nutrition Assistance Program. RI-X-E1 through E7; Appellant's Pet. for Appeal at 1, 5-7.

2. For FFY 2009, Appellant's SNAP payment error rate was 3.67 percent (3.67%). FNS-X-1; *see* RI-X-E2.

3. For FFY 2009, the NPM for SNAP payment error rates was 4.36 percent (4.36%). FNS-X-1.

4. For FFY 2010, Appellant's SNAP payment error rate was 5.98 percent (5.98 %). FNS-X-2; *see* RI-X-E3.

5. For FFY 2010, the NPM for SNAP payment error rates was 3.81 percent (3.81%). FNS-X-2.

6. For FFY 2010, a 95 percent (95%) statistical probability existed that Appellant's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates. FNS-X-2.

7. For FFY 2011, Appellant's SNAP payment error rate was 7.89 percent (7.89%). FNS-X-3; *See* RI-X-E4.

8. For FFY 2011, the NPM for SNAP payment error rates was 3.80 percent (3.80%). FNS-X-3.

9. For FFY 2011, a 95 percent (95%) statistical probability existed that Appellant's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates. FNS-X-3.

10. For FFY 2012, Appellant's SNAP payment error rate was 7.36 percent (7.36%). FNS-X-4; *see* RI-X-E5.

11. For FFY 2012, the NPM for SNAP payment error rates was 3.42 percent (3.42%). FNS-X-4.

12. For FFY 2012, a 95 percent (95%) statistical probability existed that Appellant's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates. FNS-X-4.

13. Appellant and Appellee, the USDA Food and Nutrition Service, settled Appellant's liability amount claim for FFY 2012. FNS-X-4 ("Settlement Agreement").

14. For FFY 2013, Appellant's SNAP payment error rate was 8.25 percent (8.25%). FNS-X-5; *see* RI-X-E6.

15. For FFY 2013, the NPM for SNAP payment error rates was 3.20 percent (3.20%). FNS-X-5.

16. For FFY 2013, a 95 percent (95%) statistical probability existed that Appellant's payment error rate exceeded 105 percent (105%) of the NPM for SNAP payment error rates. FNS-X-5.

17. As a result of Appellant's error rates in FFY 2012 and FFY 2013, Appellee established a liability amount of $683,350.00 for Appellant for FFY 2013. FNS-X-5.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Oral hearing is not necessary in this matter as no genuine issue of material fact exists.

3. Appellant is not entitled to good-cause relief for its SNAP payment error rates of FFY 2013 because it failed to maintain "otherwise effective administration" of its SNAP program as required by FNS regulations.

4. Appellant is not entitled to good-cause relief on the basis of caseload growth for its FFY 2013 payment error rate because it also failed to establish that caseload growth had an adverse and uncontrollable impact on SNAP operations during that period and moreover failed to demonstrate that caseload growth caused an uncontrollable increase in the error rate.

ORDER

1. The Petition for Appeal by Appellant, State of Rhode Island Department of Human Services, is denied.

2. Appellant is assessed a monetary liability of $683,350.00 for FFY 2013.

3. This Decision and Order shall become final and effective thirty (30) days after the date of service thereof unless a petition for review is filed with the Judicial Officer pursuant to 7 C.F.R. § 283.20.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

___

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: JUSTIN JENNE.
Docket No. 13-0308.
Decision and Order.
Filed July 29, 2014.

HPA.

Thomas Bolick, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

I. Introduction

The above-captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Justin Jenne ("Respondent"; "Jenne"). Complainant alleges that Respondent violated the Horse Protection Act, as amended, 15 U.S.C. §§ 1821-1831 ("the Act"; "HPA"), and the Regulations and Standards issued under the Act, 9 C.F.R. §§ 11.1-11.40; a2.1-12.10. ("Regulations"; Standards").

The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

II. Issue

[1] In this Decision and Order, the transcript of the hearing shall be referred to as "Tr. at [page number]." Complainant's evidence shall be denoted as "CX-[exhibit number]," and Respondent's evidence shall be denoted as "RX-[exhibit number]." Exhibits admitted to the record *sua sponte* shall be denoted as "ALJX-[exhibit number."

Did Respondent violate the HPA, and if so, what sanctions, if any, should be imposed because of the violations?

III. Findings of Fact and Conclusions of Law

A. Procedural History

In a complaint filed on August 2, 2013 ("the Complaint"), Complainant alleged that Respondent willfully violated the Act and the Regulations on or about August 27, 2012, when he entered the horse "Led Zeppelin" at a show while the horse was sore. Respondent timely filed an Answer and the parties exchanged evidence and filed submissions.

A hearing was held on March 11, 2014,[2] by means of an audio-visual connection between Washington, DC and Nashville, Tennessee. Respondent appeared at the Nashville site, and I presided at the Washington site, where Complainant's counsel and witnesses appeared. I admitted to the record the exhibits proffered by Complainant (CX-1B through CX-8B). Respondent did not proffer any documentary evidence[3]. I heard the testimony of Respondent and witnesses for Complainant. Complainant's counsel timely filed written closing argument and Respondent did not file closing argument. The record is closed and this matter is ripe for adjudication.

B. Summary of Factual History

Dr. Bart Sutherland is a veterinarian who is employed by APHIS as a veterinary medical officer ("VMO"). Tr. at 113-114. He was hired in the fall of 2010 to attend horse shows and enforce the HPA. Tr. at 114-115. Before he came to work for APHIS, Dr. Sutherland operated a general

[2] The hearing in this matter was held after a hearing on a complaint also alleging violations of the Act by Mr. Jenne, Docket No. 13-0080. The instant Decision and Order refers to Mr. Jenne's testimony pertaining to both cases.

[3] I held the record open for the receipt of a report of examination by Respondent's veterinarian, but that report was not submitted. A report by a different veterinarian pertaining to the examination of the horse involved in Docket No. 13-0080 was received and admitted to the record in that matter.

large animal veterinarian practice for approximately sixteen years. Tr. at 116.

Dr. Sutherland attended the 74th Annual Tennessee Walking National Celebration ("the Celebration") in Shelbyville, Tennessee in August and September of 2010. Tr. at 117. Dr. Sutherland examined Respondent's horse, Led Zeppelin, who was being led by an individual other than Mr. Jenne. Tr. at 119. Dr. Sutherland viewed a videotaped recording of his examination of the horse, and pointed out that the horse "starts pulling his leg forward right off the bat..." Tr. at 120. The horse reacted consistently to Dr. Sutherland blanching his thumb along the horse's foot. Tr. at 120-121. Dr. Sutherland also described how he believed that the person who was leading the horse was trying to distract it from the palpations, and had to be instructed not to pet the horse's head. Tr. at 122; 124-126.

Dr. Sutherland testified that Led Zeppelin was randomly selected for examination at the Celebration, where he examined between 100 and 200 horses. Tr. at 141. He found between ten and twenty horses sore during the seven day event. Tr. at 142. Dr. Sutherland considered palpation an objective test that is performed uniformly by inspectors. Tr. at 142-143. In Dr. Sutherland's experience, most sore horses are not so sore that their gait would be affected. Tr. at 143-144.

Dr. Sutherland explained that he found soreness where other inspectors did not because the other inspectors had not performed their examinations properly. Tr. at 161. Dr. Sutherland and other APHIS VMO were concerned about the performance of inspectors and had advised his supervisor of those concerns. Tr. at 160. The inspectors, known as Designated Qualified Persons ("DQP"), were not employees of USDA, but worked for Horse Industry Organizations ("HIO") who were certified by USDA. Tr. at 168.

Justin Jenne started riding horses when he was four years old and started competing in shows of Tennessee Walking Horses when he was six. Tr. at 73. Mr. Jenne testified that "horses are [his] life" and that "[he] would never engage in any type of soring or potentially hurt a horse in anyway or allow anyone that works for [him] to do so." *Id.* Mr. Jenne trains horses, and specializes in training two and three year old horses,

which are usually brought to his facility. Tr. at 73. Most of the horses he trains have not been ridden before, and Mr. Jenne and his staff teach the horses all that they know. *Id.*

Mr. Jenne brought a two-year-old stallion named Led Zeppelin to the Celebration on August 27, 2012. Tr. at 146-147. Mr. Jenne had shown the horse five times throughout the show season and he passed USDA inspection each time. Tr. at 147. USDA inspectors complimented Mr. Jenne on the horse's condition at one post-show inspection. *Id.*

Mr. Jenne described the inspection process at the Celebration as a "gauntlet" that involved several stations where the horse was swabbed by individual DQPs and then inspected by USDA at another location. Tr. at 148. After the swabbing, the horse was thermographed and "then he had to lead around the cones for the show DQPs to examine his locomotion." Tr. at 148. Led Zeppelin's feet were palpated by DQPs, and the DQPs passed the horse on both the locomotion and palpation tests. Id. USDA required the horse to go around the cones, and he passed that test. Tr. at 148. Mr. Jenne testified that the inspection of the horse at the Celebration took longer than usual, and that horses were lined up for a long time waiting for inspection. Tr. at 149; 152.

Mr. Jenne disagreed with Dr. Sutherland's conclusions, noting that he observed very little movement of his horse during the doctor's palpation, considering its age. Tr. at 149. Mr. Jenne compared Led Zeppelin to "a thirteen year old adolescent boy" (Tr. at 146-147), explaining "it's very easy for them to become agitated and bored and ready to move on." (Tr. at 153).

Mr. Jenne observed the entire testing of Led Zeppelin, which was led by his employee, Mr. Ricardo. Tr. at 149. He did not believe that Mr. Ricardo was attempting to distract the horse during the inspection, and explained that Mr. Ricardo is "a fellow that spent some time with that horse, loves him and he's just trying to assure him everything's all right." Tr. at 128. Mr. Jenne regretted that the video did not show the horse's locomotion and how well he presented himself. Tr. at 128. Mr. Jenne maintained that USDA always filmed horses walking around the cones, but the video omitted that part of the inspection. Tr. at 128-129.

Mr. Jenne had no documentation of the passing locomotion and palpation tests performed by the DQPs, who are licensed by USDA. Tr. at 153-154. He conjectured that DQPs document only horses that are found in violation, and explained that you needed to pass DQP inspection to get to USDA inspection. Tr. at 154. Many horses were inspected that night and the percentage of horses that failed inspection was high. Tr. at 149-150. After the show, Mr. Jenne's veterinarian, Dr. Richard Wilhem, inspected the horse and found no problems.

Mr. Jenne posited that Horse Industry Organizations who produce horse shows make money by disqualifying horses for a show and fining trainers and owners. Tr. at 183. He believed that a lot of revenue was generated by writing citations, and disagreed that DQPS have an incentive to pass horses belonging to friends. Tr. at 183-184.

Beverly Hicks has been employed by APHIS as an animal care inspector since November, 2006. Tr. At 104-105. Her primary duties are to inspect facilities where animals subject to APHIS' jurisdiction are housed, including horses subject to the HPA. Tr. at 105. Ms. Hicks attended the Celebration in August and September, 2012, and filmed inspections of horses, including the horse named Led Zeppelin on August 27, 2012. Tr. at 107-109. Ms. Hicks made copies of her audio-visual film onto CD, which was admitted to the record as CX-4B. Tr. at 109.

C. Prevailing Law and Regulations

In passing the Horse Protection Act, Congress observed that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1823. The Act defines the deliberate injuring of show horses as "soring", and includes the practice of applying an irritating or blistering agent to any limb of a horse; of injecting any tack, nail, screw or chemical agent on any limb of a horse; or using any practice on a horse that reasonably can be expected to cause the animal suffering, pain, distress, inflammation or lameness when "walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3)(A)(B)(D).

The HPA is administered by USDA through APHIS. A 1976 amendment to the Act led to the establishment of the Designated Qualified Person ("DPQ") program by regulations promulgated in 1979. 15 U.S.C. § 1823(c); see, also, 9 C.F.R. § 11.7. A DQP is a person who may be appointed and delegated authority by the management of a horse show to enforce the Act by inspecting horses for soring. DQPs must be licensed by a Horse Industry Organization (HIO) certified by the Department.

The HPA mandates that "[i]n any civil or criminal action to enforce this Act or any regulation under this Act, a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs and both of its hindlimbs." 15 U.S.C. § 1825(d)(5). In Landrum v. Block, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court held that the § 1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that Federal Rules do not directly apply to administrative hearings. Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer (VMO) digital palpation test by setting limits on appropriated funds to enforce the HPA. Congress directed "that none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act." *See* Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992).

In applying the statutory presumption, the Department's Judicial Officer ("JO") and Administrative Law Judges ("ALJs") have consistently observed that "it is the Secretary's belief that the opinions of its veterinarians as to whether a horse is sore are more persuasive than the opinion of DQPs." *Fields*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995); *Oppenheimer*, 54 Agric. Dec. 221 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334 (U.S.D.A. 1992), *aff'd*, 990 F.2d 140 (4th Cir.) (cert. den. 510 U.S. 867 (1993)); *Sparkman*, 50 Agric. Dec. 602 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188 (U.S.D.A. 1990), *aff'd per curiam*, 943 F. 2d 1318 (11th Cir. 1991) (cert. den. 503 U.S. 937 (1992)). Although the Landrum case held that the presumption may be rebutted by a Respondent, the history of Decisions by the JO and ALJs strongly suggests that rebutting the presumption is difficult to achieve in any case where a Veterinary Medical Officer employed by the Department opines that the horse is sore after being palpated.[4]

D. Discussion

Precedent dictates that for purposes of the HPA, Led Zeppelin must be presumed to have been sore based upon the findings of a USDA veterinarian. The USDA JO has routinely concluded that the opinions of USDA veterinarians as to whether a horse is sore are more persuasive than the opinions of DQPs. *Oppenheimer*, 54 Agric. Dec. 221 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334 (U.S.D.A. 1992), *aff d*, 990 F.2d 140 (4th Cir.) (cert. den. 510 U.S. 867 (1993)); *Sparkman*, 50 Agric. Dec. 602 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188 (U.S.D.A. 1990), *aff'd per curiam*, 943 F. 2d 1318 (11th Cir. 1991) (cert. den. 503 U.S. 937 (1992)).

Once the presumption of soreness is established, the burden of persuasion shifts to Respondent to provide proof that the horse was not sore, or that its soreness was due to natural causes. Although I credit the evidence that DQPs passed Led Zeppelin, their test results have little validity where, as here, an APHIS VMO finds soreness through palpation. Further, the case law suggests that the presumption of soreness

[4] *See* Beltz, 64 Agric. Dec. 1438 (U.S.D.A. 2005), *rev.*, 64 Agric. Dec. 1487 (U.S.D.A. 2005); *Motion for reconsideration denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006); *Aff'd. sub nom.* Zahnd v. Sec'y of the Dep't of Agric., 479 F.3d 767 (11th Cir. 2007).

must be rebutted by more proof than speculation about other natural causes, even when the evidence proffered to rebut the presumption consists of a reasoned medical opinion by a licensed veterinarian with experience in an equine practice. *See Beltz*, 64 Agric. Dec. 1438 (U.S.D.A. 2005), *rev.*, 64 Agric. Dec. 1487 (U.S.D.A. 2005); *Motion for reconsideration denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006); Aff'd. sub nom. *Zahnd v. Secretary of Department of Agriculture*, 479 F. 3d 767 (11th Cir. 2007). *See* Lacy, 66 Agric. Dec. 488 (U.S.D.A. 2007); *aff d*, *Lacy v. United States*, 278 Fed. Appx. 616 (6th Cir. 2008)[5].

I credit Mr. Jenne's testimony that the horse passed inspections at other events before the Celebration. However, it has been held that it is not unusual for a horse to be found sore at one examination and not sore at another. In re: Timothy Fields and Lori Fields, 54 Agric. Dec. 215, 219 (1995).

Accordingly, I find that the evidence is not sufficient to rebut the presumption that Led Zeppelin was sore for purposes of compliance with the HPA. As a matter of law, I must find that Respondent violated the HPA when he entered a sore horse at the Celebration in 2012.

E. Sanctions

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *Zimmerman*, 56 Agric. Dec. 433 (U.S.D.A. 1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *Lee Roach & Pool Laboratories*, 51 Agric. Dec. 252 (U.S.D.A. 1992). Any person who violates the HPA shall be subject to a civil penalty of not more than $2,200 for each violation. 15 U.S.C. § 1825(b)(1); 28 U.S.C. § 2461; 7 C.F.R. § 3.91(b)(2)(vii). In addition to any fine or civil penalty assessed under the

[5] In *Lacy*, 65 Agric. Dec. 1157 (U.S.D.A. 2006), the ALJ found that evidence from a veterinarian with equine experience who opined that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the JO reversed the ALJ's findings, on the grounds that the statutory presumption was not rebutted. On appeal, the Sixth Circuit affirmed the decision of the JO, relying upon Chevron doctrine of giving agency determinations deference. Chevron, USA, Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984)).

HPA, any person who violates the Act may be disqualified 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.

It has been held that most cases involving violation of the HPA warrant the imposition of the maximum civil penalty per violation. *McConnell*, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd* 198 F. App'x 417 (6th Cir. 2006). It further has been held that disqualification is appropriate in almost every HPA case, in addition to civil penalties, including cases involving a first-time violator of the Act. *Back*, 69. Agric. Dec. 448 (U.S.D.A. 2010).

Respondent has not presented any argument or evidence to assess when considering the penalty. In the absence of evidence supporting a lesser penalty, I find that Respondent is liable to pay a civil money penalty in the amount of $2,200.00. I also find that the circumstances warrant Respondent Justin Jenne's disqualification from participating in any manner in the exhibition, transportation, or managing of any horse for a period of one year.

Complainant requested that any disqualification of Respondent be imposed consecutive to any sanction imposed in the other case that involved an incident earlier to the instant matter. Because the HPA requires a longer disqualification for subsequent offenses, I find it appropriate that the disqualification of one year in this matter be consecutive to the one year disqualification imposed in Docket No. 13-0080. *See* Bobo, 53 Agric. Dec. 176 (U.S.D.A. 1994).

F. Findings of Fact

1. Justin R. Jenne is an individual whose mailing address is in Shelbyville, Tennessee.

2. APHIS VMO Dr. Bart Sutherland inspected horses participating in the 74th Annual Tennessee Walking National Celebration in Shelbyville, Tennessee in August and September of 2012, for compliance with the HPA.

3. On August 27, 2012, Justin Jenne entered a horse known as "Led Zeppelin" as Entry No. 542, Class No. 110 A, at the 74th Annual Tennessee Walking National Celebration.

4. The horse was led to inspection by Mr. Jenne's employee Roberto Ricardo.

5. Dr. Sutherland examined Led Zeppelin before the show.

6. Dr. Sutherland's examination was videotaped.

7. Dr. Sutherland concluded that the horse was sore within the meaning of the HPA.

G. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On August 27, 2012, Respondent Justin Jenne violated the Act when he entered the horse known as Led Zeppelin into a show while the horse was sore.

3. Because Respondent knowingly entered the horse in an exhibition, and the horse was deemed sore, Respondent's actions were willful.

4. Sanctions are warranted in the form of a civil money penalty and disqualification from participating in any manner in exhibitions for a period of time.

ORDER

Respondent Justin Jenne shall pay a civil money penalty twenty two hundred dollars ($2,200.00) for the instant violation of the HPA. Within thirty (30) days from the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

Respondent Justin Jenne also is disqualified for one uninterrupted 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, or horse sale or auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

The disqualification associated with the instant action shall begin consecutively to, and immediately upon, the completion of the disqualification period imposed in Docket No. 13-0080, and shall continue until the civil penalty assessed is paid in full.

This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

___

ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISION

In re: MICHAEL TIERNEY, d/b/a BIRCHWOOD FARMS.
Docket No. 13-0196.
Decision and Order.
Filed October 9, 2014.

OFPA.

Burren Kidd, Jr., Esq. and Frank Martin, Esq. for Complainant.
Michael S. Tierney, pro se, for Respondent.[1]
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

This matter is before me pursuant to a complaint filed by the Administrator, Agricultural Marketing Service, ("AMS"), United States Department of Agriculture ("USDA"; "Complainant") against Michael Tierney, d/b/a Birchwood Farms ("Respondent"), alleging violations of the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6522 ("OFPA"; "the Act") and the National Organic Program Regulations set forth at 7 C.F.R. §§ 205.1 -205.699 ("NOP Regulations").

This Decision and Order[2] is based upon the pleadings and arguments of the parties, and the photographic, documentary and testamentary evidence. The record is closed and the matter is ripe for adjudication.

I. Issues

1. Whether Respondent willfully violated OFPA and the NOP Regulations by selling, labeling, and representing livestock products

[1] Mr. Tierney's father, Michael Tierney, added the defense.

[2] Complainant's evidence shall be denoted as "CX-#;" Respondent's evidence shall be noted as "RX-#;" and references to the transcript of the hearing shall be designated "Tr. at [page number]." Evidence that I add to the record *sua sponte* shall be noted as "ALJX-X."

that were not from livestock under continuous organic management from the last third of gestation as organic;

2. Whether Respondent violated the Act and NOP Regulations by failing to update his organic system plan;

3. Whether Respondent violated the Act and NOP Regulations by using the term "organic" on labels of raw or processed agricultural products that were not produced or handled in compliance with NOP Regulations;

4. Whether Respondent provided livestock with feed and substances prohibited under the NOP Regulations; and

5. Whether sanctions should be issued against Respondent, and if so, the nature of those sanctions.

II. Findings of Fact and Conclusions of Law

A. Procedural History

On March 21, 2013, Complainant filed a complaint against the Respondent with the Hearing Clerk for the Office of Administrative Law Judges for USDA ("OALJ"). On April 1, 2013, Respondent filed an Answer. The parties exchanged evidence and filed witness and evidence lists pursuant to my Order, and I set a hearing date. The hearing was continued due to the government shutdown in October, 2013, and eventually was held on April 8, 2014, by personal appearance of the parties and representatives in Washington, D.C. Complainant was represented by Buren Kidd, Esq. and Frank Martin, Esq. Respondent Michael Tierney represented himself.

I admitted to the record Complainant's list of exhibits as ALJX-1. I admitted Complainant's exhibits, identified as CX-1 through CX-33. I admitted Respondent's exhibits identified as RX-1 and RX-2. I held the record open for the receipt of the transcript of the hearing and written closing argument. Both parties filed post-hearing briefs and proposed

findings of fact and conclusions of law on July 1, 2014. Respondent included with closing argument documents which had already been admitted to the record.

The record is now closed, and the matter is ripe for adjudication.[3]

B. Statutory and Regulatory Authority

The Act allows persons to seek and obtain organic certification from certifying agents accredited by the Secretary of USDA to certify crops, livestock, wild crops, products, and handling operations as compliant with the National Organic Standards set forth at 7 C.F.R. part 205. Regulations were issued to implement the Act and ensure consumers that livestock products labeled as "organic" meet the standards promulgated under the Act.

The Act and NOP Regulations require certified organic producers and sellers to submit organic system plans to their certifying agents, and 7 C.F .R. § 205.201(a) requires operators to update organic system plans to reflect changes or additions. Operators are required to keep records regarding the production and handling of products represented as organic (7 C.F .R. § 205.103), and to label products in a manner compliant with the Act and 7 C.F.R. § 205.300(a). The NOP Regulations also include standards for the manner in which livestock intended to be marketed as organic are raised and fed (7 C.F.R. § 205.237(a)).

The NOP Regulations require that " [l]ivestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the last third of gestation or hatching." 7 C.F.R. § 205.236(a). Further, "(l]ivestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time, provided that if such livestock are gestating and the offspring are to be raised as organic livestock, the breeder stock must be brought onto the facility no later than the last third of gestation." 7 C.F.R. § 205.236(a)(3).

[3] It must be noted that the transcript of the hearing proceedings has many errors, including the pagination. Throughout this Decision and Order, I used the page numbers on which testimony is recorded and not the numbers identified by the court reporter on the index. I found no error so egregious as to affect the substance of any testimony.

Non-compliance procedures are set forth in the NOP Regulations at 7 C.F.R. § 205.662. The Act authorizes the imposition of civil penalties of not more than $10,000.00 for the misuse of an organic label. 7 U.S.C. § 6519. In addition, the Act provides that the Secretary may find operators who violate the purposes of the organic certification period ineligible for a period of five years from the date of violation. 7 U.S.C. 6519 (c)(l)(C). The amount of the civil penalty shall be based on the severity of the violation. *Richardson*, 66 Agric. Dec. 69 (U.S.D.A. 2007).

C. Summary of the Evidence

1. Documentary and Photographic Evidence

CX-1 through CX-33

RX-1 and RX-2

2. Summary of Testamentary Evidence

Respondent Michael Tierney, d/b/a Birchwood Farms, became involved in the NOP in 2004, and was subject to inspections under the Act and the NOP Regulations. Tr. at 63; 29. Brian Magaro has been an independent inspector for the organic food industry since 2009 and is a member of the International Organic Inspectors Association. Tr. at 29-30. Since 1993, he has attended approximately twenty-five separate training sessions in all categories of the organic food industry. Tr. at 30. He inspects businesses with organic certification to confirm that their practices comply with the NOP Regulations. Tr. at 30-31. The scope of Mr. Magaro's inspections is determined by the organic system plan for an operator, and he relies on the information that the producer provides as the basis for organic certification. Tr. at 79-80.

Mr. Magaro inspected Respondent's operation at least four times, including an inspection conducted on September 22, 2009. Tr. at 31. He used an Initial Review Report generated by Respondent's certifying agent, Pennsylvania Certified Organic ("PCO") to document the findings of his inspection, which was based on those elements identified by Respondent's application for organic certification. Tr. at 32; CX-14. Mr.

Magaro prepared an inspection report that documented deficiencies with Respondent's operation. Tr. at 33-34; CX-14.

Mr. Magaro found that Respondent did not have adequate records to demonstrate that dairy cattle were fed properly. Tr. at 35. The inspector observed that a non-organic feed ingredient was being used. *ld.* He found barley flakes that included the ingredient of propionic acid, and which were not labeled GMO free, and he submitted a sample of their label to PCO. Tr. at 88. The inspector concluded that the barley was not certified organic but did not address the presence of propionic acid in his report. Tr. at 90. Mr. Magaro admitted that in an emergency like a natural disaster, an organic operation could use non-organic feed, but the NOP Regulations otherwise do not allow the intentional purchase and use of nonorganic feed. Tr. at 91-92.

Mr. Tierney explained that 100 pounds of the barley was fed to 35 cattle over a two-day period, which amounts to roughly 3.5 pounds per animal. Tr. at 318. Respondent had run out of feed and they "needed something to hold [the cattle] over" while they waited for their shipment of grain. Tr. at 319. Mr. Tierney observed that propionic acid is found in rumin, and he therefore believed that he was compliant so long as the feed was non-GMO [genetically modified organism].

Mr. Magaro also concluded that Respondent's records were insufficient to allow him to determine the quantity of milk that was being produced and processed. Tr. at 35-36. Mr. Magaro expected to see a list of all ingredients used in every step of the production of a product, including waste product quantities, in order to assure that the process met NOP standards. Tr. at 95. The inspector did not identify a particular dairy product that was deficient but faulted therecordkeeping itself. *Id.*

He also cited Respondent for labeling meat from "feeder pigs" as organic, where the pigs had been brought to the farm when young, fed organic feed , and then slaughtered at a facility that was not certified as organic. Tr. at 36-38. Mr. Tierney defended his decision to identify his pigs as organic by maintaining that Respondent could not comply with the regulation without buying a pregnant animal or an infant animal and raising it organically. Tr. at 321.

On September 22, 2009, Mr. Magaro also conducted an inspection of Respondent's processing operation. Tr. at 38-39. He recorded information regarding Respondent's practices regarding processing on a Handler Inspection Checklist, noting that Respondent failed to keep adequate records regarding products that had been processed. Tr. at 39-41 ; CX-14. The inspector shared his findings with Respondent and his father, Michael P. Tierney. Tr. at 42-43; 45. Respondent maintained that they were compliant, and had bought certified organic beef from "Simply Grazing" and from a farm called "Natural Acres." Tr. at 287.

Mr. Magaro could not recall if he had inspected Respondent's operation in 2008. Tr. at 48. He recalled discussing the location of organic slaughterhouses with Mr. Michael P. Tierney but denied recommending that Respondent use a non-certified slaughterhouse to produce meat that would be identified as organic. Tr. at 49-51. Mr. Magaro admitted telling Respondent that he did not know of a local organic slaughterhouse for them to use but he testified that he would not make such recommendations to producers. Tr. at 52.

Mr. Tierney testified that he did not know of the location of a nearby organic butcher shop, and that Mr. Magaro believed that there was one in Vermont. Tr. at 287. Respondent "thought [it] was unreasonable to drive ten hours one way, back and then four [sic] times. *Id.* He recalled Mr. Magaro advising that he would not have a problem with Respondent hauling animals born from certified organic mothers and raised on organic grass to the butcher shop they were familiar with. Tr. at 289. Respondent brought the organic beef to be processed first thing in the morning, when "everything is completely sterile." Tr. at 312. Mr. Magaro did not recall a conversation in which he condoned Respondent bringing animals to a non-certified slaughterhouse first thing in the morning. Tr. at 53. Mr. Magaro stated, "[i]n the 31 years I've been doing this, never has that been allowed". Tr. at 93.

Mr. Tierney contended that inspectors approved of his method. Tr. at 288-289. Respondent had applied for an organic label from USDA, which provided the labels to the slaughterhouse based on Respondent's organic certification application. Tr. at 289-290. A USDA meat inspector at the processing plant matched the label with the form and placed the label on the meat. Tr. at 290. Mr. Tierney admitted selling organic

animals "under an organic label that was not an organic butcher shop", stating that he did not understand the regulations. Tr. at 306. Respondent ceased that practice in 2009, and began to use a processor that was located an hour and one half drive from Respondent's location. Tr. at 313-314.

Mr. Magaro remembered telling Respondent that he was aware of an organic pig operation in North Carolina but did not agree that he gave advice about purchasing animals for use in the organic program that did not meet the standards required by the NOP for raising organic livestock. Tr. at 54. Mr. Magaro explained that the NOP requires an animal to be raised as organic from the last third of gestation to be certified organic, and may not be purchased as a live animal. Tr. at 55. The offspring of an animal that was raised organic would qualify for organic certification, but the mother would not because that animal would not have met the gestational requirement. Tr. at 57.

The inspector could not recall whether he saw any animals on Respondent's property, but rather, based his conclusion of non-compliance upon his observation that Respondent had meat that was improperly labeled as organic with no organic system plan for meat in place, and therefore, no certification for meat. Tr. at 61. Mr. Magaro testified that Respondent told him that they bought feeder pigs and cattle, fed them organically, and then labeled them as organic. *Id.* Had the animals been added to Respondent's certificate, Mr. Magaro would have traced them back to their point of sale to determine whether they met the requirements of organic livestock. Tr. at 62.

Mr. Tierney admitted that Respondent sold meat that was not included in their organic system plan. Tr. at 312. He did not think that pigs that were born from animals that were raised organically would not be organic solely because their parents were not from organic stock. *Id.*

Mr. Magaro was not aware of whether organic producers were given training or advice regarding the NOP, as his expertise was confined to inspecting operations for compliance with the Act and NOP Regulations. Tr. at 63-64. In his experience, an operator would align itself with a certifier and acquire the information needed to meet the standards for organic certification. Tr. at 64. He does not approve methods used by

organic operations or the requirements for certification. Tr. at 79. Mr. Magaro advises all operators to maintain records so that NOP standards may be verified, but he does not promote a specific record-keeping method. Tr. at 85-86.

Mr. Magaro described the problem he identified with Respondent's failure to accurately record the tonnage of hay from his pasture that was used as feed, and explained that "a farmer's estimate" of the amount of hay harvested would be acceptable. Tr. at 70-71. Unlike the production of dairy products, Mr. Magaro acknowledged that in a grass fed system where the majority of the feed was from pasture or grass, the amount of feed would be based on the approximate intake by the animals. Tr. at 95-96.

Mr. Tierney testified that he didn't understand how to satisfy recordkeeping requirements of tracking the food intake of animals who eat grass and who are out on a pasture for "22 hours a day, seven days a week." Tr. at 308-309. He could tell that animals were sufficiently fed by their body conditioning. Tr. at 310. Respondent has since purchased a program to track the grass eaten, but Mr. Tierney testified that "it is not scientific." Tr. at 311.

Amy Talarico has inspected organic operations as an independent organic inspector for eleven years. Tr. at 98. She also manages a certified organic farm operation. Tr. at 97. She holds certificates from the Organic Inspectors ' Association in crops, livestock and processing. Tr. at 98. Her inspections are to verify compliance with the National Organic Standards and the operator's organic system plan. *Id.*

Ms. Talarico inspected Respondent on July 9, 2010, and afterwards met with Mr. Tierney to advise him of deficiencies she had identified and documented in her inspection report. Tr. at 99-101; CX-18. Ms. Talarico found that Respondent's records for milk production were not adequate. Tr. at 102. Because records were not sufficient to track the origin and creation of products, the inspector could not verify compliance with the NOP. Tr. at 104. At the time of the inspection, Ms. Talarico also used a checklist to try to trace products back to sources, and noted that there were no actual production records for products. Tr. at 106-107; CX-19. She observed many lapses in recordkeeping. Tr. at 107.

The inspector found non-organic veal, pork and tomato-basil cheddar cheese were stored in a cooler with signs indicating "USDA organic". Tr. at 103. She recalled that Respondent explained that a new employee erroneously placed the products in the cooler. Tr. at 127. Mr. Tierney admitted that the meat was not organic, and that some of it was sold from a cooler marked with an organic label. Tr. at 315. However, the meat that Ms. Talarico saw was meant for their dog and would not have been sold. Tr. at 316. It was mistakenly stored by a new employee. *Id.* Mr. Tierney objected to have been found non-compliant because organic and non-organic products were stored in the same cooler. Tr. at 317. Respondent has since ceased labeling products as organic, and placed clarifying notices on his company's website. Tr. at 318.

Ms. Talarico also observed that some products that were not on Respondent's plan were labeled with an organic label. Tr. at 128. She prepared an addendum to her report that she submitted to the PCO in order to expand on her concerns about Respondent's operation, specifically, a brochure she collected from Respondent's facility that identified "organic" products that were not certified as organic for Respondent's operation. Tr. at 107-100; CX-20 and CX-21.

Mr. Tierney admitted that Respondent was not certified by PCO to produce or handle meat products at the time of the two inspections at issue. Tr. at 322. He could not understand why Respondent's ice cream wasn't certified until he learned that he had to include it in his organic system plan. Tr. at 325. Respondent had operated for five years, from 2004 until2009, before realizing that the plan needed to be updated to include products. Tr. at 326. Mr. Tierney's father testified that the brochure had been prepared a long time ago and Respondent has not relied upon it for a long time. Tr. at 347.

Ms. Talarico agreed that Respondent's dairy herd was in good health, despite the lack of records documenting its condition. Tr. at 112-114. She explained that even if Respondent's cows were in the pasture daily, some record should be kept to document that Respondent's management of the herd is compliant with NOP. Tr. at 116-188. She would expect to see feed records, and records of which animals were out in which paddock, and how much and when each animal was eating. Tr. at 120-121. She

saw no records documenting anything about the herd's management, and she could only rely upon her observations and Respondent's responses to her questions. Tr. at 121-123.

Kyla Smith has been the Pennsylvania Certification Program Director for a year and one half, and has worked for that organization since 2010. Tr. at 156-157. She oversees and manages the organic certification process from the receipt of an application to the issuance of an organic certificate. Tr. at 157. Operators submit an organic system plan that is used by inspectors to determine compliance. Tr. at 159-159. Any additions or changes to the plan must be submitted to the certification agent. Tr. at 160. Ms. Smith is responsible for reviewing Respondent's organic certificate records, and was familiar with them, and with reports documenting inspections of Respondent's operation. Tr. at 157-159. Respondent's operating plan was not updated to include meat products or tomato basil cheese. Tr. at 169.

On January 21,2010, PCO issued a notification of proposed suspension for noncompliance to Respondent. Tr. at 161 ; CX -14. Inspectors had "found three violation that were deemed to be noncorrectable . . . labeling and selling as "certified organic" meat products that are from nonorganic pigs and beef cattle . . . labeling as "certified organic" meat products that have been processed in a noncertified facility .. . and [using] nonorganic flaked barley containing propionic acid, a prohibited synthetic, to certified organic livestock . . . " Tr. at 161-162. These matters were considered noncorrectable because the products had already been sold, "the organic animals had already been slaughtered in a noncertified facility, and the feed had already been fed to the animals." Tr. at 162-163.

Mr. Tierney replied to the revocation notice and requested mediation in a letter dated January 18, 2010. Tr. at 165; CX-8. In the letter, he asserted that his efforts to locate organic certified pork breeders had been unsuccessful. *Id.* Ms. Smith explained that Respondent could not label and sell pigs as organic if they did not come from organic breed stock, even if the animals were raised in an organic fashion. Tr. at 165-166. Similarly, animals slaughtered in a non-organic plant cannot be sold as organic. Tr. at 167. PCO would not permit certified operations to sell as organic meat from a nonorganic slaughter house. *Id.*

On August 9, 2010, PCO sent to Respondent another notice of noncompliance and proposed suspension after a site inspection disclosed continued noncompliance. Tr. at 170-171;
CX-24, 24A. Matters that were raised as concerns in an inspection report are often included in certification reports, and sometimes violations of the NOP Regulations are also reported on certification reports, but not on inspection reports. Tr. at 190-191.

Ms. Smith explained that although Respondent's sale of cheese and milk was initially considered a violation, the subsequent request for approval of the products as organic was accompanied by documentation and approved. Tr. at 189. Ms. Smith also explained that the NOP Regulations prohibit the use of synthetic products in livestock production, and that propionic acid is prohibited because it is synthetic. Tr. at 215-216.

Matthew Michael has worked for USDA for twenty-one (21) years and is the Director of the Compliance and Enforcement Division of the NOP. Tr. at 218-219. He testified that there are over 25,000 certified organic operations accredited and certified by 84 NOP agents. Tr. at 220. PCO was accredited by the USDA Agricultural Marketing Service Administrator ("AMS") as an NOP agent. Tr. at 221; CX-1. Mr. Michael testified that AMS has received Respondent's appeals of PCO's determinations of noncompliance and proposed revocation and combined the appeals in one determination issued on June 16, 2011, and denying the appeals. Tr. at 223; CX- 27; CX-29. He explained that when an accredited certifier such as PCO proposes an adverse action, the operator has the right to request mediation, and PCO has the authority to grant or deny the request for mediation. Tr. at 256. AMS provides guidance to accredited certifiers, but does not have standardized forms for recordkeeping. Tr. at 257.

Mr. Michael testified that enforcement of the NOP Regulations assures consumers that organic food meets consistent standards and prevents non-compliant operators from gaining an economic advantage. Tr. at 224-225. Organic operators are able to charge a premium price for their products to recoup the costs of compliance with the NOP standards. Tr. at 225. Mr. Michael considered Respondent's violations to be serious,

as they covered four categories of organic products, and he believed that revocation of Respondent's organic certification was warranted. Tr. at 225-226. Mr. Michael explained: ". . . the actions of the operation were counter to the purposes of the act. Consumers were misled, thus the consumer confidence in the organic seal is eroded. They produced and sold products in violation of the regulations, putting themselves in an unfair advantage with their competitors." Tr. at 228.

Mr. Michael found the recordkeeping violations very serious because an inspector relies upon records to determine compliance, and in order to be certified, an operator must demonstrate the ability to comply with the NOP standards. Tr. at 228-229. He explained that the regulations require that feeding records be kept for ruminants that are maintained and fed from pastures. Tr. at 258. Dairy experts are able to determine how much feed from pasture that a cow eats by using industry recognized calculations. Tr. at 260.

Mr. Tierney stated that some inspectors were thorough, such as Mr. Magaro, but others did not want to go through all of his paperwork. Tr. at 292. Since being given the noncompliance for recordkeeping, Respondent "has spent $10,000.00 on a recordkeeping system that assigns lot numbers to every single one of our products. We have a parlor system that tracks milk flow and I mean, everything has been upgraded ... we keep a daily log." Tr. at 296-298.

Because Respondent is currently suspended from the NOP, Mr. Michael concluded that Mr. Tierney is unable to comply with the regulations. Tr. at 230. A suspension could be overturned if USDA AMS agrees to reinstate an operator, but in this case, Respondent's suspension was not overturned. Tr. at 233. The number of repeated violations by Respondent convinced Mr. Michael that revocation was warranted, just as he had concluded in cases involving operators who had a similar number and type of violations. Tr. at 253. An operation which has its certification revoked is ineligible to sell or label products represented as organic for five years from the date of revocation, but the Secretary can reduce the term of revocation. Tr. at 253; 261.

The elder Mr. Tierney testified that Mr. Magaro had confirmed with him that you need a certified organic pig to start a certified pig operation.

Tr. at 333. Mr. Tierney corroborated his son's testimony that Mr. Magaro had advised that he had no problem with Respondent taking animals in their own trailer to a butcher who would process the animals at the start of the day when everything was clean. Tr. at 334.

D. Discussion

1. Respondent's Motion to Dismiss the Complaint

In his written closing argument, Respondent moved for dismissal of the complaint on procedural and substantive grounds. Respondent first raised the issue of whether the matter was within the statute of limitations. Mr. Tierney has cited no statutory or regulatory authority for his position on this issue. Respondent raises the question of why USDA did not bring the instant complaint against him until five years after the alleged violation.

The administrative appeal process allows certified operators to request mediation of the adverse action or appeal the determination to USDA. After PCO denied Respondent's request for mediation, Respondent appealed the non-compliances to USDA's AMS, which issued a decision on Respondent's appeals on June 16, 2011. CX-19. According to the NOP Regulations, "[i]fthe Administrator or State organic program denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice or the State organic program's rules of procedure." 7 C.F.R. § 205.681(a)(2). The instant complaint was filed by USDA on March 21, 2013.

The regulations do not impose a deadline for the filing of the required complaint. The complaint was filed less than two years after Respondent's appeals were denied. The Act provides for the imposition of a five year revocation from the date of occurrence of violations of the program, but that does not constitute a statute of limitations. *See* 7 U.S.C. § 6519 (c)(l)(C).

Accordingly, Respondent's factual assertions are not supported, and his claim that the proceeding is barred by a statute of limitations is

without merit. Respondent's other grounds for dismissal are denied as unsupported, for the reasons discussed below.

2. Violations

Violations of 7 CFR. § 205.236(a)

Respondent admittedly sold, labeled, and represented livestock products as organic where the preponderance of the evidence demonstrates that the livestock were not produced and handled under a continuous organic management plan. Mr. Tierney admitted that he had purchased piglets from breeding stock that was not organic, in direct violation of 7 C.F.R.§ 205.236(a). Although Respondent raised and fed the pigs in accordance with an organic plan, they were not from a source that met the NOP standards.

I give little weight to the testimony that Respondent was unable to identify an organic source for purchase. Respondent knew what the regulations required and expressed frustration that his PCO inspector could not identify a source of piglets that met the expectations of the NOP Regulations. It is clear from Respondent's testimony that the operation could have developed the proper generational organic sources at its own facility but instead decided to circumvent the regulations for financial gain.

Similarly, Respondent slaughtered organically raised animals at a non-organic facility. Again, Respondent was frustrated that Mr. Magaro could not recommend a certified butchering facility close to his operation, and Respondent made the decision to use his local non-organic processor. Mr. Tierney testified that the facility Mr. Magaro identified was too far away to use. I give little weight to the assertions by both Mr. Tierney's that Mr. Magaro approved the use of a non-organic slaughter house. Mr. Magaro did not recall such a conversation, and I credit his testimony that he would not condone a scheme that was obviously not compliant with NOP Regulations.

Additionally, even if Respondent had fully complied with the requirements for organic breed stock and slaughtering at a certified facility, Respondent would nevertheless remain noncompliant with the

NOP Regulations because the operation was not certified by PCO to produce or handle livestock for organic meat production. This lapse represents much more than lax recordkeeping. The onus of knowing and meeting the expectations of the program fall on those who stand to benefit from it. The Act requires participants in the NOP to submit their organic plan, and outlines the substance ofthe plan. 7 U.S.C. § 6513. The NOP Regulations provide specific instruction to operators regarding the plan.

Accordingly, I find that Respondent sold, labeled and represented livestock products as organic that were not from livestock under continuous organic management from the last third of gestation in violation of 7 C.F.R. § 205.236(a). Respondent produced meat at a non-organic slaughterhouse in violation of 7 C.F.R. § 205.236(a). Respondent was not certified to produce or handle livestock for organic meat production.

Violations of Labeling Standards

Respondent labeled and sold cheese and meat products as "organic", and advertised those products as organic in his brochure and on his website. At both inspections germane to this adjudication, the inspectors found non-certified meat that was labeled organic, and that was stored in coolers marked with the USDA organic logo. Dairy products were labeled organic that were not certified as part of Respondent's plan. Respondent admitted that he used the term organic on labels for products that were not certified as organic. Respondent provided organic labels for meat slaughtered at a non-organic plant. There is no contrary evidence.

I give little weight to the explanations offered by Respondent. Although I credit that meat not meant for sale was mistakenly stored, and that products considered organic by other manufacturers were stored with non-organic products, the use of the brochure and the identification of non-certified products in Respondent's advertising, at its store, and on its website, undermines Respondent's contentions that the mislabeling was inadvertent. Mr. Tierney provided organic labels for use by a non-organic slaughter house. Respondent voluntarily participated in the organic program for economic gain. Respondent admitted that organic

products are sold at a premium price. I credit Mr. Michael's testimony that consumer confidence in the program rests heavily upon the buyer's ability to rely on representations of organic production, and that the USDA organic label is a hallmark of the program.

The evidence supports finding that Respondent violated 7 C.F.R. § 205.300(a).

Violations of Organic Feed Regulations

Respondent admittedly provided livestock with a product that included a substance that was listed in the NOP Regulations as a prohibited synthetic substance. I give no probative weight to the testimony that propionic acid naturally occurs, or that the amount given to the animals was small. The barley that the animals were fed contained the substance, and the regulation allows no exceptions. Despite Mr. Magaro's testimony that non-organic feed might be used in a disaster, the regulations do not provide that exception. The Act specifically provides certain exceptions, but none apply to the instant circumstances. See, 7 U.S.C. §§ 6505(c) and (d) and 6506 (b). Even if it was determined that a natural disaster merited an exception to the feeding requirements for livestock, Mr. Tierney's explanation that his animals were fed the suspect barley "to tide them over" while waiting for his regular feed delivery hardly represents a disaster situation. That Respondent fell short of necessary feed reflects poor management.

The uncontroverted evidence establishes that Respondent violated 7 C.F.R. § 205.237(a).

Failure to Update Organic System Plan

Respondent failed to update his organic system plan to include additional dairy products and meat. Although Mr. Tierney posited that Respondent was unaware that the plan could and should be amended to reflect products that Respondent produced or sold as organic, he nevertheless admitted that Respondent was advised to do so when he first sought organic certification. The record supports finding that Respondent failed to update his organic system plan in violation of 7 C.F.R. § 205.201(a).

Recordkeeping Violations

I accord substantial weight to Mr. Michael's testimony regarding the significance of recordkeeping to demonstrate compliance with the NOP Regulations. Compliance inspections are infrequent, the ratio of inspectors to facilities is small, and the program relies heavily on voluntary compliance of participating certified operators. Respondent's recordkeeping was considered inadequate to show how much food his pasture fed animals ate when turned out. Mr. Tierney seemed to believe that he did not need to keep records of cows that spent most of their lives out in pasture, eating at will, and seemed to believe that the apparent health of the cows proved that they were sufficiently fed. However, the record makes clear that Respondent was advised that records of the whereabouts of each cow at any time must be recorded, and an approximation of their intake could be made to satisfy the requirements of the NOP Regulations.

Other recordkeeping deficiencies were noted by inspectors, and Respondent has apparently realized the importance of maintaining records, considering his purchase of an expensive recordkeeping system tailored to NOP participants. I find no support for Respondent's claim that the record fails to establish "what acceptable record keeping is." The NOP Regulations set forth specific requirements for records that must be maintained, and I accord weight to the testimony of two PCO inspectors who discussed recordkeeping deficiencies with Respondent after their inspections. The evidence on this issue is not contradicted, and I find that Complainant's allegations of violations of 7 C.F.R. § 205.103 are sustained.

Willfulness

Mr. Tierney testified that he had asked PCO for direction and guidance with complying with the NOP Regulations and was informed that the onus was on him to comply. Tr. at 291. He stated that "we have operated under this, basically understanding of the regulations only through non-compliances." Tr. at 291-292. Mr. Tierney believes that the allegations of non-compliance arise from a personal dispute between Respondent and PCO, which is the subject of litigation. Tr. at 302-303.

He noted that the allegations at issue were five years old, and that Respondent "had a lot more knowledge now than we did back then." Tr. at 321. Respondent also maintains that mistakes were made due to misunderstandings, and that he was overwhelmed when he first sought certification in 2004. Tr. at 357-358. Respondent renewed these arguments in written closing argument, wherein he also alleged that his shortcomings were due to NOP's failure to impose clear guidelines for certifying agents and operators to follow.

I reject Respondent's explanations for his failure to comply with NOP standards. Respondent's conduct demonstrates a grasp of the program's requirements and novel methods to avoid implementing them. Many of his defenses are little more than excuses for his conduct, and I find little support for his contention that NOP failed to issue guidelines. The Act and the NOP Regulations detail the requirements of the program. Inspectors for PCO described their expectations of Respondent's compliance.

I find that Respondent's attribution of his non-compliance with the Act and NOP Regulations to various factors, such as the failure of PCO to give him guidance; the lack of training from government entities; his misunderstanding of requirements; and plain ignorance of the regulations, reinforces the conclusion that Respondent's violations were willful. Respondent did not seek the advice of a consultant or otherwise strive to learn the NOP standards first hand. Indeed, Respondent purposely devised ways to avoid the rigors of compliance while maintaining ignorance of the NOP Regulations.

Respondent delivered his organic certification and USDA certified organic labels to a non-organic slaughterhouse, where a USDA meat inspector applied the labels, which suggests a disingenuous plan designed to circumvent the NOP Regulations while maintaining the appearance of compliance. The USDA inspector who had labeled Respondent's meat as organic with labels that Respondent provided was not associated with the NOP. Respondent used his certification to get the labels approved, and then delivered them to the non-organic slaughtering facility, fully aware that the plant was not organic. This overt circumvention of the regulations resulted in the labeling of meat

produced at a non-organic facility as organic, and lulled consumers to believe that the meat bearing the USDA label was organic.

Additional evidence of Respondent's willful violation of the regulations lies in his requests for advice from his inspection agent about issues that he could not easily resolve, such as locating organic breeding stock. The request signifies Respondent's awareness of regulatory requirements and his non-compliant solutions to regulatory hurdles represents Respondent's disregard for the regulations.

The evidence demonstrates that when faced with a difficult compliance issue and satisfying his convenience, Respondent chose the easiest path. In the instance of keeping records of food intake by his pasture fed cows, Respondent concluded that the regulation made no sense, and he made no efforts to comply with the NOP Regulations. Similarly, Respondent failed to remove USDA organic symbols from his website for the somewhat implausible reason that it would cost "thousands of dollars" to do so. This violation continued at the time of the hearing, despite Respondent's status of being suspended from participating in the NOP since May of 2013. Tr. at 304; 361.

I decline to give probative weight to the insinuations of bias by PCO against Respondent, arising from litigation between those parties. The scope of my adjudication is confined to whether Respondent violated the Act and the NOP Regulations, and if so, the applicable sanction, if any. Under the circumstances, I find that Respondent's conduct reflects the willful nature of his violations, regardless of the motives of the PCO.

E. Sanctions

Respondent contends that he has already suffered economically because he has not been able to use an organic designation for months, but needs to continue operating in an organic fashion with no ability to recover those costs. Tr. at 355. However, I accord substantial weight to Mr. Michael's testimony about why revocation is an appropriate sanction in the instant matter. Mr. Michael observed that by failing to abide by the NOP Regulations, Respondent gained an unfair advantage over their competition and misled consumers. Mr. Michael concluded that Respondent's actions were counter to the purposes of the Act. He found

that the violations were willful, repeated and in some instances, uncorrectable, which are all conditions that merit revocation. Mr. Michael was additionally influenced by Respondent's current status of suspension, which he found indicated a continual inability to comply with the NOP. He observed that an operator would need to seek reinstatement after the expiration of a suspension and did not believe Respondent had done so. Tr. at 232. Mr. Michael believed that revocation of Respondent's organic certification was consistent with other revocations for similar violations. Tr. at 253.

Accordingly, I find that the preponderance of the evidence supports the revocation of Respondent's organic certification for a period of five (5) years. I note that the Act also provides for a civil money penalty for mislabeling violations, but I decline to impose that sanction in the absence of a recommendation for civil penalties by AMS. *See* 7 U.S.C. § 6519(a).

The Act provides that the revocation or suspension period should begin from the date of occurrence of the violation. 7 U.S.C. § 2121 (c)(l)(C). Respondent remains in violation of the Act and NOP regulations, as he continues to use the USDA organic logo on his website. Therefore, the effective date of revocation could begin upon the effective date of this Decision and Order. However, considering Respondent's current suspended status, I find that the effective date of the five year revocation should coincide with the first date that the current suspension was put into effect in May, 2013.

III. FINDINGS OF FACT

1. Michael P. Tierney is an individual doing business as Birchwood Farms, whose mailing address is in Pennsylvania.

2. At all times material hereto, Respondent was engaged in business as a certified organic crop, livestock and processor operation.

3. Respondent was certified as an organic operation on April 15, 2004, by Pennsylvania Certified Organic (PCO).

4. On April 29, 2002, PCO was accredited by USDA as a certifying agent pursuant to the NOP Regulations.

5. On September 22, 2009, PCO inspected Respondent's facilities and found that Respondent had sold, labeled and represented livestock products as organic, which were not from livestock under continuous organic management within the last third of gestation in violation of the NOP Regulations.

6. The inspection conducted on September 22, 2009, found that Respondent had failed to update his organic system plan to include products.

7. The inspection conducted on September 22, 2009, found that Respondent had used the term "organic' on labels and in labeling raw and processed agricultural produced that were not produced or handled in accordance with NOP Regulations.

8. The inspection of September 22, 2009, concluded that Respondent had fed livestock feed that included a substance prohibited by NOP Regulations.

9. The inspection of September 22, 2009, found that Respondent had failed to maintain adequate records concerning the production and handling of agricultural products that were intended to be sold, labeled, or represented as "organic."

10. On January 12, 2010, PCO issued Respondent a Notice of Non-compliance and Notice of Proposed Revocation relating to the violations disclosed by the inspection conducted on September 22, 2009.

11. On January 28, 2010, Respondent replied to the Notices and requested mediation.

12. On February 12, 2010, PCO denied the request for mediation.

13. On February 27, 2010, Respondent filed a timely appeal of the Notices with the AMS Administrator.

14. On May 18,2010, Respondent applied for and was issued an organic product verification as a producer and handler of: (1) organic crops-pasture; (2) organic livestock-dairy cows and milk; (3) organic yogurt-plain and vanilla (contract only), organic cheese-raw garlic cheddar, raw plain cheddar cheese, and baby Swiss cheese; and (4) 100% organic milk and raw butter (contract only).

15. On July 9, 2010, PCO inspected Respondent's facilities and found that Respondent used the term "organic" on labels and in labeling raw or processed agricultural products that were not produced or handed in accordance with NOP Regulations.

16. The July 9, 2010 inspection disclosed that Respondent failed to maintain records concerning the production and handling of agricultural products that were or that were intended to be sold, labeled, or represented as organic.

17. On July 9, 2010, Respondent was given notice of the non-compliances found at the inspection.

18. On July 12, 2010, Respondent contested the non-compliances.

19. On August 9, 2010, PCO issued a Notice of Non-compliance and Notice of Proposed Revocation to Respondent with respect to the July 9, 2010 violation.

20. On August 19, 2010, Respondent filed a timely appeal of the July 9, 2010 Notices.

21. On June 16, 2011, the AMS Administrator denied both of Respondent's appeals.

22. Subsequently, Respondent was suspended by PCO from participating in the NOP as a certified operator, with a 90 day suspension effective May, 2013.

23. Respondent did not seek reinstatement of its organic certification and the suspension continues to be in effect.

24. At the time of the hearing, Respondent's website continued to bear the USDA organic logo, although Respondent's non-certified status was noted on the website.

IV. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent sold, labeled and represented livestock products as organic that were not from livestock under continuous organic management in willful violation of 7 C.F.R.§ 205.236(a).

3. Respondent failed to update its organic system plan in willful violation of 7 C.F .R. § 205.201.

4. Respondent used the term "organic" on labels and in labeling raw or processed agricultural products that were not produced or handled in accordance with NOP Regulations, in willful violation of 7 C.F.R. § 205.300(a).

5. Respondent fed livestock feed that contained a prohibited substance in willful violation of 7 C.F.R. § 237(a).

6. Respondent failed to maintain adequate records concerning the production and handling of agricultural products that were or were intended to be sold, labeled, or represented as "organic" in willful violation of7 C.F.R. § 205.103.

7. Revocation of Respondent's certification to participate as an operator in the NOP is appropriate pursuant to 7 C.F.R. §§ 205.662(±)(2) and 205.681(a)(2).

ORDER

Respondent shall cease and desist from violating the NOP Regulations.

Respondent's organic certification and the organic certification for all responsibly connected persons affiliated with Respondent's operation is revoked for a period of not less than five years; the effective date shall coincide with the first date that Respondent's current suspension from the program was effective in May 2013.

Pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Initiated by the Secretary, this Decision and Order shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service. 7 C.F.R. §§ 1.139 and 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

The Hearing Clerk shall file the attached exhibits as electronic and hard copies with the official record.

___

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders & Dismissals] with the sparse case citation but without the body of the order. Miscellaneous Orders & Dismissals (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

AGRICULTURAL MARKETING AGREEMENT ACT

In re: BURNETTE FOODS, INC.
Docket No. 11-0334.
Miscellaneous Order.
Filed July 2, 2014.

AMAA – Extension of time.

James J. Rosloniec, Esq. for Petitioner.
Sharlene Deskins, Esq. for Respondent.
Initial Decision and Order entered by Jill S. Clifton, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING BURNETTE FOODS, INC.'S RESPONSE TO THE ADMINISTRATOR'S APPEAL PETITION AND FOR FILING THE ADMINISTRATOR'S RESPONSE TO BURNETTE FOODS, INC.'S APPEAL PETITION

On July 1, 2014, Burnette Foods, Inc., filed a motion requesting that I extend to August 14, 2014, the time for filing Burnette Foods, Inc.'s response to the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture's [hereinafter the Administrator], Appeal Petition and the time for filing the Administrator's response to Burnette Foods, Inc.'s Appeal Petition.

For good reason stated, Burnette Foods, Inc.'s request for extensions of time is granted. The time for filing Burnette Foods, Inc.'s response to the Administrator's Appeal Petition is extended to, and includes, August 14, 2014, and the time for filing the Administrator's response to Burnette Foods, Inc.'s Appeal Petition is extended to, and includes, August 14,

2014.[1]

___

ANIMAL WELFARE ACT

In re: CHINA CARGO AIRLINES, CO., LTD., A/K/A CHINA CARGO AIRLINES, LTD., A SUBSIDIARY OF CHINA EASTERN AIRLINES CORPORATION LIMITED, A CORPORATION CHARTERED IN THE PEOPLE'S REPUBLIC OF CHINA.
Docket No. 14-0041.
Memorandum Opinion and Order.
Filed August 6, 2014.

AWA.

Colleen Carroll, Esq. for Complainant.
Edward J. Longosz, II, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

MEMORANDUM OPINION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter "the Act"], and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*) [hereinafter "Regulations and Standards"]. The matter initiated on November 18, 2013 with a Complaint filed by the Administrator of the Animal Plant and Health Inspection Service of the United States Department of Agriculture [hereinafter "USDA"; "Complainant"] against China Cargo Airlines, Co., Ltd., also known as China Cargo Airlines, Ltd. [hereinafter "China Cargo"; "Respondent"]. The Complaint alleges that, on or about March 10, 2010, Respondent committed numerous violations of the Act and the Regulations and Standards during its

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Burnette Foods, Inc., must ensure its response to the Administrator's Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 14, 2014, and the Administrator must ensure his response to Burnette Foods, Inc.'s Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, August 14, 2014.

acceptance and transportation of 566 live guinea pigs from Shanghai, People's Republic of China to Los Angeles, California (Compl. ¶¶ 1-2).

On December 3, 2013, Respondent filed a Consent Motion for an Extension of Time to File an Answer. On December 4, 2013, I entered an Order granting the Consent Motion and allowing Respondent until January 23, 2014 to file an answer. On January 23, 2014, Respondent filed its Answer to the Complaint.

On February 25, 2014, I entered an Order directing Complainant to file with the Hearing Clerk by March 27, 2014 a list of exhibits and list of witnesses; directing Respondent to file with the Hearing Clerk by April 24, 2014 a list of exhibits and list of witnesses; and directing the parties to consult with each other and, no later than one week after the date of Respondent's exchange deadline, to file a Status Report with the Hearing Clerk. On March 18, 2014, Complainant filed its List of Exhibits and List of Witnesses with the Hearing Clerk. On April 24, 2014, Respondent filed its List of Exhibits and List of Witnesses with the Hearing Clerk.

On May 13, 2014, Complainant filed a Status Report requesting a two-day hearing. On June 11, 2014, Complainant filed: (1) a Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Motion for Adoption"]; and (2) a Proposed Decision and Order by Reason of Default. On July 1, 2014, Respondent filed its Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default [hereinafter "Response and Objections"]. In its Response, Respondent requested an oral argument "on all issues presented" (Resp., "Oral Argument Requested").

Presently before me are: (1) Complainant's "Motion for Adoption of Decision and Order by Reason of Default"; (2) Respondent's "Response and Objections to Complainant's Motion for Adoption of Decision and Order by Reason of Default"; and (3) a request for oral argument filed by Respondent.

Discussion

"It is well established that the Rules of Practice, 7 C.F.R. § 1.130 *et*

seq., rather than the Federal Rules of Civil Procedure apply to adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act."[2] Pertinent to the case at bar, the Rules of Practice for the U.S. Department of Agriculture[3] [hereinafter "Rules of Practice"] establish that "an answer must be filed within 20 days after service of the complaint."[4] The Rules of Practice also provide that an answer "shall . . . [c]learly admit, deny, *or explain* each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."[5] Per Rule 1.136, "failure to file an answer within [20 days] shall be deemed, for the 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."[6]

Rule 1.139 establishes the procedure upon a party's 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

---

[2] Hamilton, 64 Agric. Dec. 1659, 1662 (U.S.D.A. 2005) (internal citations omitted); *see* Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999) ("The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice.").

[3] 7 C.F.R. §§ 1.130-1.151.

[4] *Hamilton*, 64 Agric. Dec. at 1662 (citing 7 C.F.R. § 1.136); *cf.* FED. R. CIV. P. 12(a)(1)(A) (requiring a defendant to serve answer within 21 days of being served a summons or complaint or, if defendant has waived service timely per FED. R. CIV. P. 2(d), within 60 days after a request for waiver was sent or within 90 days of being sent to a defendant outside the United States).

[5] *Hamilton*, 64 Agric. Dec. at 1662 (emphasis added).

[6] 7 C.F.R. § 1.136(c) (emphasis added). *See* Morrow v. Dep't Agric., 65 F.3d 168, 168 (6th Cir. 1995) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

> 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.

With regard to the filing of answers, the Rules of Practice differ from the Federal Rules of Civil Procedure [hereinafter "Federal Rules"] in one technical yet significant aspect. While the Federal Rules provide that a responding party must "admit or deny the allegations asserted against it by an opposing party,"[7] they also establish that a "party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, *and the statement has the effect of a denial*."[8] The Rules of Practice, contrarily, make no reference to a lack of knowledge or information; they simply direct a respondent to (1) admit, deny, *or explain* each allegation of the complaint and set forth any defenses; (2) admit all facts alleged in the complaint; or (3) admit the jurisdictional allegations and neither admit nor deny the remaining allegations, while consenting to the "issuance of an order without further procedure."[9] The key distinction is that while a defendant in federal court may claim lack of information and in effect "deny" an allegation, a respondent in our administrative proceedings must clearly deny or "otherwise respond" to each allegation as any other response treated will be treated as an admission.[10]

Here, Complainant seeks to take advantage of the disparity between the two rules by suggesting that, because Respondent did not explicitly deny each allegation in the Complaint, Respondent effectively admitted all claims. Specifically, Complainant asserts that Respondent's Answer "admitted, or did not deny, or did not otherwise respond to the material

---

7 FED. R. CIV. P. 7.1(b)(1)(B).
8 FED. R. CIV. P. 7.1(b)(5) (emphasis added).
9 7 C.F.R. § 1.136(b)(1)(2)(3) (2013).
10 *See* FED. R. CIV. P. 7(b); 7 C.F.R. § 1.136(b) (emphasis added).

allegations of the complaint" and that "[p]ursuant to the Rules of Practice, those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding" (Mot. Adoption Decision ¶ I.A.), thereby "waiv[ing] the right to a hearing" (Mot. Adoption Decision ¶ I.A.4). Complainant's argument, however, lacks merit as Respondent did admit, deny, or *otherwise explain* each allegation of the Complaint pursuant to Rule 1.136.

The Complaint contains four material "Alleged Violations" not relating to jurisdiction, each of which Respondent either denied or explained. Accordingly, the allegations may not be treated as "admitted" in the current proceeding. In response to Alleged Violation # 3 (*i.e.*, Respondent violated Regulations by "failing to handle 566 guinea pigs as expeditiously and carefully as possible" in mislabeling the containers of guinea pigs as "perishables, not containing live animals"), Respondent conceded that the shipping entity misidentified the containers of guinea pigs but further stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint, and therefore, neither admits or denies the same, but demands strict proof thereof." With respect to Alleged Violation # 4 (*i.e.*, Respondent violated Regulations by failing to satisfy Standards for humane treatment of guinea pigs by accepting 566 live guinea pigs for shipment more than four hours prior to scheduled conveyance), Respondent answered that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Similarly, in responding to Alleged Violation # 5 (*i.e.*, Respondent violated Regulations by failing to meet Standards in transporting the animals in "nonconforming primary enclosures"), Respondent stated that it was "without sufficient knowledge and information as to form a belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof." Respondent also answered to Alleged Violation # 6 (i.e., Respondent violated Regulations by failing to meet Standards in failing to place 566 live guinea pigs in animal cargo space; failing to place enclosures containing the guinea pigs in the primary conveyance in a way in which they could be removed as soon as possible in an emergency situation; failing to provide the guinea pigs access to food or water for approximately 24 hours; accepting 566 live guinea pigs

for transport without adequate food; failing to visually observe the guinea pigs when they were unloaded to ensure that they were receiving enough air for normal breathing; failing to place guinea pigs in an animal holding area upon arrival to Los Angeles, California as quickly as possible) by stating that it was "without sufficient information and belief as to the truth of the allegations . . . and therefore, neither admits or denies the same, but demands strict proof thereof."

Respondent also provided nine "affirmative defenses," one of which ("Tenth Defense") states: "Respondent *denies all allegations not specifically responded to,* and reserves the right to interpose additional defenses, if appropriate." Based upon the substance of Respondent's statements, it is plain that the Answer has, at minimum, explained or otherwise responded to each material allegation of the Complaint.[11] Accordingly, Respondent's pleadings will not be treated as admissions, and Respondent will not be deemed to have waived its right to a hearing.

Complainant cites various cases that, upon analysis of each case in its entirety, are either inapplicable or plainly distinguishable from the present case.[12] Complainant cites these cases to support its contention

[11] In analyzing whether Respondent's statements constitute explanations or responses, the regular and ordinary definitions of the terms "explain," "respond," and "otherwise" will be used. *See* Nat'l Ass'n Home Builders v. Defenders Wildlife, 551 U.S. 644, 672 (2007) ("An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation'. . ."") (internal quotations omitted); Barnhart v. Walton, 535 U.S. 212, 212 (2002) ("Courts grant considerable leeway to an agency's interpretation of its own regulations . . .); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 179 (1995) (stating that where an act does not define a certain term, that "term should be given its ordinary meaning"). The OALJ accepts the following definitions: (1) *explain* (verb): "to make known," "to make plain or understandable," "to give the reason for or cause of," or "to show the logical development or relationships of;"(2) *respond* (verb): "to say something in return: make an answer," "to react in response," "to show favorable reaction," or "to be answerable;" and (3) *otherwise* (adverb): "in a different way or manner," "in different circumstances," "in other respects," or "if not." *explain*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/explain (last visited July 15, 2014); *answer*, MERRIAM-WESBTER.COM (2014), http://www.merriam-webster.com/dictionary/answer (last visited July 15, 2014); *otherwise*, MERRIAM-WEBSTER.COM (2014), http://www.merriam-webster.com/dictionary/otherwise (last visited July 15, 2014).

[12] Footnote 2 of Complainant's "Motion for Adoption of Decision and Order by Reason of Default" contains the following parenthetical citations: (1) Spring Valley Meats, Inc., 56 Agric. Dec. 1731 n.9 (U.S.D.A. 1997) (citing Kneeland, 50 Agric. Dec. 1571, 1572

that because "the respondent admitted, or did not deny, or did not otherwise respond to the material allegations of the complaint. . . . those material allegations are deemed to be admitted by the respondent, for the purpose of the instant proceeding."[13] However, as Respondent correctly submits in its Response and Objections, the cases "largely address situations in which Respondents failed to respond to a Complaint, failed to timely respond to a Complaint, and/or did not respond to allegations contained within a Complaint."[14] Those situations are markedly different from the case at bar. In attempting to apply those specific, fact-oriented

---

(U.S.D.A. 1991) ("allegations of complaint are deemed admitted where answer does not deny material allegations of complaint"); (2) Henson, 45 Agric. Dec. 2246, 2260 (U.S.D.A. 1986) ("default decision was properly issued where answer failed to deny allegations of complaint"); (3) Guffy, 45 Agric. Dec. 1742, 1747 (U.S.D.A. 1986) ("where answer does not deny allegations of complaint, default decision is properly issued"); (4) Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) ("answer which admits one allegation of com plaint and fails to respond to other allegations is admission of all allegations in complaint"); (5) Stoltzfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) ("answer stating that 'no violation was intended' does not deny or otherwise respond to complaint and pursuant to 7 C.F.R. 1.136(c) is deemed admission of allegations of complaint"); (6) Lucas, 43 Agric. Dec. 1721, 1722, 1725 (U.S.D.A. 1984) ("answer fails to admit, deny, or otherwise respond to allegations of complaint and is deemed admission of allegations of complaint"); (7) Lema, 58 Agric. Dec. 291 (U.S.D.A. 1999) ("where respondent did not deny material allegations of Complaint and expressly admitted carrying 'acidic fruits' aboard aircraft on which he arrived in United States"); (8) Hardin Cnty. Stockyards, Inc., 53 Agric. Dec. 654, 656 (U.S.D.A. 1994) (quoting: "Therefore, as respondent did not deny the allegations in the complaint, that he engaged in the conduct alleged to be prohibited, he is found to have willfully violated the Act. The Secretary's Rules of Practice . . . provide that when a respondent admits the material allegations in the complaint, complainant may seek a decision, as the complainant has done here, without a hearing."); (9) Paul, 45 Agric. Dec. 556, 558-60 (U.S.D.A. 1986) ("default decision was properly issued where respondent failed to file timely answer and in his late answer did not deny material allegations of complaint; by failing to file timely answer and to deny allegations in complaint, respondent is deemed to have admitted violations of the AWA and Regulations alleged in complaint"); (10) Reece, 70 Agric. Dec. 1061 (U.S.D.A. 2011) ("late-filed answer admitted allegations by failing to specifically deny them"); (11) Aull, 50 Agric. Dec. 353 (U.S.D.A. 1991) ("answer did not deny allegations"). The facts in these cases are manifestly distinct from those of the present case. Here, Respondent filed a timely, properly formatted Answer that either denied or otherwise explained—at some points stating that it lacked sufficient information and knowledge to form a belief as to the allegation's truth, which is a commonly accepted response under the Federal Rules of Civil Procedure—each material allegation of the Complaint. The Answer did not expressly admit to any material allegations, and it included a request for hearing per Rule 1.41.

[13] Mot. for Adoption of Decision & Order by Reason Default at 2.

[14] Resp. & Objs. to Mot. for Adoption of Decision & Order by Reason Default at ¶10.

holdings to the present situation, Complainant has misconstrued the language of the Rules of Practice and erred in seeking to employ the cited cases to support a default judgment.

Even had Respondent's Answer lacked the degree of specificity preferred by Complainant, it may have been unethical for Respondent to answer in any other fashion. While the Rules of Practice instruct a respondent to explicitly admit, deny, or explain each material allegation of a complaint, the Model Rules of Professional Conduct and Federal Rules of Civil Procedure provide that a party *may not* admit or deny an allegation without sufficient information or evidence to do so.[15] The Federal Rules go so far as to permit a court to "impose an appropriate sanction on any attorney, law firm, or party that violate[s] the rule or is responsible for the violation."[16] Given that the present allegations occurred in China more than three years prior to the filing of the Complaint, it is unlikely that Respondent would have had the information and evidence necessary to provide a clear, specific, and definite admittance or denial without violating recognized ethical standards.

I find it inconceivable that Rule 1.136 was designed to afford parties an occasion to circumvent hearings via procedural tactics. As prior decisions have explained, "the requirement in the Rules of Practice that Respondents deny or explain any allegation of the Complaint and set forth any defense in a timely manner is necessary to enable USDA to handle its workload in an expeditious and economical matter."[17] Here, the method by which Respondent answered the Complaint does not hinder judicial efficiency. To the contrary, Complainant's attempt to

---

[15] *Compare* 7 C.F.R. § 1.136(b)(1) (2013) (answer must "clearly admit, deny, or explain each of the allegations of the Complaint") *with* MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (an attorney "shall not knowingly . . . make a false statement of fact or law to a tribunal . . . or . . . offer evidence that the lawyer knows to be false") *and* FED. R. CIV. P. 11(b) (a party or representative "presenting to the court a pleading, written motion, or other paper . . . certifies that to the best of the person's knowledge, information, and belief . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a belief or lack of information").

[16] FED. R. CIV. P. 11(c)(1).

[17] Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999).

evade a hearing on the basis of procedural technicalities does so. If, as is suggested by Respondent, Complainant's objective was to compel Respondent to settle by precluding the opportunity for a hearing, a motion for summary judgment might have been a more proper course of action.[18]

I have on several occasions expressed my "displeasure with the [Department's] attempt to 'end run' around the merits of the case with procedural maneuvers."[19] Such an approach is inconsistent with the judicial preference for adjudication and the disfavor of default judgments, and it offends notions of fairness when utilized to impede a respondent's right to hearing.[20] Indeed, the Ninth Circuit has cautioned against "ignor[ing] the tenet that cases should be decided on their merits whenever possible" and "fail[ing] to consider the overall fairness of the proceedings given what [is] at stake."[21] Rather than dispose of

---

[18] "A motion for summary adjudication carries the potential to dispose of an entire claim or portion of it with finality and without trial . . . . While the current rules do not specifically provide for either the use or exclusion of summary judgment, the Judicial Officer has consistently ruled that hearings are futile and summary judgment is appropriate where there is no factual dispute of substance." Peter M. Davenport, *The Department of Agriculture Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. NAT'L ASS'N ADMIN. L.J. 567, 583 (2013). As little of the underlying facts in the case appear to be in dispute, the use of a motion for summary judgment would have required Respondent to come forward with its evidence to rebut that advanced by Complainant in support of its motion as once a moving party supports its motion, the burden shifts to the non-moving party, who may not rest upon mere allegation or denial in pleadings, but must set forth specific facts supported by documentary material showing there is a genuine issue for trial. T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F. 2d 626, 630 (9th Cir. 1987), Muck v. United States, 3 F. 3d 1378, 1380 (10th Cir. 1993).

[19] Ramos v. U.S. Dep't Agric., 68 Agric. Dec. 60, 74 (U.S.D.A. 2009) (citing Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993); Lion Raisins, Inc. v. U.S. Dep't Agric., 354 F.3d 1072, Case No. CV-F-04-5844 (E.D. Ca. May 12, 2005); *see also* Davenport, *supra* note 17, at 577 ("Despite the frequently expressed, traditional judicial preference for fundamental fairness of adjudicatory proceedings, the Department's reliance upon aggressive use of procedural rules to achieve resolution is generally successful, even where the Department's administrative law judges have sought to afford a respondent a hearing on the merits where they believe good cause existed.").

[20] "The judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory proceedings. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual." Oberstar v. Fed. Deposit Ins. Co., 987 F.2d 494, 504 (8th Cir. 1993).

[21] *Lion Raisins, Inc.*, 66 Agric. Dec. at 541-42.

proceedings on the basis of extraneous procedural issues, my fellow judges and I have repeatedly sought to "afford respondents a hearing on the merits where they felt there was good cause, noting the traditional preference for such disposition. To do otherwise loses sight of the basic tenet that fairness concerns should be paramount where quasi-criminal sanctions may be imposed."[22] As Complainant here requests a civil penalty of $290,000.00[23] for the loss of approximately 560 guinea pigs—a sum sufficiently large to constitute a "quasi-criminal" sanction—I will defer ruling on the motion seeking a default decision and schedule a hearing on the substantive issues.[24]

In deferring my ruling, I acknowledge that Complainant, as representative of the Department, has an obligation to initiate disciplinary proceedings in a fair and straightforward manner.[25] This is obviously consistent with the Model Rules of Professional Conduct, which provide that attorneys have "a duty to use legal procedure to the fullest benefit of the client's case, but also a duty not to abuse legal procedure."[26]

ORDER

For the above reasons, it is ORDERED:

---

[22] Hamilton, 64 Agric. Dec. 1659, 1664-65 (U.S.D.A. 2005).

[23] While the value of the guinea pigs at the time of their flight is not readily available, current ads suggest a value of approximately $10-30 per animal.

[24] *See* Lion Raisins, Inc., 66 Agric. Dec. at 542 (holding that USDA Judicial Officer abused discretion in entering default judgment against respondent due to "minor deviation from the Rules of Practice with no showing of prejudice to the USDA"). "The refusal to allow the late answer . . . deprived Lion Raisins of the hearing to which it was entitled." *Id.*

[25] *See Hamilton*, 64 Agric. Dec. at 1662 ("Government attorneys at all levels are charged with a very peculiar and awesome fiduciary responsibility when they are called upon to enforce the law or regulations, yet still being mindful of the fact that they are a servant of the people. While they indeed have an obligation to advance their cases with earnestness and vigor, every action taken must be in the context of seeing that justice is done. Measured against that yardstick, I cannot but express doubt that decisions to seek victories by procedural maneuvers thereby avoiding a hearing on the merits . . . are inconsistent with the principles and objectives of this Department, much less being inconsistent with what I have been advised by senior attorneys of the Department is agency policy.").

[26] MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt (1983).

1. Complainant's Motion for Adoption of Decision and Order by Reason of Default is DEFERRED.

2. Respondent's Objections to the Complainant's Motion is also DEFERRED.

3. Respondent's Request for Oral Argument is DENIED.

4. This matter is set for oral hearing to commence at 9:00 AM Local Time on September 9, 2014 in the United States Department of Agriculture Courtroom, Room 1037 South Building, 1400 Independence Avenue, SW, Washington DC 20250 and will continue from day to day until concluded or recessed.

Copies of this Memorandum Opinion and Order shall be served upon the parties by the Hearing Clerk.

___

In re: BRIAN STAPLES, AN INDIVIDUAL d/b/a STAPLES SAFARI ZOO AND BRIAN STAPLES PRODUCTIONS.
Docket No. 14-0022.
Miscellaneous Order.
Filed July 17, 2014.

AWA – Modification of order.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Ruling Denying Motion for Default Judgment by Jill S. Clifton, Administrative Law Judge.
Ruling Granting Joint Request to Modify Order entered by William G. Jenson, Judicial Officer.

RULING GRANTING JOINT REQUEST TO MODIFY ORDER

On July 15, 2014, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], and Brian Staples filed a Joint Request to Modify Paragraph 2 of Order. The Administrator and Mr. Staples request that I modify paragraph two of the Order I issued in *Staples*, 73Agric. Dec. ___ (U.S.D.A. June 26, 2014), with all other provisions

and the text of *Staples*, 73 Agric. Dec. ___ (U.S.D.A. June 26, 2014), to remain as filed on June 26, 2014.

Based upon the agreement of the parties, I vacate paragraph two of the Order issued in *Staples*, 73 Agric. Dec. ___, slip op. at 21 (U.S.D.A. June 26, 2014), and I issue a new paragraph two to read, as follows:

> 2. Mr. Staples' Animal Welfare Act license (Animal Welfare Act license number 91-C-0060) is suspended for a period of nine months and continuing thereafter until Mr. Staples has demonstrated compliance with the Animal Welfare Act and the Regulations.

Paragraph two of this Order shall become effective 90 days after service of this Order on Mr. Staples.

___

EQUAL ACCESS TO JUSTICE ACT

In re: JENNIFER CAUDILL, AN INDIVIDUAL a/k/a JENNIFER WALKER AND JENNIFER HERRIOTT WALKER.
Docket No. 13-0186.
Miscellaneous Order.
Filed October 15, 2014.

EAJA – Extension of time.

William J. Cook, Esq. for Applicant.
Colleen A. Carroll, Esq. for APHIS.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING THE ADMINSITRATOR'S APPEAL PETITION

On October 14, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to October 30, 2014 the time for filing the Administrator's appeal petition. On October 15, 2014, counsel for the Administrator, by telephone, informed

me that she discussed the Administrator's request with counsel for Ms. Caudill, who informed her (counsel for the Administrator) that Ms. Caudill had no objection to the Administrator's request for an extension of time. For good reason stated, the Administrator's motion for an extension of time is granted. The time for filing the Administrator's appeal petition is extended to, and includes, October 30, 2014.[1]

___

In re: JENNIFER CAUDILL, AN INDIVIDUAL a/k/a JENNIFER WALKER AND JENNIFER HERRIOTT WALKER.
Docket No. 13-0186.
Miscellaneous Order.
Filed October 31, 2014.

EAJA – Extension of time.

William J. Cook, Esq. for Applicant.
Colleen A. Carroll, Esq. for APHIS.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING THE ADMINISTRATOR'S APPEAL PETITION

On October 30, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], requested that I extend to November 3, 2014 the time for filing the Administrator's appeal petition. Counsel for the Applicant informed counsel for the Administrator that the Applicant does not oppose the Administrator's request for an extension of time. For good reason stated, the Administrator's motion for an extension of time is granted. The time for filing the Administrator's appeal petition is

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 30, 2014.

extended to, and includes, November 3, 2014.[2]

___

In re: JENNIFER CAUDILL, AN INDIVIDUAL a/k/a JENNIFER WALKER AND JENNIFER HERRIOTT WALKER.
Docket No. 13-0186.
Miscellaneous Order.
Filed October 31, 2014.

EAJA – Extension of time.

William J. Cook, Esq. for Applicant.
Colleen A. Carroll, Esq. for APHIS.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING THE ADMINISTRATOR'S APPEAL PETITION

On October 30, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], requested that I extend to November 3, 2014 the time for filing the Administrator's appeal petition. Counsel for the Applicant informed counsel for the Administrator that the Applicant does not oppose the Administrator's request for an extension of time. For good reason stated, the Administrator's motion for an extension of time is granted. The time for filing the Administrator's appeal petition is extended to, and includes, November 3, 2014.[3]

—

[2] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 3, 2014.

[3] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, November 3, 2014.

FEDERAL MEAT INSPECTION ACT

In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, L.L.C.
Docket Nos. 14-0094, 14-0095.
Miscellaneous Order.
Filed September 10, 2014.

FMIA – Appeal to Judicial Officer – Decision – Extension of time – Finality of ALJ decision.

Lisa Jabaily, Esq. for Complainant.
Paul Rosberg, pro se, for Respondents.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alfred V. Almanza, Administrator, Food Safety and Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on April 11, 2014. The Administrator instituted the proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [Federal Meat Inspection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges: (1) on September 27, 2013, in the United States District Court for the District of Nebraska, Paul Rosberg pled guilty to a felony (the sale of misbranded meat and meat products and aiding and abetting, in violation of 21 U.S.C. § 610(c)(1) and 18 U.S.C. § 2); and (2) on December 27, 2013, judgment was entered against Mr. Rosberg.[1] The Administrator avers Mr. Rosberg and Nebraska's Finest Meats, L.L.C. are unfit to engage in any business requiring federal inspection services under Title I of the Federal Meat Inspection Act,

[1] Compl. ¶ II at 2.

pursuant to 21 U.S.C. § 671.[2]

On May 7, 2014, Mr. Rosberg filed an Answer to Complaint on behalf of himself and Nebraska's Finest Meats, L.L.C. Mr. Rosberg asserts that he is the 100-percent owner of Nebraska's Finest Meats, L.L.C., admits that he was convicted of violating 21 U.S.C. § 610(c)(1), and requests a continuance of this proceeding pending the conclusion of proceedings for judicial review of his conviction of violating 21 U.S.C. § 610(c)(1).

On May 19, 2014, pursuant to 7 C.F.R. § 1.139, the Administrator filed a Motion for Decision Without Hearing requesting entry of an order withdrawing federal inspection services from Mr. Rosberg, Nebraska's Finest Meats, L.L.C., and their affiliates, successors, and assigns, based upon Mr. Rosberg and Nebraska's Finest Meats, L.L.C.'s admissions of the factual allegations of the Complaint and their failure to assert any valid defense to the Complaint.[3]

On June 10, 2014, Mr. Rosberg and Nebraska's Finest Meats, L.L.C. filed a response to the Administrator's Motion for Decision Without Hearing again admitting Mr. Rosberg's conviction of violating 21 U.S.C. § 610(c)(1) and requesting a continuance of this proceeding pending the conclusion of proceedings for judicial review of his conviction of violating 21 U.S.C. § 610(c)(1).

On June 19, 2014, Administrative Law Judge Janice K. Bullard [ALJ] filed a Decision and Order on the Record [Decision] indefinitely withdrawing federal inspection services from Mr. Rosberg, Nebraska's Finest Meats, L.L.C., and Kelly Rosberg, manager of Nebraska's Finest Meats, L.L.C.[4]

The Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014.[5] On July 29, 2014, Mr. Rosberg appealed the ALJ's Decision to the Judicial Officer on behalf of himself and Nebraska's

---

[2] Compl. ¶ III at 2.
[3] Mot. for Decision Without Hr'g at 10-11.
[4] ALJ's Decision at 7.
[5] United States Postal Service Product & Tracking Information for 7003 1010 0001 7367 4916.

Finest Meats, L.L.C. On August 6, 2014, the Administrator filed Complainant's Response to Respondents' Appeal Petition. On August 6, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[6] The Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014;[7] therefore, Mr. Rosberg and Nebraska's Finest Meats, L.L.C. were required to file their appeal petition with the Hearing Clerk no later than July 23, 2014. Instead, Mr. Rosberg and Nebraska's Finest Meats, L.L.C. filed their appeal petition with the Hearing Clerk on July 29, 2014. Therefore, I find Mr. Rosberg and Nebraska's Finest Meats, L.L.C.'s appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[8] The ALJ's Decision became final 35 days after the

---

[6] 7 C.F.R. § 1.145(a).

[7] *See supra* note 5.

[8] *See, e.g.*, Piedmont Livestock, Inc., 72 Agric. Dec. 422 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing Piedmont Livestock, Inc.'s appeal petition filed three days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed 1 day after the chief administrative law judge's decision became final); Custom Cuts, Inc., 72 Agric. Dec. 484 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month 27 days after the chief administrative law judge's decision became final); Self, 71 Agric. Dec. 1169 (U.S.D.A. 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, 69 Agric. Dec. 631 (U.S.D.A. 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one week after the administrative law judge's decision became final); Noble, 68 Agric. Dec. 1060 (U.S.D.A. 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); Edwards, 66 Agric. Dec. 1362 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., 66 Agric. Dec. 939 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray,

Hearing Clerk served Mr. Rosberg with the ALJ's Decision.[9] Thus, the ALJ's Decision became final on July 28, 2014. Mr. Rosberg and Nebraska's Finest Meats, L.L.C., filed their appeal petition on July 29, 2014. Therefore, I have no jurisdiction to hear Mr. Rosberg and Nebraska's Finest Meats, L.L.C.'s appeal petition.

On August 12, 2014, and September 2, 2014, Mr. Rosberg filed replies to Complainant's Response to Respondents' Appeal Petition on behalf of himself and Nebraska's Finest Meats, L.L.C. Mr. Rosberg and Nebraska's Finest Meats, L.L.C., contend that they had good cause for filing an appeal petition after the ALJ's Decision became final and contend Mr. Rosberg was wrongfully convicted of violating 21 U.S.C. § 610(c)(1). The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for filing an appeal petition after the ALJ's Decision became final. Accordingly, Mr. Rosberg and Nebraska's Finest Meats, L.L.C.'s appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Rosberg and Nebraska's Finest Meats, L.L.C.'s appeal petition,

---

64 Agric. Dec. 1699 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the chief administrative law judge's decision became final); Mokos, 64 Agric. Dec. 1647 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the chief administrative law judge's decision became final); Blackstock, 63 Agric. Dec. 818 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed two days after the administrative law judge's decision became final); Gilbert, 63 Agric. Dec. 807 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); Nunez, 63 Agric. Dec. 766 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[9] *See* 7 C.F.R. § 1.139; ALJ's Decision at 7.

filed July 29, 2014, is denied.

2. The ALJ's Decision, filed June 19, 2014, is the final decision in this proceeding.

___

In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 14-0094, 14-0095.
Miscellaneous Order.
Filed October 31, 2014.

FMIA – Appeal to Judicial Officer – Filing, effective date of – Finality of ALJ decision – Reconsideration , petition for – Service.

Lisa Jabaily, Esq. for Complainant.
Paul Rosberg, pro se for Respondents.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

Procedural History

On September 24, 2014, Paul Rosberg and Nebraska's Finest Meats, L.L.C. [Respondents], filed "Appeal or Motion for Reconsideration of September 10th, 2014 Order" [Petition for Reconsideration] requesting that I reconsider *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal). On October 15, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Respondents' Petition for Reconsideration.

Discussion

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

Judicial Officer, 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.* . . .
>
> . . . .
> (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 purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised in Respondents' Petition for Reconsideration, I find no error of law or fact necessitating modification of *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal). Moreover, Respondents do not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal). Therefore, I deny Respondents' Petition for Reconsideration.

Respondents raise five issues in their Petition for Reconsideration. First, Respondents contend I erroneously stated Administrative Law Judge Janice K. Bullard [ALJ] ordered the indefinite withdrawal of

inspection services from Respondents (Pet. for Recons. at 1).

The ALJ explicitly ordered the indefinite withdrawal of inspection services from Respondents, as follows:

ORDER

> Inspection services are hereby indefinitely withdrawn from Respondents Nebraska's Finest Meats, L.L.C[.,] and Paul Rosberg. This sanction extends by association to Kelly Rosberg, manager of Nebraska's Finest Meats, and inspection services are hereby indefinitely withdrawn from Kelly Rosberg.

ALJ's Decision and Order on the Record [ALJ's Decision] at 7. Therefore, I reject Respondents' contention that my statement that the ALJ issued an order indefinitely withdrawing inspection services from Respondents is error.

Second, Respondents contend I erroneously stated the Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014. Respondents assert the ALJ's Decision was "made" on June 19, 2014, not June 23, 2014. (Pet. for Recons. at 2).

The Rules of Practice provide that the date of service of an administrative law judge's decision is the date of delivery by certified or registered mail, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
> (c) *Service on party other than the Secretary*. (1) Any . . . 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 known residence of such party if an individual[.]

7 C.F.R. § 1.147(c)(1). United States Postal Service records establish the Hearing Clerk served Mr. Rosberg with the ALJ's Decision by certified mail on June 23, 2014.[2] Therefore, I reject Respondents' contention that my statement that the Hearing Clerk served Mr. Rosberg with the ALJ's Decision on June 23, 2014, is error.

Third, Respondents contend I erroneously stated Respondents appealed the ALJ's Decision on July 29, 2014. Respondents assert they appealed the ALJ's Decision on July 19, 2014. (Pet. for Recons. at 2). The Rules of Practice provide that a document is deemed to be filed at the time it is received by the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
> (g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). The Hearing Clerk's date stamp establishes the date a document reaches the Hearing Clerk.[3] The Hearing Clerk's date stamp establishes that Respondents' appeal petition reached the Hearing Clerk on July 29, 2014. Therefore, I reject Respondents' contention that my

---

[2] United States Postal Service Product & Tracking Information for 7003 1010 0001 7367 4916.

[3] Sergojan, 69 Agric. Dec. 1438, 1442 (U.S.D.A. 2010) (Order Den. Pet. to Reconsider) (stating the Hearing Clerk's date and time stamp establishes the date and time a document reaches the Hearing Clerk); Lion Raisins, Inc., 68 Agric. Dec. 244, 287 (U.S.D.A. 2009) (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion) (holding the most reliable evidence of the date a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document), *appeal dismissed*, No. 1:10-cv-00217-AWA-DLB (E.D. Cal. June 23, 2010); Lion, 65 Agric. Dec. 1214, 1221 (U.S.D.A. 2006) (Ruling) (same).

statement that Respondents appealed the ALJ's Decision on July 29, 2014, is error.

Fourth, Respondents, relying on *Houston v. Lack*, 487 U.S. 266 (1988), contend their appeal of the ALJ's Decision was timely, as the mailbox rule applies in this proceeding (Pet. for Recons. at 1).

Houston v. Lack holds, under Federal Rule of Appellate Procedure 4(a)(1), a pro se prisoner's notice of appeal is filed at the moment of delivery to prison authorities for forwarding to the appropriate United States district court. The Federal Rules of Appellate Procedure govern procedure in the United States courts of appeals[4] and are not applicable to administrative proceedings conducted under the Rules of Practice. Therefore, I find *Houston v. Lack*, which construes the Federal Rules of Appellate Procedure, inapposite.[5]

A document required or authorized to be filed under the Rules of Practice is deemed to be filed at the time the document reaches the Hearing Clerk,[6] and the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice.[7] An incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk under the Rules of Practice.[8] Therefore, I

---

[4] FED. R. APP. P. 1(a)(1).

[5] Heartland Kennels, Inc., 61 Agric. Dec. 492, 536-38 (U.S.D.A. 2002) (holding *Houston v. Lack*, 487 U.S. 266 (1988), inapplicable to proceedings conducted under the Rules of Practice).

[6] 7 C.F.R. § 1.147(g).

[7] Agri-Sales, Inc., No. 13-0195, 73 Agric. Dec. ___, slip op. at 9 (U.S.D.A. Aug. 4, 2014) (stating the Judicial Officer has consistently held that the mailbox rule is not applicable to proceedings under the Rules of Practice); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 86 (U.S.D.A. 2009) (stating the argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer); Knapp, 64 Agric. Dec. 253, 302 (U.S.D.A. 2005) (stating the mailbox rule does not apply in proceedings under the Rules of Practice); Reinhart, 59 Agric. Dec. 721, 742 (U.S.D.A. 2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

[8] *See generally* Stepp, 59 Agric. Dec. 265, 268 (U.S.D.A. 2000) (Ruling Den. Resp'ts' Pet. for Recons. of the Order Lifting Stay) (stating neither respondents' mailing the reply to motion to lift stay nor the United States Postal Service's delivering the reply to motion

reject Respondents' contention that their appeal petition must be deemed to have been filed on the day Mr. Rosberg delivered the appeal petition to prison authorities for forwarding to the Hearing Clerk, I reject Respondents' contention that the mailbox rule applies to this proceeding, and I reject Respondents' contention that they timely filed their appeal petition.

Fifth, Respondents contend my conclusion that the Judicial Officer does not have jurisdiction to extend the time for filing an appeal after an administrative law judge's decision has become final, is error (Pet. for Recons. at 2).

The Judicial Officer has continuously and consistently held, under the Rules of Practice, that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes

---

to lift stay to the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, constitutes filing with the Hearing Clerk); Kafka, 58 Agric. Dec. 357, 365 (U.S.D.A. 1999) (Order Den. Late Appeal) (stating the respondent's unsuccessful efforts to file his appeal petition with the Hearing Clerk do not constitute filing the appeal petition with the Hearing Clerk), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table), *printed in* 60 Agric. Dec. 23 (U.S.D.A. 2001); Sweck's, Inc., 58 Agric. Dec. 212, 213 n.1 (U.S.D.A. 1999) (stating appeal petitions must be filed with the Hearing Clerk; stating the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); Murray, 58 Agric. Dec. 77, 82 (U.S.D.A. 1999) (Order Den. Pet. for Recons.) (stating the effective date of filing a document with the Hearing Clerk is the date the document reaches the Hearing Clerk, not the date the respondent mailed the document); Noell, 58 Agric. Dec. 130, 140 n.2 (U.S.D.A. 1999) (stating the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal dismissed sub nom.* Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000); Peterson, 57 Agric. Dec. 1304, 1310 n.3 (U.S.D.A. 1998) (Order Den. Late Appeal) (stating neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); Funches, 56 Agric. Dec. 517, 528 (U.S.D.A. 1997) (stating attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); Jacobs, 56 Agric. Dec. 504, 514 (U.S.D.A. 1996) (stating even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

final.[9] Respondents offer no support for their contention that this holding is incorrect; therefore, I reject Respondents' contention that the conclusion is error.

For the foregoing reasons, the following Order is issued.

ORDER

Respondents' Petition for Reconsideration, filed September 24, 2014, is denied.

___

[9] *See, e.g.*, Piedmont Livestock, Inc., 72 Agric. Dec. ___ (U.S.D.A. Apr. 29, 2013) (Order Den. Late Appeal) (dismissing Piedmont Livestock, Inc.'s appeal petition filed 3 days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed 1 day after the chief administrative law judge's decision became final); Custom Cuts, Inc., 72 Agric. Dec. ___ (U.S.D.A. Feb. 20, 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month 27 days after the chief administrative law judge's decision became final); Self, 71 Agric. Dec. ___ (U.S.D.A. Sept. 24, 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, 69 Agric. Dec. 631 (U.S.D.A. 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one week after the administrative law judge's decision became final); Noble, 68 Agric. Dec. 1060 (U.S.D.A. 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, 66 Agric. Dec. 1362 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., 66 Agric. Dec. 939 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, 64 Agric. Dec. 1699 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the chief administrative law judge's decision became final); Mokos, 64 Agric. Dec. 1647 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); Blackstock, 63 Agric. Dec. 818 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); Gilbert, 63 Agric. Dec. 807 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Nunez, 63 Agric. Dec. 766 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

In re: PAUL ROSBERG & KELLY ROSBERG, d/b/a NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 12-0182, 12-0183.
Miscellaneous Order.
Filed November 7, 2014.

FMIA – Appeal to Judicial Officer – Extension of time – Finality of ALJ decision.

Lisa Jabaily, Esq. for Complainant.
Paul Rosberg, pro se for Respondents.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alfred V. Almanza, Administrator, Food Safety and Inspection Service, United States Department of Agriculture [the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on January 18, 2012. The Administrator instituted the proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [the FMIA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [the Rules of Practice]. The Administrator alleged Respondents intimidated and interfered with Food Safety Inspection Service personnel in violation of the FMIA and sought issuance of an order indefinitely suspending federal inspection service under the FMIA from Respondents and their affiliates, officers, operators, partners, successors, and assigns.[1]

At the time the instant proceeding was pending, Paul Rosberg pled guilty in the United States District Court for the District of Nebraska to the sale of misbranded meat and meat products and aiding and abetting, in violation of 21 U.S.C. § 610(c)(1) and 18 U.S.C. § 2.[2] United States District Judge Richard G. Kopf entered judgment against Mr. Rosberg in

[1] Compl. at second and third unnumbered pages.
[2] United States v. Rosberg, Case No. 8:12CR271 (D. Neb. Sept. 27, 2013) (Plea Agreement).

the criminal proceeding on December 27, 2013.[3] Based upon Mr. Rosberg's conviction, the Administrator instituted another administrative proceeding, FMIA Docket Nos. 14-0094 and 14-0095, against Mr. Rosberg and Nebraska's Finest Meats, L.L.C., alleging they are unfit to engage in business requiring federal inspection service under the FMIA. On June 19, 2014, Administrative Law Judge Janice K. Bullard [the ALJ] issued a decision in FMIA Docket Nos. 14-0094 and 14-0095 indefinitely withdrawing federal inspection service from Mr. Rosberg, Nebraska's Finest Meats, L.L.C., and Kelly Rosberg, manager of Nebraska's Finest Meats, L.L.C.[4]

On July 29, 2014, the ALJ filed a decision in the instant proceeding dismissing this proceeding as moot because the remedy sought by the Administrator in the instant proceeding was previously imposed in *Rosberg*, 73 Agric. Dec. 214 (U.S.D.A. 2014) (Decision and Order on the R.).[5]

The Hearing Clerk served Respondents with the ALJ's Decision on August 18, 2014.[6] On September 23, 2014, Respondents appealed the ALJ's Decision to the Judicial Officer. On October 15, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[7] The Hearing Clerk served Respondents with the ALJ's Decision on August 18, 2014;[8] therefore, Respondents were required to file their appeal petition with the Hearing Clerk no later than September 17, 2014.

---

[3] United States v. Rosberg, Case No. 8:12CR271-001 (D. Neb. Dec. 27, 2013) (J. in a Criminal Case).

[4] Rosberg, 73 Agric. Dec. 214, 219 (U.S.D.A. 2014) (Decision and Order on the R.).

[5] Rosberg, 73 Agric. Dec. ___ (U.S.D.A. July 29, 2014) (Decision and Order Dismissing Case as Moot) [the ALJ's Decision].

[6] United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 4177.

[7] 7 C.F.R. § 1.145(a).

[8] *See supra* note 6.

Instead, Respondents filed their appeal petition with the Hearing Clerk on September 23, 2014. Therefore, I find Respondents' appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[9] The ALJ's Decision became final 35 days after the

[9] *See, e.g.*, W. Coast Commodities, LLC, No. 12-0475, 73 Agric. Dec. ___ (U.S.D.A. Sept. 18, 2014) (Order Den. Late Appeal) (dismissing West Coast Commodities's appeal petition filed 187 days after the administrative law judge's decision became final and dismissing Michael Paul Partlow's appeal petition filed 50 days after the administrative law judge's decision became final); Rosberg, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one day after the administrative law judge's decision became final); Piedmont Livestock, Inc., 72 Agric. Dec. 422 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing Piedmont Livestock, Inc.'s appeal petition filed three days after the chief administrative law judge's decision became final and dismissing Joseph Ray Jones's appeal petition filed 1 day after the chief administrative law judge's decision became final); Custom Cuts, Inc., 72 Agric. Dec. 484 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month 27 days after the chief administrative law judge's decision became final); Self, 71 Agric. Dec. 1169 (U.S.D.A. 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, 69 Agric. Dec. 631 (U.S.D.A. 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one week after the administrative law judge's decision became final); Noble, 68 Agric. Dec. 1060 (U.S.D.A. 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, 66 Agric. Dec. 1362 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the administrative law judge's decision became final); Tung Wan Co., 66 Agric. Dec. 939 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, 64 Agric. Dec. 1699 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the chief administrative law judge's decision became final); Mokos, 64 Agric. Dec. 1647 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the chief administrative law judge's decision became final); Blackstock, 63 Agric. Dec. 818 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed two days after the administrative law judge's decision became final); Gilbert, 63 Agric. Dec. 807 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); Nunez, 63 Agric. Dec. 766 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

Hearing Clerk served Respondents with the ALJ's Decision.[10] Thus, the ALJ's Decision became final on September 22, 2014. Respondents filed their appeal petition on September 23, 2014. Therefore, I have no jurisdiction to hear Respondents' appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for filing an appeal petition after the ALJ's Decision became final. Accordingly, Respondents' appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondents' appeal petition, filed September 23, 2014, is denied.

2. The ALJ's Decision, filed July 29, 2014, is the final decision in this proceeding.

___

[10] *See* 7 C.F.R. § 1.139; ALJ's Decision at 11.

In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 14-0094, 14-0095.
Miscellaneous Order.
Filed December 31, 2014.

FMIA – Appeal to Judicial Officer – Extension of time – Reconsideration, petition for.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING RESPONDENTS' MOTION FOR EXTENSION OF TIME TO FILE A SECOND PETITION FOR RECONSIDERATION

Procedural History

On September 24, 2014, Paul Rosberg and Nebraska's Finest Meats, L.L.C. [Respondents] filed "Appeal or Motion for Reconsideration of September 10th, 2014 Order" [Petition for Reconsideration] requesting that I reconsider *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal). On October 31, 2014, I issued *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2014) (Order Den. Resp'ts' Pet. for Recons.), denying Respondents' September 24, 2014 Petition for Reconsideration.

On December 2, 2014, Respondents filed a motion to extend the time for filing a response to *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2014) (Order Den. Resp'ts' Pet. for Recons.). On December 5, 2014, Alfred V. Almanza, Administrator, Food Safety and Inspection Service, United States Department of Agriculture [Administrator], filed Opposition to Respondents' Motion for Extension of Time. On December 31, 2014, Respondents filed a response to the Administrator's Opposition to Respondents' Motion for Extension of Time, and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Respondents' December 2, 2014 motion for an extension of time.

Discussion

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer, 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.* . . .
> . . . .
> (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).

I find Respondents' December 2, 2014, motion to extend the time for filing a response to *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Oct. 31, 2014) (Order Den. Resp'ts' Pet. for Recons.), constitutes a motion to extend the time for filing Respondents' second petition for reconsideration of *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal). A party may not file more than one petition for reconsideration of a decision of the Judicial Officer;[2] therefore, Respondents' December 2, 2014, request for an

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

[2] Heartland Kennels, Inc., 61 Agric. Dec. 562, 567 (U.S.D.A. 2002) (Order Den. Second Pet. for Recons.) (holding, under the Rules of Practice, a party may not file more than one petition for reconsideration of the decision of the Judicial Officer); Goetz, 61 Agric. Dec. 282, 286 (U.S.D.A. 2002) (Order Lifting Stay) (same). *Cf.* Fitchett Bros.,

extension of time to file a second petition for reconsideration of *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal), must be denied.

For the foregoing reasons, the following Ruling is issued.

RULING

Respondents' December 2, 2014, motion for an extension of time to file a second petition for reconsideration of *Rosberg*, No. 14-0094, 73 Agric. Dec. ___ (U.S.D.A. Sept. 10, 2014) (Order Den. Late Appeal), is denied.

___

Inc., 29 Agric. Dec. 2, 3 (U.S.D.A. 1970) (Dismissal of Pet. for Recons.) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

HORSE PROTECTION ACT

ABBY L. FOX.
Docket No. 13-0311.
Order of Dismissal.
Filed July 14, 2014.

ZACH WILSON.
Docket No. 13-0368.
Order of Dismissal.
Filed September 23, 2014.

In re: JUSTIN R. JENNE.
Docket Nos. 13-0080, 13-0308.
Miscellaneous Order.
Filed September 29, 2014.

HPA – Extension of time.

Thomas Bolick, Esq. for Complainant.
Dudley W. Taylor, Esq. for Respondent.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING THE ADMINISTRATOR'S RESPONSES TO JUSTIN R. JENNE'S APPEAL PETITIONS AND PETITIONS TO REOPEN HEARINGS

On September 26, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a motion requesting that I extend to October 31, 2014, the time for filing the Administrator's responses to Justin R. Jenne's appeal petitions and petitions to reopen hearings. Mr. Jenne does not object to the Administrator's motion for extensions of time.

For good reason stated, the Administrator's motion for extensions of time is granted. The time for filing the Administrator's responses to Mr. Jenne's appeal petitions and petitions to reopen hearings is extended

to, and includes, October 31, 2014.[1]

___

JOHN ALLEN.
Docket No. 13-0348.
Order of Dismissal.
Filed October 2, 2014.

ZACH WILSON.
Docket No. 13-0374.
Order of Dismissal.
Filed October 24, 2014.

ORGANIC FOODS PRODUCTION ACT

PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Miscellaneous Order.
Filed September 9, 2014.

In re: PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Miscellaneous Order.
Filed September 29, 2014.

OFPA – Service – Vacate and remand.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order entered by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

REMAND ORDER

The Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator],

[1] The Hearing Clerk's office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Administrator must ensure his responses to Mr. Jenne's appeal petitions and petitions to reopen hearings are received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, October 31, 2014.

instituted this proceeding by filing a Complaint on January 31, 2012. The Administrator instituted the proceeding under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522); the National Organic Program Regulations (7 C.F.R. pt. 205); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges Paul A. Rosberg failed to declare on applications for organic certification under the National Organic Program that he was previously certified under the National Organic Program and failed to provide copies of previous noncompliance letters or descriptions of how he achieved compliance with the National Organic Program, in willful violation of 7 C.F.R. § 205.401.[2] On May 9, 2012, Mr. Rosberg filed an answer denying the material allegations of the Complaint.[3]

On January 30, 2014, the Administrator filed Complainant's Motion for Summary Judgment [Motion for Summary Judgment]. The Hearing Clerk attempted to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment by certified mail at 87288 [redacted] Nebraska [redacted].[*] The United States Postal Service returned this mailing to the Hearing Clerk marked "unclaimed."[4] On March 5, 2014, the Hearing Clerk re-mailed the Administrator's Motion for Summary Judgment by regular mail to Mr. Rosberg at the same address in an attempt to serve Mr. Rosberg in accordance with 7 C.F.R. § 1.147(c)(1).[5]

On May 28, 2014, Administrative Law Judge Janice K. Bullard [ALJ] filed a Decision and Order on Summary Judgment. On May 30, 2014, the ALJ vacated the May 28, 2014, Decision and Order on Summary Judgment[6] and issued an Amended Decision and Order on Summary Judgment in which the ALJ found Mr. Rosberg had not filed a response to the Administrator's Motion for Summary Judgment and granted the

---

[2] Compl. ¶ II at 3-4.
[3] Partial Answer.
[*] Personally identifiable information redacted by the Editor. *See* 5 U.S.C. § 552(b)(6).
[4] United States Postal Service Product and Tracking Information for 7012 1010 0002 0093 7197.
[5] Mem. to the File issued by Jamaal Clayburn, Legal Assistant, Office of the Hearing Clerk, on March 5, 2014.
[6] Order Vacating Decision and Order Issued on May 28, 2014.

Administrator's Motion for Summary Judgment.[7]

The Hearing Clerk attempted to serve Mr. Rosberg with the ALJ's Order Vacating Decision and Order Issued on May 28, 2014, and the ALJ's Amended Decision and Order on Summary Judgment by certified mail at 84288 [redacted] Nebraska [redacted].[8**] The United States Postal Service returned this mailing to the Hearing Clerk marked "unclaimed."[9] On June 27, 2014, the Hearing Clerk re-mailed the ALJ's Amended Decision and Order on Summary Judgment to Mr. Rosberg by regular mail at 87288 [redacted] Nebraska [redacted]*** in an attempt to serve Mr. Rosberg in accordance with 7 C.F.R. § 1.147(c)(1).[10]

On August 14, 2014, Mr. Rosberg appealed the ALJ's Amended Decision and Order on Summary Judgment to the Judicial Officer.[11] On August 28, 2014, the Administrator filed Complainant's Response to Appellant's Appeal of Amended Decision and Order on Summary Judgment, and on September 2, 2014, Mr. Rosberg filed a supplement to his August 14, 2014 appeal petition.[12]

On appeal, Mr. Rosberg requests that I vacate the ALJ's Amended Decision and Order on Summary Judgment because he did not have an opportunity to respond to the Administrator's Motion for Summary Judgment. Mr. Rosberg asserts the Hearing Clerk attempted to serve him with the Administrator's Motion for Summary Judgment at his previous address in Wausa, Nebraska, rather than his last known residence in

---

[7] Am. Decision and Order on Summ. J. at 2, 11.

[8] The record contains no explanation for the Hearing Clerk's mailing the Order Vacating Decision and Order Issued on May 28, 2014, and the Amended Decision and Order on Summary Judgment to 84288 [redacted] Nebraska [redacted], rather than to 87288 [redacted] Nebraska [redacted]. (Personally identifiable information redacted by the Editor. *See* 5 U.S.C. § 552(b)(6)).

[**] Personally identifiable information redacted by the Editor. *See* 5 U.S.C. § 552(b)(6).

[9] United States Postal Service Product and Tracking Information for 7012 1010 0002 0090 9989.

[***] Personally identifiable information redacted by the Editor. *See* 5 U.S.C. § 552(b)(6).

[10] Mem. to the File issued by Shawn C. Williams, Hearing Clerk, Office of the Hearing Clerk, on July 24, 2014.

[11] Motion for Recons.: Obj. for Decision Without Hr'g or Notice of Hr'g.

[12] Supp. Motion for Recons.: Obj. for Decision Without Hr'g or Notice of Hr'g [Supplement to Appeal Petition].

Yankton, South Dakota, as required by 7 C.F.R. § 1.147(c)(1). Mr. Rosberg asserts he informed the Hearing Clerk of his change of address in a letter dated February 26, 2014, a copy of which Mr. Rosberg identified as Exhibit C and attached to his Supplement to Appeal Petition.

The record does not contain an original of Mr. Rosberg's February 26, 2014 letter stamped as received by the Hearing Clerk; therefore, I have some doubt that the Hearing Clerk received Mr. Rosberg's letter informing the Hearing Clerk of the change of Mr. Rosberg's address. However, I give Mr. Rosberg the benefit of the doubt and find he informed the Hearing Clerk of his new address in [redacted][****] South Dakota, and the Hearing Clerk failed to serve Mr. Rosberg with the Administrator's Motion for Summary Judgment in accordance with 7 C.F.R. § 1.147(c)(1).

Accordingly, I vacate the ALJ's Amended Decision and Order on Summary Judgment and remand the proceeding to the ALJ to provide Mr. Rosberg an opportunity to respond to the Administrator's Motion for Summary Judgment.

For the foregoing reasons, the following Order is issued.

REMAND ORDER

1. The ALJ's May 30, 2014 Amended Decision and Order on Summary Judgment is vacated.

2. This proceeding is remanded to the ALJ to provide Mr. Rosberg an opportunity to respond to the Administrator's Motion for Summary Judgment and for further proceedings in accordance with the Rules of Practice.

___

[****] Personally identifiable information redacted by the Editor. *See* 5 U.S.C. § 552(b)(6)

In re: MICHAEL TIERNEY, d/b/a BIRCHWOOD FARMS.
Docket No. 13-0196.
Miscellaneous Order.
Filed December 9, 2014.

OFPA – Appeal to Judicial Officer, failure to file timely – Purported appeal petition.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING PURPORTED APPEAL PETITION

Procedural History

Administrative Law Judge Janice K. Bullard [the ALJ] issued *Tierney*, No. 13-0196, 73 Agric. Dec. ___ (U.S.D.A. Oct. 9, 2014), in which the ALJ: (1) concluded Michael Tierney violated the National Organic Program Regulations (7 C.F.R. §§ 205.1-.699); (2) ordered Mr. Tierney to cease and desist from violating the National Organic Program Regulations; and (3) revoked Mr. Tierney's organic certification for a period of not less than five years. On November 18, 2014, Mr. Tierney appealed *Tierney*, No. 13-0196, 73 Agric. Dec. ___ (U.S.D.A. Oct. 9, 2014), to the Judicial Officer. On December 4, 2014, the Administrator, Agricultural Marketing Service, United States Department of Agriculture, filed Complainant's Response to Respondent's Request for an Appeal to the Judicial Officer, and, on December 5, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

Mr. Tierney's November 18, 2014, filing states in its entirety, as follows:

> USDA
> Office of Hearing Clerk
> Room 1031, South Building
> 1400 Independence Avenue SW

Washington, DC 20250-9200

Sent via Certified mail and e-mail

12 November 2014

Re: Doc No. 13-0196
Michael P. Tierney
Birchwood Farm

Request for an appeal to the Judicial Officer for a hearing before the Secretary of Agriculture.

Please forward proper procedure to follow.

Respectfully,
/s/
Michael P. Tierney

The rules of practice applicable to this proceeding[1] set forth requirements for an appeal petition, as follows:

§ 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

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [the Rules of Practice].

> 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.

7 C.F.R. § 1.145(a). Mr. Tierney's November 18, 2014 filing does not identify any error by the ALJ, does not identify any portion of the ALJ's Decision and Order or any ruling by the ALJ with which Mr. Tierney disagrees, and does not allege any deprivation of rights. In short, Mr. Tierney's November 18, 2014 filing does not remotely conform to the requirements for an appeal petition in 7 C.F.R. § 1.145(a).

I have long held that purported appeal petitions which do not remotely conform to the requirements of 7 C.F.R. § 1.145(a) are dismissed;[2] therefore, Mr. Tierney's purported appeal petition is dismissed.

Moreover, even if I were to find that Mr. Tierney's November 18, 2014 filing conformed to the requirements for an appeal petition in 7 C.F.R. § 1.145(a) (which I do not so find), I would deny Mr. Tierney's appeal petition because it is late-filed. The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[3] The Hearing Clerk served Mr. Tierney

---

[2] Estes, No. 11-0027, 73 Agric. Dec. ___ (U.S.D.A. June 12, 2014) (Order Dismissing Purported Appeal Pet. and Cross-Appeal), *available at* http://nationalaglawcenter.org/wp-content/uploads//assets/decisions/061214.Estes_.AWA11-0027.ODPACA..pdf (last visited March 8, 2016); Kasmiersky, 73 Agric. Dec. 275 (U.S.D.A. 2014) (Order Dismissing Purported Appeal Pet.); Oasis Corp., 72 Agric. Dec. 480 (U.S.D.A. 2013) (Order Dismissing Purported Appeal Pet.); Gentry, No. 07-0152, 68 Agric. Dec. ___ (U.S.D.A. Mar. 18, 2009) (Order Dismissing Purported Appeal Pet.), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/gentry2.pdf (last visited March 8, 2016); Breed, 50 Agric. Dec. 675 (U.S.D.A. 1991) (Order Dismissing Purported Appeal); Lall, 49 Agric. Dec. 895 (U.S.D.A. 1990) (Order Dismissing Purported Appeal).

[3] 7 C.F.R. § 1.145(a).

with the ALJ's Decision and Order on October 16, 2014;[4] therefore, Mr. Tierney was required to file his appeal petition with the Hearing Clerk no later than November 17, 2014.[5] Instead, Mr. Tierney filed his purported appeal petition with the Hearing Clerk on November 18, 2014.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Tierney's November 18, 2014 purported appeal petition is dismissed.

___

[4] United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 9202.

[5] Thirty days after the date the Hearing Clerk served Mr. Tierney with the ALJ's Decision and Order was Saturday, November 15, 2014. The Rules of Practice provide, when the time for filing a document or paper expires on a Saturday, 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 to include the next following business day.

7 C.F.R. § 1.147(h). The next business day after Saturday, November 15, 2014 was Monday, November 17, 2014.

In re: MICHAEL TIERNEY, d/b/a BIRCHWOOD FARMS.
Docket No. 13-0196.
Miscellaneous Order.
Filed December 29, 2014.

OFPA – Filing, effective date of – Purported appeal petition – Reconsideration, petition for.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION FOR RECONSIDERATION

Procedural History

On December 22, 2014, Michael Tierney filed a Petition for Reconsideration requesting that I reconsider *Tierney*, No. 13-0196, 73 Agric. Dec. ___ (U.S.D.A. Dec. 9, 2014) (Order Dismissing Purported Appeal Pet.). On December 23, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Tierney's Petition for Reconsideration.

Discussion

1. Summary of Denial of Mr. Tierney's Petition for Reconsideration

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer, as follows:

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

[1] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

> (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 purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Mr. Tierney in the Petition for Reconsideration, I find no error of law or fact necessitating modification of *Tierney*, No. 13-0196, 73 Agric. Dec. ___ (U.S.D.A. Dec. 9, 2014) (Order Den. Purported Appeal Pet.). Moreover, Mr. Tierney does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *Tierney*, No. 13-0196, 73 Agric. Dec. ___ (U.S.D.A. Dec. 9, 2014) (Order Den. Purported Appeal Pet.). Therefore, I deny Mr. Tierney's Petition for Reconsideration.

2. Issues Raised by Mr. Tierney in the Petition for Reconsideration

Mr. Tierney raises two issues in the Petition for Reconsideration. First, Mr. Tierney contends I erroneously found his purported appeal petition was late-filed (Pet. for Recons. at 1).

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an

appeal petition with the Hearing Clerk within 30 days after service.[2] The Hearing Clerk served Mr. Tierney with Administrative Law Judge Janice K. Bullard's [ALJ] Decision and Order on October 16, 2014;[3] therefore, Mr. Tierney was required to file his appeal petition with the Hearing Clerk no later than November 17, 2014.[4]

Mr. Tierney contends his appeal petition was timely filed, on November 8, 2014, when he sent his appeal petition to the ALJ and Buren Kidd, the attorney in the Office of the General Counsel, United States Department of Agriculture, who represents the Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], in this proceeding.

I have consistently held a respondent's sending a document or even delivering a document to a location or person other than the Hearing Clerk does not constitute filing with the Hearing Clerk.[5] Therefore, I find

---

[2] *See* 7 C.F.R. § 1.145(a).

[3] United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 9202.

[4] Thirty days after the date the Hearing Clerk served Mr. Tierney with the ALJ's Decision and Order was Saturday, November 15, 2014. The Rules of Practice provide, when the time for filing a document or paper expires on a Saturday, 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 to include the next following business day.

7 C.F.R. § 1.147(h). The next business day after Saturday, November 15, 2014, was Monday, November 17, 2014.

[5] *See* Arends, 70 Agric. Dec. 839, 851 (U.S.D.A. 2011) (stating complainant's counsel's receipt of respondents' response to an order to show cause does not constitute filing the response with the Hearing Clerk); Heartland Kennels, Inc., 61 Agric. Dec. 492, 537 (U.S.D.A. 2002) (stating an incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk); Stepp, 59 Agric. Dec. 265, 268 (U.S.D.A. 2000) (Ruling Den. Resp'ts' Pet. for Recons. of Order Lifting Stay) (stating neither respondents' mailing a response to a motion nor the United States Postal Service's delivering the response to the United States Department of Agriculture, Mail & Reproduction Management Division,

Mr. Tierney's sending his purported appeal petition to the ALJ and counsel for the Administrator does not constitute filing with the Hearing Clerk, as required by 7 C.F.R. § 1.145(a).

Mr. Tierney further contends the Hearing Clerk received his appeal petition on November 17, 2014; therefore, the appeal petition was timely filed.

The Rules of Practice provide that a document is deemed to be filed at the time it reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
> (g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). The most reliable evidence of the date a document reaches the Hearing Clerk is the date stamped on that document by an employee of the Office of the Hearing Clerk.[6] The Hearing Clerk's date

---

constitutes filing with the Hearing Clerk); Sweck's, Inc., 58 Agric. Dec. 212, 213 n.1 (U.S.D.A. 1999) (stating appeal petitions must be filed with the Hearing Clerk; the hearing officer erred when he instructed litigants that appeal petitions must be filed with Judicial Officer); Peterson, 57 Agric. Dec. 1304, 1310 n.3 (U.S.D.A. 1998) (Order Den. Late Appeal) (stating that neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); Jacobs, 56 Agric. Dec. 504, 514 (U.S.D.A. 1996) (stating, even if the respondent's answer had been received by complainant's counsel within the time for filing the answer, respondent's answer would not be timely because complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

[6] Rosberg, No. 12-0183, 73 Agric. Dec. ___, slip op. at 4 (U.S.D.A. Oct. 31, 2014) (Order Den. Resp'ts' Pet. for Recons.) (stating the Hearing Clerk's date stamp establishes the date a document reaches the Hearing Clerk); Sergojan, 69 Agric. Dec. 1438, 1442 (U.S.D.A. 2010) (Order Den. Pet. to Reconsider) (same); Lion Raisins, Inc., 68 Agric.

stamp establishes that Mr. Tierney's appeal petition reached the Hearing Clerk on November 18, 2014; therefore, I reject Mr. Tierney's unsupported contention that he timely filed his purported appeal petition with the Hearing Clerk on November 17, 2014.

Second, Mr. Tierney appeals the ALJ's Decision and Order (Pet. for Recons. at 1-2).

As an initial matter, a petition for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) is not the proper vehicle by which to appeal an administrative law judge's decision. Instead, a petition for reconsideration filed pursuant to 7 C.F.R. § 1.146(a)(3) constitutes a request that the Judicial Officer reconsider the Judicial Officer's decision. Moreover, the Hearing Clerk served Mr. Tierney with the ALJ Decision and Order on October 16, 2014;[7] therefore, Mr. Tierney was required by 7 C.F.R. § 1.145(a) to file his appeal petition with the Hearing Clerk no later than November 17, 2014.[8] Mr. Tierney filed the Petition for Reconsideration containing his appeal of the ALJ's Decision and Order on December 22, 2014, 35 days after he was required to file his appeal petition. Mr. Tierney's December 22, 2014, appeal of the ALJ's Decision and Order comes far too late to be considered.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Tierney's December 22, 2014 Petition for Reconsideration is denied.

___

Dec. 244, 287 (U.S.D.A. 2009) (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion) (holding the most reliable evidence of the date a document reaches the Hearing Clerk is the date stamped by the Office of the Hearing Clerk on that document), *appeal dismissed*, No. 1:10-cv-00217-AWA-DLB (E.D. Cal. June 23, 2010); Lion, 65 Agric. Dec. 1214, 1221 (U.S.D.A. 2006) (Ruling) (same).

[7] *See supra* note 3.

[8] *See supra* note 4.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

NO DEFAULT DECISIONS REPORTED.

CONSENT DECISIONS

ANIMAL WELFARE ACT

China Cargo Airlines Co., Ltd., A/K/A China Cargo Airlines, Ltd., a subsidiary of China Eastern Airlines Corporation Limited, a corporation chartered in the People's Republic of China.
Docket No. 14-0041.
Filed September 4, 2014.

FEDERAL CROP INSURANCE ACT

Jimmy Leon Cagle.
Docket No. 14-0107.
Filed July 17, 2014.

Jimmy Leon Cagle, D//B/A Birdsong Crop Insurance.
Docket No. 14-0108.
Filed July 17, 2014.

FEDERAL MEAT INSPECTION ACT

Dettelbach Farms, Inc. and Steven Dettelbach.
Docket No. 14-0181.
Filed September 24, 2014.

Galant Food Company.
Docket No. 14-0170.
Filed August 15, 2014.

Redwood Meat Company, Inc.
Docket No. 14-0174.
Filed August 25, 2014.

Allen Nylander.
Docket No. 14-0175.
Filed August 25, 2014.

John Nylander.
Docket No. 14-0176.
Filed August 25, 2014.

Cheryl Nylander.
Docket No. 14-0177.
Filed August 25, 2014.

Rick Nylander.
Docket No. 14-0178.
Filed August 25, 2014.

Ryan Nylander.
Docket No. 14-0179.
Filed August 25, 2014.

HORSE PROTECTION ACT

Michael Scott Beaty.
Docket No. 13-0309.
Filed July 14, 2014.

Quentin Fox.
Docket No. 13-0312.
Filed July 14, 2014.

Nicholaus Plafcan.
Docket No. 13-0242.
Filed July 30, 2014.

Jack H. Heffington.
Docket No. 14-0053.
Filed December 5, 2014.

POULTRY PRODUCTS INSPECTION ACT

Dettelbach Farms, Inc. and Steven Dettelbach.
Docket No. 14-0181.
Filed September 24, 2014.

CONSENT DECISIONS

Galant Food Company.
Docket No. 14-0170.
Filed August 15, 2014.