

# **AGRICULTURE DECISIONS**

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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

## AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in AGRICULTURE DECISIONS.

Beginning in 1989, AGRICULTURE DECISIONS is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in AGRICULTURE DECISIONS.

Consent decisions entered subsequent to December 31, 1986, are no longer published. However, a list of consent decisions is included. Consent decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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**AGRICULTURAL MARKETING AGREEMENT ACT**

**COURT DECISION**

**BALICE v. U.S. DEPARTMENT OF AGRICULTURE.**

**No. 98-16766.**

**Filed February 8, 2000.**

**(Cite as 203 F.3d 684 (9<sup>th</sup> Cir. ))**

**Almonds - Civil penalty - Ability to pay - Eighth amendment - Excessive fines clause.**

The United States Court of Appeals for the Ninth Circuit affirmed the Judicial Officer's finding that an almond handler had violated the Almond Marketing Order (7 C.F.R. pt. 981) and the Judicial Officer's assessment, pursuant to 7 U.S.C. § 608c(14)(B), of a \$225,500 civil penalty against the almond handler. The Court held that the Judicial Officer's determinations are supported by substantial evidence, that the Judicial Officer's choice of sanction is neither unwarranted in law nor without justification in fact, and that the amount of the civil penalty is not unconstitutionally excessive. The Court rejected the almond handler's contention that 7 U.S.C. § 608c(14)(B) requires the Judicial Officer to consider a handler's ability to pay when assessing a civil penalty. The Court concluded that the assessment of a \$225,500 civil penalty implicates the Excessive Fines Clause of the Eighth Amendment, but that the civil penalty assessed by the Judicial Officer does not violate the Eighth Amendment because the civil penalty is not grossly disproportionate to the gravity of the offenses for which it was imposed.

**UNITED STATES COURT OF APPEALS  
NINTH CIRCUIT**

Before: GRAAFEILAND,<sup>1</sup> ALARCON, and SILVERMAN, Circuit Judges.

ALARCON, Circuit Judge:

Vito Balice ("Balice") appeals from the district court's final order affirming the judicial officer's ("JO") decision to assess a \$225,500 civil penalty against him pursuant to § 608c(14)(B) of the Agricultural Marketing Agreement Act of 1937 ("AMAA"). The JO assessed a civil penalty of \$9,500 individually against Balice and a civil penalty of \$216,000 jointly and severally against Balice and his two uncles, Onofrio Calabrese and Rocco Calabrese ("Calabreses"), for violating various provisions of the Almond Marketing Order during the 1987-1988 crop year.

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<sup>1</sup>Honorable Ellsworth A. Van Graafeiland, Senior United States Circuit Judge, for the Second Circuit, sitting by designation.

Balice contends that the JO's decision to assess the penalty was arbitrary and capricious and in violation of the Eighth Amendment's prohibition against excessive fines. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm, because we conclude that the JO's determinations were supported by substantial evidence, that the JO's choice of sanction was neither unwarranted in law nor without justification in fact, and that the amount of the fine was not constitutionally excessive.

## I

During the 1987-1988 crop year, Balice and the Calabreses, doing business as the O.R.C. Company, operated as handlers of almonds grown in California. *See* 7 C.F.R. § 981.13 (1987). As handlers of California almonds, they were subject to regulation under both the AMAA and the Almond Marketing Order. *See* 7 U.S.C. § 608c(1), (2), (6); 7 C.F.R. §§ 981.1-981.474 (1987). For the 1987-1988 crop year, the Almond Marketing Order required every handler of almonds to

- (1) keep certain records during the course of the almond season and for two years following the end of the season (the "record keeping requirement"),
- (2) furnish in a timely manner certain reports to the Almond Board of California (the "Almond Board") (the "reporting requirement"),
- (3) maintain a reserve, and thus withhold from handling, an amount of almonds equal to 18% of the "kernel weight" of all almonds received for the handler's account (the "reserve requirement"), and
- (4) dispose of the "kernel weight" of inedible almonds either to the Almond Board or to secondary outlets by a certain date (the "inedible disposition requirement").

Section § 608c(14)(B) of the AMAA authorized the Secretary of the USDA ("Secretary") to assess a civil penalty against a handler in an amount up to \$1,000 for each violation of the Almond Marketing Order and directed the Secretary to treat each day in which the handler was in violation of the order as a separate violation. *Id.*

On January 5, 1990, the Administrator of the Agricultural Marketing Service, a branch of the U.S. Department of Agriculture ("USDA"), initiated a disciplinary proceeding against Balice and the Calabreses alleging that they had violated the

record keeping, the reporting, the reserve, and the inedible disposition requirements of the Almond Marketing Order during the 1987-1988 crop year. Balice and the Calabreses filed answers denying those allegations. A two day administrative hearing was held before an administrative law judge ("ALJ") in March of 1991. Balice was represented by counsel and testified at the hearing. The Calabreses, who are citizens of Italy, were represented by separate counsel, but did not appear at the hearing.

The ALJ found that Balice and the Calabreses violated the record keeping, the reporting, the reserve, and the inedible disposition requirements of the Almond Marketing Order during the 1987-1988 crop year. The ALJ then assessed a civil penalty jointly and severally against the three in the amount of \$216,000. That penalty consisted of fines in the amount of

- (1) \$74,500 for continuous violations of the record keeping requirement,
- (2) \$1,000 for the failure to file one report and for the late filing of another report,
- (3) \$62,000 for continuous violations of the reserve requirement, and
- (4) \$78,500 for continuous violations of the inedible disposition requirement.

Balice appealed the decision to the JO. The USDA filed a cross-appeal contending that the fine should be increased to \$582,000. The Calabreses did not file an appeal from the decision.

The JO adopted most of the ALJ's findings, added several new findings, and increased the civil penalty from \$216,000 to \$225,500. That penalty consisted of fines in the amount of

- (1) \$74,500 for the continuous violations of the record keeping requirement,
- (2) \$2,000 for the failure to file one report and for the late filing of another report,
- (3) \$124,000 for the continuous violations of the reserve requirement, and
- (4) \$25,000 for the continuous violations of the inedible disposition requirement.

The JO determined that Balice was individually liable for \$9,500 of the \$225,500 penalty and that Balice and the Calabreses were jointly and severally liable for the remaining \$216,000 of the penalty.

Balice filed a complaint in the district court seeking a review of the JO's decision and a declaration that the civil penalty was invalid. The district court concluded that there was substantial evidence to indicate that Balice had violated the record keeping, the reporting, the reserve, and the inedible disposition requirements of the Almond Marketing Order during the 1987-1988 crop year. It also found that the \$225,500 penalty was neither arbitrary and capricious nor constitutionally excessive under the Eighth Amendment. Accordingly, the district court granted summary judgment in favor of the USDA. We review that decision *de novo*. See *Balint v. Carson City*, 180 F.3d 1047, 1050 (9<sup>th</sup> Cir. 1999) (en banc).

## II

In this appeal, Balice contends that the JO erred in applying the penalty provisions of the AMAA. He argues that the JO should have considered "significant mitigating factors," such as his ability to pay the amount of the fine and his level of culpability, when assessing the penalty against him. He further argues that the JO's choice of sanction was arbitrary and capricious and that the JO's findings that he violated the record keeping and the inedible disposition requirements were not supported by substantial evidence.

Judicial review of an agency decision is narrow. We will not substitute our judgment for that of the agency. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Aluminum Co. of Amer. v. Administration, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9<sup>th</sup> Cir. 1999). Under the Administrative Procedures Act, we may only set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). We apply the substantial evidence standard when reviewing the factual findings of an agency. See *Armstrong v. Commissioner of the Soc. Sec. Admin.*, 160 F.3d 587, 589 (9<sup>th</sup> Cir. 1998). When reviewing a choice of sanction, we are limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." See *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 967 (9<sup>th</sup> Cir. 1991) (internal quotations omitted). We will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9<sup>th</sup> Cir. 1984) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-88, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)).

A

Balice contends that the JO erred in failing to consider “significant mitigating factors,” such as his degree of culpability and his ability to pay a fine, when assessing the \$225,500 civil penalty against him pursuant to § 608c(14)(B). The record shows, however, that the JO considered

the nature of the violations, the number of the violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to Respondent Balice, and any other circumstances shedding light on the degree of culpability involved

when assessing the penalty against Balice. *In re Calabrese*, 51 Agric. Dec. 131, 154-55 (1992). We need only decide whether, as Balice suggests, the JO was required to consider Balice’s ability to pay the amount of fine imposed. It is clear from the express language of the AMAA and from the legislative history of § 608c(14)(B) that Congress did not intend to limit the USDA’s discretion in that manner.

In 1987, Congress amended § 608c(14)(B) out of concern for the integrity of the market order program. *See* 1987 U.S. Code Cong. & Admin. News, 2313-1, 2313-29. Prior to the amendment, only the U.S. Attorney’s Office was authorized to initiate disciplinary proceedings to enforce the terms and conditions of market orders. *See id.* Due to the large volume of cases before that office, however, and because AMAA disciplinary proceedings are both time consuming and cumbersome, few U.S. Attorneys took the time to prosecute violations of market orders. *See id.*

As a result, Congress amended the statute’s penalty provisions to allow the Secretary to enforce the requirements of market orders through the use of civil penalties. *See* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1501. The amendment authorized the Secretary to initiate administrative actions and to assess a penalty of not more than \$1,000 for each violation of a market order. The amendment also required the Secretary to treat each day in which a handler is in violation of a market order as a separate violation. *See id.*; 7 U.S.C. § 608c(14)(B); *see also* 1987 U.S. Code Cong. & Admin. News, 2313-1, 2313-29, 2313-30. The amendment did not, however, set forth a list of specific factors for the Secretary to consider when exercising that grant of authority. “It simply . . . authorize[d] the Secretary . . . to seek an administrative civil penalty when

circumstances indicate that it would be an effective regulatory enforcement tool.” 1987 U.S. Code Cong. & Admin. News, 2313-1, 2313-30.

We decline to accept Balice’s suggestion that we read into § 608c(14)(B) a means test that Congress failed to set forth in the statute. Indeed, when Congress has intended to create such a requirement in the past, it has expressly identified and carefully described that factor in the penalty provision itself. When Congress amended the penalty provision of the Packers and Stockyards Act in 1976, for instance, it specifically directed the USDA to consider the effect of a sanction on a person’s ability to continue in business before assessing a civil penalty for any unfair, discriminatory, or deceptive business practice.<sup>2</sup> See Act of Sept. 13, 1976, Pub. L. No. 94-410 § 3(b) (codified at 7 U.S.C. § 213(b)); see also *Bosma*, 754 F.2d at 810 (holding that the USDA bears the burden of producing evidence to show that a civil penalty is reasonable under the factors specified in 7 U.S.C. § 213(b)). Congress has also included similar provisions in the Clean Air Act and in the Shipping Act.<sup>3</sup> See 42 U.S.C. § 7413(e)(1); 46 App. U.S.C. § 1712(c). We

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<sup>2</sup>Section 213 of the Packers and Stockyard Act provides, in pertinent part:

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than \$10,000 for each such violation. *In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person’s ability to continue in business . . . .* 7 U.S.C. § 213(b) (emphasis added).

<sup>3</sup>Section 7413 of the Clean Air Act, provides, in pertinent part:

(e) Penalty assessment criteria

(1) *In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as Justice may require) the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.* 42 U.S.C. § 7413(e)(1) (emphasis added).

Section 1712 of the Shipping Act provides, in pertinent part:

(continued...)

believe that, had Congress intended to require the Secretary to consider a handler's ability to pay when assessing a penalty for a violation of a market order, it surely would have so provided in the plain language of the AMAA or at least noted the fact during its legislative sessions.<sup>4</sup> See *Farley & Calfee, Inc.*, 941 F.2d at 969-70 (declining an appellant's "plea for mitigation and leniency" where the Perishable Agricultural Commodities Act and the USDA "appear to provide little of either").

Our holding that the AMAA does not require the USDA to consider an almond handler's ability to pay a civil penalty is not at odds with the Eighth Circuit's decision in *Corder v. United States*, 107 F.3d 595, 598 (8<sup>th</sup> Cir. 1997).<sup>5</sup> In that

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<sup>3</sup>(...continued)  
(c) Assessment procedures

Until a matter is referred to the Attorney General, the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this chapter. *In determining the amount of the penalty, the Commission shall take into account* the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, *ability to pay*, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty. 46 App. U.S.C. § 1712(c) (emphasis added).

<sup>4</sup>Where a statute requires an agency to consider specific mitigating factors before assessing a civil penalty, § 556(d) of the Administrative Procedures Act places on the agency the burden of producing evidence showing that a proposed penalty is reasonable in light of those factors. See 5 U.S.C. § 556(d) (providing that the "proponent of a rule or order has the burden of proof"); *Bosma*, 754 F.2d at 810 (vacating a penalty imposed pursuant to § 213(b) of the Packers and Stockyards Act where neither the USDA nor the market agent furnished evidence concerning the size of the agent's business or the effect of the penalty on the agent's ability to continue on in business). As discussed in the text, however, we hold that § 608c(14)(B) of the AMAA did not impose a duty on the USDA to come forward with evidence showing that Balice had the means to pay the \$225,500 civil penalty. Nor did Balice ever attempt to present evidence in the administrative proceeding concerning his inability to pay any amount of penalty.

<sup>5</sup>Our holding is limited to adjudications occurring prior to the effective date of § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996. Pub. L. No. 104-121 § 223(a) (set out as a note under 5 U.S.C. § 601). That section, which was not in effect when this action was adjudicated, provides:

- (a) In general. Each agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section [Mar. 29, 1996] to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violation of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities. *Id.*

(continued...)

case, the court invalidated a regulation that applied a series of multipliers in a manner that subjected nearly every first time offender of the Food Stamp Act (“FSA”) to a \$40,000 fine. *See id.* at 598. The court did not construe the omission of mitigating factors in the penalty provisions of the FSA to be a grant of standardless discretion to impose whatever fine the agency pleases. *Id.* at 597. Instead, it interpreted the omission of the mitigating factors as a “signal that [the agency] should follow principles of fairness that Congress has more clearly delineated in other laws administered” by the USDA, including the Packers and Stockyards Act. *Id.* at 598.

We do not read *Corder* as always requiring the USDA to consider the mitigating factors specified in the penalty provisions of the Packers and Stockyards Act or in similar legislation. In *Corder*, the Eighth Circuit simply invalidated a regulation that reflected the USDA’s “hostile attitude toward an alternative monetary sanction Congress enacted” to alleviate the “excessively harsh” penalty that the FSA had previously mandated. *Id.* at 597-98; *see also* H.R. Rep. No. 100-828, pt. 1, 27-28 (1988). The legislative history of the penalty provision at issue in that case indicates that Congress specifically intended the USDA to consider certain mitigating factors when assessing a fine under the FSA. In providing for the alternative monetary sanction, Congress noted that “permanent disqualification . . . upon the first trafficking offense—*without any evaluation of preventive measures taken or complicity in the trafficking—seems excessively harsh.*” H. Rep. No. 100-828, pt. 1, 27-28 (1988) (emphasis added). It then stated that the purpose of the monetary sanction was to ensure “that the punishment will more closely fit the crime.” *Id.* That purpose is quite distinct from the purpose of the amendment to § 608c(14)(B) of the AMAA, which was to ensure that “regulatory violations of market orders will be dealt with in a timely, efficient, and effective manner.” 1987 U.S. Code Cong. & Admin. News, 2313-1, 2313-30.

Nor do we find the reasoning in *Corder* persuasive under the facts of this case. Unlike the penalty in *Corder*, the sanction imposed in this case was not the product of a “standardless exercise of discretion.” Rather, it was the result of an informed administrative decision making process that took into account the nature of the violations, the number of the violations, the damage or potential damage to the market order program, the amount of profit potentially available to Balice, the extent to which Balice had received prior warnings or instructions, and any other circumstances shedding light on the degree of Balice’s culpability. The JO’s failure

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<sup>5</sup>(...continued)

Whether § 223(a) requires the USDA to consider a handler’s ability to pay a civil penalty assessed under § 608c(14)(B) is a question for the future.

to consider Balice's ability to pay was not erroneous.

**B**

The JO found that Balice violated the record keeping requirements of § 981.70 of the Almond Marketing Order by failing to maintain necessary records on May 18, 1988 and from March 13, 1989 until the USDA filed its complaint on January 5, 1990. For those violations, the JO assessed a penalty against Balice of \$250 per day for the 298 days in which Balice had failed to maintain the necessary records. Balice contends that "it is arbitrary and capricious . . . to fine Balice on a daily basis for not providing records that he did not have, and that the USDA was no longer demanding." He also argues that the amount of his penalty should not have been calculated based on the filing of the complaint, an event over which he had no control.

Section 981.70 of the Almond Marketing Order requires an almond handler to maintain records which "clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information in respect to his operations."<sup>6</sup> 7 C.F.R. § 981.70 (1987). That section further provides that handlers must retain those records for "2 years after the end of the crop year to which they apply" and that "each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit." *Id.*

There is substantial evidence in the administrative record to support the JO's conclusion that Balice violated § 981.70 for 298 days. At the administrative hearing, the USDA introduced Balice's statements to an auditor that he had failed to inspect incoming almonds, that he had purchased some almonds on a cash basis

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<sup>6</sup>The Almond Marketing Order provides, in pertinent part:

§ 981.70 Records and verification.

Each handler shall keep records which will clearly show the details of his receipts of almonds, withholdings, sales, shipments, inventories, reserve disposition, advertising and promotion activities, and other pertinent information in respect to his operations pursuant to the provisions of this part. Such records shall be retained by the handler for 2 years after the end of the crop year to which they apply. Each handler's premises shall be accessible to authorized representatives of the Board and the Secretary for examination and audit of the aforesaid records and for inspection and observation of almonds. The Board shall make such checks of almonds or audits of each handler's records as it deems appropriate or are requested by the Secretary to insure that accurate information as required in this part is being furnished by handlers. 7 C.F.R. § 981.70 (1987).

without obtaining receipts, and that he had retained only shipping invoices and bills of lading for other purchases. Balice was also under a continuing duty to provide that information to the USDA during the times in question. A compliance officer testified that he made an “open ended” request for Balice’s records for the 1987-1988 crop year on March 13, 1988 and that Balice had never supplied them. *See Big Bear Super Market No. 3 v. Immigration & Naturalization Serv.*, 913 F.2d 754, 757 (9<sup>th</sup> Cir. 1990) (holding that the Immigration Reform and Control Act, which requires employers to maintain Forms I-9 and make them available for inspection for 3 years, imposes on employers a continuing duty to present the forms upon request). The JO’s decision that Balice had “failed in his duty to maintain adequate records” during the times in question was therefore proper.

The JO’s decision to fine Balice \$250 for each day in which he failed to produce the requested information was neither arbitrary nor capricious. The record keeping requirement is essential to the enforcement and operation of the market order program. It serves the purpose not only of verifying a handler’s compliance with the provisions of the Almond Market Order, but also of enabling the Almond Board to set its economic policy. Indeed, Congress has authorized the USDA to fine a handler up to \$1,000 per day for each day in which the handler fails to maintain the necessary records. *See 7 U.S.C. § 608c(14)(B)*. Under that authority, the JO could have assessed against Balice a fine for as much as \$298,000. The JO’s decision to impose a fine of one fourth of that amount, while severe, was allowable.

We agree with the JO that it is irrelevant that records were in Italy. The Almond Marketing Order specifically required Balice to make his premises available for an audit and to maintain the necessary records during the entire 1987-1988 crop year and for two years thereafter. *See 7 C.F.R. § 981.70 (1987)*. Balice was aware that the USDA had made an ongoing request for records when he forwarded the documents to Italy. He was then in control of the records and reasonably could have delivered them to the USDA or, at the very least, made copies available for inspection. Balice’s contention that it was arbitrary and capricious for the JO to calculate the penalty based on the filing of the complaint is devoid of merit.

### C

The JO additionally found that Balice violated the reporting requirements of § 981.74 and § 981.472 of the Almond Marketing Order by failing to file one report

and by filing another report late. *See* 7 C.F.R. §§ 981.74, 981.472 (1987).<sup>7</sup> The JO declined to accept, however, the ALJ's decision to impose a total fine of \$1,000 for those violations. The JO concluded that the offenses were "serious" and imposed a \$2,000 fine instead. That penalty was the largest sanction authorized by the AMAA. *See* 7 U.S.C. § 608c(14)(B). Balice does not dispute that he violated the reporting requirements. Rather, he suggests that the JO's decision to increase the fine without first requiring the USDA to show harm to the government was arbitrary and capricious.

We are not persuaded that the USDA was required to show harm to the government before the JO could increase the fine from \$1,000 to \$2,000. Section 557(b) of the Administrative Procedures Act provides that on an appeal from, or a review of, the initial decision of an ALJ, an "agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). We have interpreted that section as allowing a JO to increase a penalty that is proposed by an ALJ. *See Holiday Food Serv., Inc. v. Department of Agric.*, 820 F.2d 1103, 1105 (9<sup>th</sup> Cir. 1987) (citing *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9<sup>th</sup> Cir. 1984)). We have not, however,

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<sup>7</sup>The Almond Marketing Order provides, in pertinent part:

§ 981.472 Report of almonds received.

- (a) Each handler shall report to the Board on ABC Form 1 the total adjusted kernel weight of almonds, by varieties, received by it for its own account within any of the hereinafter prescribed reporting periods. Each such report shall be filed with the Board within five (5) business days after the close of the applicable one of the following reporting periods: July 1 to August 31; September 1 to September 15; September 16 to September 30; October 1 to October 15; October 16 to October 31; November 1 to November 15; November 16 to November 30; December 1 to December 31; January 1 to March 31; April 1 to June 30.
- (b) For the reporting periods July 1 through December 31, and January 1 through March 31, each handler shall submit a summary report to the Board, within 30 days after the end of the reporting period, which shall show the adjusted kernel weight of almonds received for the handler's own account by county of production and such varieties as may be requested by the Board. 7 C.F.R. § 981.472 (1987).

§ 981.74 Other reports.

Upon the request of the Board, made with the approval of the Secretary, every handler shall furnish to the Board in such manner and at such times as it prescribes (in addition to such other reports as are specifically provided for in this part) such other information as will enable the Board to perform its duties and exercise its powers hereunder. 7 C.F.R. § 981.74 (1987).

construed that language as requiring an agency to show harm to the government before a JO may perform such an increase. *See id.* For, to do so would contravene the express terms of § 557(b). We therefore decline to accept Balice's suggestion that the USDA was required to show harm to the government before the JO could increase the penalty for the reporting violations.

#### D

The JO also found that Balice violated the minimum reserve requirement of §§ 981.46, 981.50, and 981.52 of the Almond Marketing Order by failing to maintain in his possession, or under his control, a minimum quantity of almonds.<sup>8</sup> *Id.* For the 1987-1988 crop year, the Secretary estimated that the domestic and worldwide almond crop was expected to be the largest in history and, as a result, established an 18% reserve requirement. *See id.* That requirement imposed a strict duty on handlers to withhold from handling 18% of the kernel weight of all almonds they received for their own account during the season. *See* 7 C.F.R. § 981.235 (1987); 52 Fed. Reg. 39,900, 39,901-3 (1987). The Secretary also warned that reserve almonds would be diverted to low paying secondary outlets unless market demand

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<sup>8</sup>The Almond Marketing Order provides, in pertinent part:

§ 981.46 Withholding reserve.

When a reserve percentage has been fixed for any crop year, as hereinafter provided, no handler shall handle almonds except on condition that he comply with the requirements in respect to withholding reserve almonds and the prescribed disposition thereof. 7 C.F.R. § 981.46 (1987).

§ 981.50 Reserve Obligation.

Whenever salable and reserve percentages are in effect for a crop year, each handler shall withhold from handling a quantity of almonds having a kernel weight equal to the reserve percentage of the kernel weight of all almonds such handler receives for his own account during the crop year: Provided, that, any quantity of almonds delivered to outlets such as poultry or animal feed or crushing into oil, in a manner permitting accountability to the Board, shall not be included in such receipts. The quantity of almonds hereby required to be withheld from handling shall constitute, and may be referred to as the "reserve" or "reserve obligation" of a handler. The almonds handled as salable almonds by any handler, in accordance with the provisions of this part, shall be deemed to be that handler's quota fixed by the Secretary within the meaning of section 8a(5) of the act. 7 C.F.R. § 981.50 (1987).

outpaced the supply of nonreserve almonds.<sup>9</sup> *See* 52 Fed. Reg. at 39,901.

The JO found that Balice failed to maintain adequate reserves on March 22, 1988 and from March 31, 1988 through July 31, 1988 when the Secretary terminated the reserve requirement. The JO found that Balice's conduct was a "very serious violation of the AMAA and the Order" and, as a result assessed a total penalty of \$124,000 against Balice for the 124 days that Balice was in violation of the reserve requirement. Balice concedes that he was in violation of the reserve requirement on the days in question. He contends, however, that the JO's decision to impose such a large fine was arbitrary and capricious. He argues that the \$124,000 penalty, which is the statutory maximum, is impermissibly high given that other almond sellers made an "equal profit" when the Secretary released the almond reserve on July 31, 1988, that he was a small-time handler of almonds, and that the penalty could not have been higher if he had sold his entire reserve into the open market.<sup>10</sup>

We reject Balice's contention that the JO's choice of sanction was unwarranted. The fact that the Secretary ultimately released the reserve and the fact that Balice was a small-time handler of almonds do not mitigate the fact that Balice violated the order by selling surplus almonds into a market that the Secretary had deemed closed. The purpose of the reserve requirement is to prevent handlers from destabilizing the price of almonds by selling excess almonds into a highly saturated market. *See* 52 Fed. Reg. 39,900, 39,900-3 (1987). Because the Almond Market Order provided that the Secretary could allocate reserve almonds to purchasers in low paying secondary outlets, even a small time handler could make large profits by selling reserve almonds at nonreserve prices. *See* 52 Fed. Reg. 39,000, 39,901.

In fact, we agree that Balice made a potential profit of roughly \$250,000 simply by selling one third of his reserve into the open market. For the 1987-1988 crop year, the Almond Marketing Order strictly required handlers to withhold from the open market 18% of the quantity of almonds handled for their own accounts. *See* 52 Fed. Reg. 39,900, 39,900-3 (1987). By selling his reserve, Balice took

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<sup>9</sup>The Secretary explained the possible disposition of reserve almonds for the 1987-1988 crop year:

Reserve almonds could be transferred to the salable category at a later date if it is found that the salable percentage is insufficient to satisfy 1987-88 trade demand, including desirable carryover requirements for use during the 1988-89 crop year (if it appears that the 1988 crop will be insufficient to meet 1988-89 trade demand needs). *Otherwise, reserve almonds will be diverted to secondary outlets* such as almond oil or animal feed. 52 Fed. Reg. 39,900, 39,901 (1987) (emphasis added).

<sup>10</sup>We note that Balice has abandoned his argument that he did not place the reserve almonds for sale in the "open market."

advantage of an artificially high demand and unlawfully disposed of almonds at a price of \$1.40 a pound when those almonds were lawfully salable at a price of only \$0.05-\$0.08 per pound. We are not persuaded by the fact that the Secretary later released the reserve and allowed handlers to sell their reserve almonds at normal market prices. Profit is determined based on the prevailing market prices at the time of a sale. Were the rule otherwise, almond handlers could engage in strategic behavior and disturb the sensitive supply-and-demand conditions of the almond market, but avoid liability simply because the price of almonds increased.<sup>11</sup>

Balice's contention that his penalty could not have been greater had he sold his entire reserve into the open market is equally unavailing. Though the JO's decision to impose the statutory maximum for only a partial sale of an almond reserve may create an incentive for those in violation of the reserve requirement to dispose of their entire reserve, that is not a factor that we will consider. The wisdom of the JO's policy decisions is beyond the scope of our review. It is a fundamental principle of law that "where Congress has entrusted an administrative agency with the responsibility of selecting the most effective means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-186, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (citations and internal quotations omitted). In this case, Congress has entrusted the Secretary with the duty of operating the market order program and enforcing the terms and conditions of each order. It has also authorized the department to assess a penalty of \$1,000 per day for each day that Balice had failed to maintain his reserve. *See* 7 U.S.C. § 608c(14)(B). The fact that it may have been unwise for the JO to impose that fine is simply not relevant to the issue of whether the JO's choice of sanction was allowable.

## E

The JO also found that Balice violated the Almond Marketing Order by failing to dispose of 2,596 pounds of "inedible" almond kernels. An inedible almond kernel is a piece of an almond "with any defect scored as serious damage, or damage due to mold, gum, shrivel, or brown spot, . . . or which has embedded dirt or other foreign material not easily removed by washing." 7 C.F.R. § 981.408

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<sup>11</sup>Even on a small scale, such strategic behavior may seriously affect the stability of the almond market. *See United States v. Ruzicka*, 329 U.S. 287, 293, 67 S.Ct. 207, 91 L.Ed.2d 290 (1946) (stating that "even temporary defaults by some [milk] handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements").

(1987). Section 981.42 of the Almond Marketing Order requires each handler to inspect all incoming almonds and to determine the percentage of all inedible almond kernels. *Id.* The order further requires each handler to accumulate the quantity of inedible kernels in excess of a threshold amount and to dispose of an equivalent “weight” of almond kernels to the Almond Board or to secondary outlets, such as “crushers, feed manufacturers, and feeders,” by a certain date.<sup>12</sup> *Id.*; 7 C.F.R. § 981.442 (1987). Effective December 1, 1987, the Secretary set the threshold amount at 0% of a handler’s total incoming kernel weight and set August 31, 1998, as the deadline for disposal. *See* 52 Fed. Reg. 29,222, 29,223 (1987). Each handler was therefore required to dispose of an amount of almonds equal to the full weight of the handler’s inedible almond kernels by August 31, 1988. *See id.*; 7 C.F.R. § 981.442(a)(5) (1987).

The JO adopted the ALJ’s findings that Balice handled a total of 571,726 pounds of almond kernels during the relevant part of the 1987-1988 almond season. Because Balice had failed to inspect his incoming almonds, the JO calculated Balice’s inedible disposition obligation by applying the industry average for inedible kernels to Balice’s total amount of incoming kernels. The JO calculated that obligation to be 10,291 pounds of kernels.<sup>13</sup> The JO also found that Balice had properly disposed of only 7,695 pounds of almond kernels before August 31, 1988, representing an inedible disposition shortfall of 2,596 pounds of kernels. For that

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<sup>12</sup>The Almond Marketing Order provides, in pertinent part:

§ 981.442 Quality control.

- (a) Incoming. Pursuant to § 981.42(a), the quantity of inedible kernels in each variety of almonds received by a handler, including almonds of his own production, shall be determined and disposed of in accordance with the provisions of this paragraph.
- (a)(4) Disposition obligation. The weight of inedible kernels in excess of [a threshold] percent of kernel weight reported to the Board of any variety received by a handler shall constitute that handler’s disposition obligation. If a variety other than Peerless is used as bleaching stock, the weight so used may be reported to the Board and the disposition obligation for that variety reduced proportionately.
- (a)(5) Meeting the disposition obligation. . . . Each handler’s disposition obligation shall be satisfied when the almond meat content of the material delivered to accepted users equals the disposition obligation, but no later than [a certain date], succeeding the crop year in which the obligation was incurred. 7 C.F.R. § 981.442 (1987).

<sup>13</sup>Both parties agree that Balice had an inedible disposition requirement of 10,291 pounds of kernels. That figure represents 1.8% of the 571,726 pounds of almond kernels that Balice took in during the relevant part of the 1987-1988 season.

shortfall, the JO assessed a penalty against Balice of \$1,000 per day for the first 25 days that Balice was in violation of the requirement.

Balice claims that the JO abused its discretion in concluding that he violated the inedible disposition requirement. Balice agrees that he had an inedible disposition requirement of 10,291 pounds of almond kernels and that he disposed of only 7,695 pounds of inedible kernels, or 9,260 pounds of almond material, during the 1987-1988 crop year. He nevertheless suggests that he satisfied his inedible disposition obligation based on the following testimony by a member of the Almond Board:

Q So, are you saying that O.R.C. did not receive credit towards their 1987-88 inedible disposition through this inedible disposition on or about August 24th, 1988?

A They didn't meet the Marketing Order deadline by disposing of their inedibles by July 31st. Its likely, although I'm not sure, but its likely that we credited it on the books just to keep the books straight, but they didn't dispose of it by the deadline.

Q Were you aware of the fact on August 3, 1988, the Secretary issued the final rule in the Federal Register . . . extending the deadline for disposing of the '87-88 crop year inedible disposition to August 31st?

A I don't recall. I know that I mean, I'm not sure I was aware of it at the time. I don't recall now.

Q If the Secretary had indeed extended the deadline as indicated by the final rule to August 31, 1988, then did O.R.C. properly and within the time frame dispose of its inedibles for the '87-88 crop year?

A Yes.

Balice's reliance on the above testimony is misplaced. When read in context, the statement that Balice "properly and within the time frame disposed of its inedibles" merely indicates that Balice's August 24<sup>th</sup> disposition to Nut Oil, Inc. was timely. It does not indicate that the "weight" of that disposition was sufficient to satisfy Balice's obligation to dispose of 10,291 pounds of inedible kernels. Indeed, the August 24<sup>th</sup> disposition to Nut Oil, Inc. was the only inedible disposition that Balice made during the relevant part of the crop year. That disposition consisted of 9,323 pounds of almond material and had a "kernel weight" of only 7,695

pounds. While “within the time frame” and “proper,” that disposition was insufficient to satisfy Balice’s obligation to dispose of 10,291 pounds of inedible kernels. The JO therefore did not err in concluding that Balice had violated the inedible disposition requirement.

Balice also contends that the JO acted arbitrarily and capriciously by fining him \$1,000 per day for the first 25 days in which he violated the inedible disposition requirement. He suggests that this court should invalidate the penalty, because the inedible disposition requirement is a “joke.” He reasons that the inedible disposition requirement “is in reality volume control and not quality control, because there are no regulations regarding the percentage of inedible almonds that can be shipped to consumers.”

The fact that Balice believes that the inedible disposition requirement is a “joke” is not a proper basis for contesting the JO’s decision to impose a fine pursuant to § 608c(14)(B) of the AMAA. Section 608c(14)(B) authorizes the Secretary to fine an almond handler \$1,000 per day for each day in which the handler is in violation of a marketing order. *See* 7 U.S.C. § 608c(14)(B). As an exception, that section also allows a handler to avoid liability for violating a provision of a market order only if the handler contemporaneously files a written petition with the Secretary that prays for a modification of the order or for an exemption from its requirements.<sup>14</sup>

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<sup>14</sup>Section 608c of the AMAA provides, in pertinent part:

- (14) Violation of order; penalty.
  - (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding \$1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, *except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler’s petition was filed with the Secretary, and the date on which notice of the Secretary’s ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15).* . . .
- (15) Petition by handler for modification of order or exemption; court review of ruling of Secretary.
  - (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying

(continued...)

*Id.*; see also 7 U.S.C. § 608c(15)(B). In this case, Balice did not file a written petition with the Secretary pursuant to § 608c(15) between September 1, 1988 and September 25, 1988 and, as a result, cannot qualify for the exception to liability under § 608c(14)(B). Thus, the JO's decision to assess the statutorily authorized penalty of \$25,000 was allowable.

### III

Finally, Balice contends that the \$225,500 penalty violates the Eighth Amendment to the United States Constitution. That Amendment provides that "Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amdt. 8. The Supreme Court has recognized that a civil penalty satisfies those protections so long as it is not grossly disproportionate to the gravity of the offense for which it is imposed. See *United States v. Bajakajian*, 524 U.S. 321, 334-35, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Whether a penalty is grossly disproportionate calls for the application of a constitutional standard to the facts of a particular case, and in that context, de novo review is appropriate. See *id.* at 337 n.10, 118 S.Ct. 2028.

Neither party disputes that the imposition of the \$225,500 fine implicates the Eighth Amendment. We need only decide whether the penalty is grossly disproportionate. In making that determination, we note that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* at 336, 118 S.Ct. 2028 (citing *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)).

In this case, Congress authorized the JO to assess a penalty against Balice for as much as \$528,000. Balice nevertheless contends that it was constitutionally excessive for the JO to impose a \$225,500 fine against the "least culpable member of the group" for a "first offense" that "occurred over 12 years ago" and that resulted in "no harm to the Government and no harm to the industry." That argument misrepresents the nature of Balice's conduct and the gravity of his offenses.

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<sup>14</sup>(...continued)

for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. §§ 608c(14)(B), (15)(A) (emphasis added).

Balice was not, as he suggests, the “least culpable” member of the group. Indeed, he was in charge of the daily operation of the company and was in control of both the records and the stock of almonds. He willfully failed to maintain records for important transactions and later transferred whatever records that he did maintain to his uncles in Italy, despite the USDA’s open ended request that he submit the records to auditors. That violation largely frustrated the USDA’s attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board’s ability to set its economic policy.

Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only \$0.05 to \$0.08 per pound, when the prevailing market price for the almonds was \$1.40 per pound. That conduct not only resulted in an illegal profit of roughly \$246,677, but it also undermined the Secretary’s efforts to protect the stability of the almond market. The severity of that conduct is highlighted by the Secretary’s reasons for imposing an abnormally high reserve requirement for the 1987-1988 crop year. In prescribing the 18% reserve requirement, the Secretary explained:

While this rule may restrict the amount of almonds which handlers may sell in normal domestic and export markets, the salable and reserve percentages are needed to lessen the impact of the oversupply situation facing the industry and to promote stronger marketing conditions, thus avoiding unreasonable fluctuations in prices and supplies and improving grower returns. Further, this action will provide market stability during the 1988-89 crop year in the event that 1988 production is below market needs. Given the cyclical tendency of almond production, this is a likely possibility.

....

[A]n oversupply of almonds could result in market instability and a downward spiral in prices, whereby buyers would be reluctant to purchase almonds until they were convinced that a bottom price had been reached. This could result in both decreased consumption and sharply lower prices. 52 Fed. Reg. 39,900, 39,901-3 (1987).

Balice’s failure to maintain an adequate reserve of almonds, therefore, was a serious violation of the reserve requirement. The fine of \$224,500, which is less than Balice’s potential profit from unlawfully handling his reserve, is not grossly disproportionate. *See Cole v. U.S. Dep’t of Agric.*, 133 F.3d 803, 808-9 (11<sup>th</sup> Cir.

1998) (holding that a \$400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the oversupply of tobacco in the marketplace).

AFFIRMED.

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**AGRICULTURAL MARKETING AGREEMENT ACT**

**DEPARTMENTAL DECISIONS**

**In re: KREIDER DAIRY FARMS, INC.**

**94 AMA Docket No. M-1-2.**

**Decision and Order filed August 12, 1997.**

**Milk – Milk marketing order – Producer handler exemption.**

Petitioner challenged the decision of the Market Administrator for the New York-New Jersey Marketing Area denying Petitioner producer-handler status and exemption from making payments to the producer-handler settlement fund. Judge Bernstein found that it was feasible for Ahava Dairy Products, Inc., one of Petitioner's customers, to obtain fluid milk products from at least one other handler during Petitioner's periods of short production. Judge Bernstein concluded Petitioner was able to reduce its surplus, was "riding the pool," and was receiving an unearned economic benefit from a producer-handler exemption. Based on this conclusion Judge Bernstein upheld the Market Administrator's decision and dismissed Petitioner's petition.

Sharlene A. Deskins, for Respondent.

Marvin Beshore, Harrisburg, PA, for Petitioner.

Decision issued by Edwin S. Bernstein, Administrative Law Judge.

This is a proceeding under section 15(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c(15)(A), and the Federal New York-New Jersey Milk Marketing Order (Order 2) (7 C.F.R. Part 1002). Petitioner, Kreider Dairy Farms, Inc. (Kreider), is a dairy farm operation which produces and processes kosher fluid milk which it sells in the marketing area covered by Order 2. Kreider filed a Petition on December 23, 1993, challenging the decision of the Order 2 Market Administrator to regulate it as a handler operating a partial pool plant. Kreider maintained that it was a producer-handler under the regulations and was accordingly exempt from paying into the producer settlement fund. The Petition requested a refund, with interest, of amounts paid into the fund.

I presided over the initial hearing on the Petition on December 14, 1994. On March 20, 1995, I issued an Initial Decision and Order upholding the Petition and directing a refund to Kreider of all amounts charged pursuant to the contested imposition of the regulations, without interest. The Market Administrator appealed to the Judicial Officer, and Kreider filed a cross-appeal seeking a refund of interest. The Judicial Officer reversed the Initial Decision and Order and dismissed the Petition. Petitioner appealed to the United States District Court for the Eastern District of Pennsylvania. On cross-motions for summary judgment, the Court ruled that neither the plain language of Order 2 nor its promulgation history support a

finding that Kreider should be denied producer-handler status. Nor did it find that Departmental precedent supported such a finding. It was, however, unable to determine from the record whether Kreider would receive an unearned economic benefit from producer-handler status. The action was, therefore, remanded for further fact finding. Specifically, the court stated:

[T]his action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is "riding the pool." To this end, the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.

*Kreider Dairy Farms, Inc. v. Glickman*, 1996 WL 472414, \*9 (E.D. Pa. 1996).

A hearing was held in Washington, D.C. on April 23, 1997, to receive evidence on the remanded issue. Petitioner was represented by Marvin Beshore of Harrisburg, Pennsylvania. Respondent was represented by Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, D.C.

The parties filed Proposed Findings of Fact, Proposed Conclusions of Law, and Briefs on June 12, 1997, and Reply Briefs on June 23 and 24, 1997. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

In this opinion, "Tr. 1997" refers to the transcript of the April 23, 1997, hearing; "Tr. 1994" refers to the transcript of the 1994 hearing; "RX 1997" refers to the numbered exhibits that Respondent introduced at the 1997 hearing; "RX 1994" refers to the numbered exhibits that Respondent introduced at the 1994 hearing; and "PX" refers to the exhibits that Petitioner introduced at the 1994 hearing.

#### **Findings of Fact**

1. Petitioner, Kreider Dairy Farms, Inc., is a Pennsylvania Corporation with its principal place of business at 1461 Lancaster Road, Manheim, Lancaster County, Pennsylvania 17545 (PX 2; Tr. 1994 at 21-22).

2. Petitioner's facilities are physically located within the marketing area of Federal Milk Marketing Order Number 4 (7 C.F.R. Part 1004), which regulates the marketing of milk in the Middle Atlantic marketing area (Tr. 1994 at 21-25). Petitioner has since its inception been a producer-handler under Order 4--that is, a dairy farm enterprise involved in the production, processing, and sales of fluid milk products. As a producer-handler under Order 4, Petitioner is exempt from

accounting to the market order pool for the minimum class value of its utilization of milk and at the same time is not entitled to participate in the pool as a producer with respect to the minimum producer blend price (Tr. 1994 at 21-26, 51-52).

3. In November 1990, Petitioner began direct sales and distribution of kosher milk products including whole milk, flavored milk, low fat milk, and skim milk to Ahava Dairy Products (Ahava), in Brooklyn, New York. Ahava is located in the New York-New Jersey marketing area which is covered by Milk Marketing Order Number 2 (PX 1, 3 & 5; Tr. 1994 at 26-28, 140-41).

4. Ahava is a distributor of kosher food products to wholesale and retail customers in and around New York City (Tr. 1994 at 54, 71-72).

5. Ahava sells milk under two labels, "Ahava" and "New Square." The "New Square" label has a higher level of kosher certification than the "Ahava" label, and has stricter processing requirements.

6. Kreider is an all kosher plant which produces milk suitable for certification by the bais din of New Square (Tr. 1994 at 58-59).

7. Under the supervision of rabbis, Kreider processes and packages the milk into containers at its facilities in Lancaster County and delivers the products in its trucks to Ahava's warehouse in Brooklyn (Tr. 1994 at 56-59, 73-74, 80-86). The milk is packaged by Petitioner in accordance with Ahava's instructions under the "New Square" label or the "Ahava" label (PX 14; Tr. 1994 at 57, 76). Ahava either sells the milk retail at its place of business or delivers the milk to between 800 and 1100 customers, which consist of retail stores, restaurants, and schools (Tr. 1994 at 72, 76-77).

8. At various times between 1991 and 1996, Ahava also received milk from Farmland Dairies, Mason-Dixon Farms, Degraff Dairies, and Lewis County Dairy. At all times Ahava was supplied by at least one producer other than Kreider (RX 1997: 1).

9. At the time of the 1997 hearing, Kreider had ceased doing business with Ahava because Ahava owed Kreider \$300,000, and Ahava was planning to file for bankruptcy (Tr. 1997 at 101).

10. In December 1990, the Market Administrator for Order 2 notified Petitioner that, as a result of its sales to Ahava, it had a potential obligation to the producer settlement fund (PX 1).

11. In August 1992, the Market Administrator for Order 2 notified Petitioner that its sales of fluid milk products to other handlers for sale or distribution in Order 2 caused it to be regulated as a handler operating a partial pool plant pursuant to 7 C.F.R. § 1002.29(b) (PX 7; Tr. 1994 at 135-36). On that basis, Petitioner was billed beginning with November 1991 deliveries for all volumes of its fluid milk products distributed in the Order 2 market area at the rate established under Order 2

(Tr. 1994 at 138-41).

12. In order to be designated a producer-handler by the Market Administrator under the Order 2 regulations, a handler must have under its complete and exclusive control the production, processing, and distribution of milk, and operate that business as a self-contained, integrated operation (Tr. 1997 at 17).

13. It is the policy of the Order 2 regulations to exempt producer-handlers from pooling and milk pricing provisions of the Order 2 regulations because: (a) they have a minimal effect on the marketplace; (b) they sell only their own production of milk; and (c) they do not rely upon the market to carry their surplus milk supplies (Tr. 1997 at 18).

14. The Order 2 regulations do not define “surplus” or establish any criteria for a minimum or maximum surplus required of producer-handlers (Tr. 1997 at 78).

15. Respondent defines “surplus” as any milk in excess of Class I milk utilizations, as measured by bulk sales (Tr. 1997 at 19).

16. Class I milk products consist of whole milk, low fat milk, skim milk, and other types of fluid milk products (Tr. 1997 at 41).

17. Class III milk is used in products such as butter, cheese, and evaporated milk (Tr. 1997 at 42).

18. Surpluses exist due to seasonal changes in milk production. Dairy cows produce the most milk in the spring and the least amount in the fall. In order to produce enough milk during periods of lower production, producers must operate at a capacity which causes a surplus during periods of higher production (Tr. 1997 at 44-46).

19. Between August 1994 and October 1996, Kreider had an average monthly surplus which was lower than the average monthly surplus of producer-handlers in Order 2 (RX 1997: 8, 11, 13).

### **Discussion and Conclusion**

The remand ordered by the District Court for the Eastern District of Pennsylvania was prompted by language in the Judicial Officer’s Decision and Order which stated that Kreider would receive an unearned economic benefit from a producer-handler exemption. The District Court found that the presence of an economic benefit, as explained by the Judicial Officer, was not supported by the record. It explained the insufficiency as follows:

This court finds that this purported economic benefit is not supported by the record before it. In its Amicus brief, Ahava states that in order for Kreider’s milk to receive Ahava’s certification that the milk is kosher, there

must be “direct daily supervision and control over the production and processing facilities by appropriate rabbinical authorities” and that such supervision is “extensive.” (Amicus Ahava’s Mem. Supp. Pl. Mot. Summ. J. at 3 & 3 n. 2.) Because of Ahava’s special requirements, it is not apparent from the record that Kreider can depend on other handlers from the pool to supply Ahava’s needs in the period of short production. [FN 4]

FN 4. For example, Ahava has determined that “Farmland Dairies, a major fluid milk processor in the Northern New Jersey-New York area, although entirely owned by a family of the Jewish faith . . . was unacceptable as a source of kosher milk” to New York’s ultra-orthodox Jewish community, which makes up Ahava’s customer base. (Amicus Ahava’s Mem. Supp. Pl. Mot. Summ. J. at 5)

If the record cannot support the economic justification behind the Defendant’s action, then it appears arbitrary, especially since, as noted previously, the language of Order 2 is ambiguous and the MA’s action is not clearly supported by the promulgation history of Order 2 or departmental interpretation. . . . Therefore, this action is remanded to the Secretary to hold such further proceedings necessary to determine whether in fact Kreider is “riding the pool.” To this end, *the Secretary must determine whether it is in fact feasible for Ahava to turn to other handlers in a period of short production.*

*Kreider Dairy Farms, Inc. v. Glickman*, 1996 WL 47214, \*9 (emphasis added).

Upon consideration of the evidence submitted during the initial hearing and during the hearing following remand, I find that it is feasible for Ahava to turn to other handlers in periods of Kreider’s short production.

Petitioner makes a number of arguments relating to the validity of Respondent’s economic benefit argument. For example, it argues that the constraints being imposed should be established through rulemaking. In addition, Petitioner places a great deal of emphasis on the fact that it has no control over Ahava’s other sources of supply and should, therefore, not be penalized on that basis. The issue presented here, however, is a very narrow one. The Court remanded solely to make a factual determination as to whether Petitioner is “riding the pool.” To the extent Petitioner’s legal arguments fall beyond the scope of this narrow factual issue, they have not been considered.

Although the regulations do not define “riding the pool,” the Judicial Officer explained the benefit as follows:

Petitioner avoids producing a great deal of surplus milk. That is, Petitioner does not have to produce enough milk to satisfy its customers’ needs in the period of short production, because, during the period of short production, Petitioner can count on Ahava’s other suppliers to supply pool milk to meet the needs of the firms ultimately buying Petitioner’s milk. If a producer-handler could turn over its distribution function to a subdealer, it could achieve the same result as if it were permitted to receive milk from other sources. That is, during the period of short production, it could meet the needs of its (ultimate) customers by means of the subdealer getting pool milk from other handlers during the period of short production.

*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. at 847-48.

The record is clear that Ahava received milk from sources other than Kreider. What is less clear is whether all of the milk received from the other producers was kosher certified, and therefore, directly substitutable for Kreider’s milk. The District Court pointed out that Ahava had special requirements which other producers may not have been able to meet. Although there was conflicting evidence regarding the kosher status of at least one of Ahava’s other suppliers, the greater weight of the evidence suggests that Ahava only sold kosher milk, and accordingly Ahava only received kosher milk.

Ahava’s owner, Moise Banayan, testified during the 1994 hearing that Ahava received milk products from Farmland (Tr. 1994 at 62, 65), and Kreider’s records show purchases from Farmland between January 1991 and September 1995 (RX 1997: 1). Mr. Banayan also testified, however, that milk produced at Farmland’s plant in Wallington, New Jersey was not all kosher, and, therefore, could not be marketed under the New Square label (Tr. 1994 at 60). In addition, the District Court noted that Farmland’s milk was unacceptable to the ultra-orthodox Jewish community, which makes up Ahava’s customer base. *Kreider, supra at \*9*. There is no indication, however, that Ahava distributed anything other than kosher products. When Mr. Banayan was asked what business he was in, he stated that he owned “a distribution company of kosher food products” (Tr. 1994 at 54). No reference was ever made to any non-kosher products being distributed by Ahava.

Kreider’s general manager, Richard Shellenberger, testified that Ahava imposed requirements for the New Square label that were stricter than those imposed by Kreider’s previous kosher customer (Tr. 1994 at 84-86). This leads to the

conclusion that there are varying levels of kosher certification. Ahava distributed under two different labels--"Ahava" and "New Square." The implication is that the "Ahava" label had lower requirements for kosher certification, which Farmland was able to meet.

Kreider primarily sold milk to Ahava under the "New Square" label, but also supplied some milk for the "Ahava" label. Although Kreider would not be able to rely on Farmland to meet its needs in supplying milk for the "New Square" label, it could rely on this milk to lessen its burden of supplying the "Ahava" label. There was no evidence presented with respect to the level of certification of milk supplied by other producers. Since Ahava only distributed kosher milk, the other producers, like Farmland, would have at least been able to supply the Ahava label. It was, therefore, feasible for Ahava to turn to Farmland, as well as other producers during periods of short production.

Petitioner argues that the data presented by Respondent fails to show a "consistent, direct relationship between Kreider's sales to Ahava, Kreider's surplus milk sales, and Ahava's purchases from other sources" (Petitioner's Brief at 13). The question presented by the District Court, however, was whether it was *feasible* for Ahava to turn to other producers. Accordingly, it is not necessary that any sort of causal nexus actually be shown. It is enough that Ahava could obtain milk from such other sources if Kreider could not meet Ahava's needs.

Furthermore, during the relevant time period, Kreider did maintain an annual surplus that was lower than the average of producer-handlers in Order 2. Between August 1994 and October 1996, the five largest producer-handlers in Order 2 had an average monthly surplus that was 30.78% of total farm production (RX 11); and the three smallest producer-handlers in Order 2 had an average monthly surplus of 25.07% (RX 13). For the same twenty-seven month period, Kreider had an average monthly surplus of 13.85% (RX 8).

Although there are no requirements as to the amount of surplus a producer-handler must have, an inference can be made that Kreider was able to reduce its surplus because of its ability to rely on other producers to meet Ahava's needs. As such, Kreider was "riding the pool," and receiving an unearned economic benefit. Accordingly, the decision of the Market Administrator to deny Kreider producer-handler status must be upheld and the petition must be denied.

### **Order**

The petition is dismissed.

Pursuant to the Rules of Practice, this Decision and Order shall become final and effective without further procedure thirty-five (35) days after service upon the

parties unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service, as provided in section 900.65 of the Rules of Practice (7 C.F.R. § 900.65).

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**In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED ASSOCIATION; AND ROBERT J. SAULSBURY, AN INDIVIDUAL.**

**AMAA Docket No. 94-0002.**

**Decision and Order on Remand filed February 14, 2000.**

**Raisins – Civil penalties – Eighth Amendment – Excessive fines clause.**

The Judicial Officer concluded that a \$205,000 civil penalty assessed against Respondents was not excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The Judicial Officer had assessed a \$219,000 civil penalty against Respondents in *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), *aff'd in part, denied in part & remanded*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999). Respondents filed a Complaint for Review of the Decision and Order in the United States District Court for the Eastern District of California, which affirmed the Decision and Order, with the exception of \$14,000 of the civil penalty. However, the Court concluded that the civil penalty provision in section 8c(14)(B) of the Agricultural Marketing Agreement Act (7 U.S.C. § 608c(14)(B)) was subject to the Excessive Fines Clause and remanded the proceeding to the Judicial Officer for further findings concerning whether the civil penalty assessed in the Decision and Order, as modified by the Court, was excessive within the meaning of the Excessive Fines Clause. The Judicial Officer found: (1) Respondents' 205 violations of the Raisin Order over almost a 5-year period were grave violations of the Raisin Order; (2) Respondents were highly culpable for the violations; (3) Respondents' violations harmed the Raisin Administrative Committee, handlers subject to the Raisin Order, the United States government, consumers of raisins produced from grapes grown in California, the Secretary of Agriculture's implementation of the policies expressly stated in the AMAA, and the integrity of the Raisin Order; (4) the civil penalty assessed against Respondents was authorized by the AMAA and was approximately 10 per centum of the maximum civil penalty that could have been assessed against Respondents; (5) the civil penalty assessed against Respondents was consistent with civil penalties assessed in similar cases; (6) Respondents had the ability to pay the assessed civil penalty; and (7) Respondents' financial condition may be significantly damaged by the payment of the civil penalty, but the civil penalty was not so disproportionate to Respondents' circumstances that there was no realistic expectation that Respondents would be able to pay the civil penalty.

Colleen A. Carroll, for Complainant.

Brian C. Leighton, Fresno, California, for Respondents.

Initial decision issued by James W. Hunt, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the

AMAA]; the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California [hereinafter the Raisin Order] (7 C.F.R. pt. 989); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) by filing a Complaint on May 23, 1994.

The Complaint alleges that Saulsbury Enterprises and Robert J. Saulsbury [hereinafter Respondents] violated sections 989.58, 989.59, 989.66, 989.73, 989.80, 989.241, 989.242, and 989.243 of the Raisin Order (7 C.F.R. §§ 989.58, .59, .66, .73, .80, .241-.243). On June 13, 1994, Respondents filed an Answer denying the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] conducted a 2-day hearing. Colleen A. Carroll represented Complainant and Brian C. Leighton represented Respondents. The parties submitted post-hearing briefs, and on June 27, 1995, the ALJ issued an initial decision in which the ALJ found Respondents shipped approximately 2,247,879 pounds of raisins to Canada without having the raisins inspected and failed to file 20 forms<sup>1</sup> with the Raisin Administrative Committee. The ALJ concluded that Respondents violated section 989.59 of the Raisin Order (7 C.F.R. § 989.59) by shipping off-grade or failing raisins during the 1988-1989, 1989-1990, and 1990-1991 crop years and assessed Respondents, jointly and severally, a \$3,000 civil penalty.

On August 29, 1995, Complainant appealed to the Judicial Officer; on September 26, 1995, Respondents filed a response to Complainant's appeal petition; and on October 2, 1995, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On May 7, 1996, I issued a Decision and Order concluding that: (1) during crop years 1988-1989, 1989-1990, and 1990-1991, Respondents violated section 989.58 of the Raisin Order (7 C.F.R. § 989.58) on 60 occasions by receiving natural condition raisins without having them inspected; (2) during crop years 1988-1989, 1989-1990, and 1990-1991, Respondents violated section 989.59 of the Raisin Order (7 C.F.R. § 989.59) on 60 occasions by shipping natural condition raisins without having them inspected; (3) from October 26, 1988, to April 26, 1990, Respondents violated sections 989.66 and 989.241 of the Raisin Order (7 C.F.R. §§ 989.66, .241) by failing to hold raisins in reserve for the 1988-1989 crop year; (4) from October 25, 1989, to July 12, 1991, Respondents violated 989.66 and 989.242

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<sup>1</sup>Specifically, the ALJ found that during the 1988-1989, 1989-1990, and 1990-1991 crop years, Respondents failed to file with the Raisin Administrative Committee: (1) three RAC-5 Forms, giving notice of the intention to handle raisins and making application for inspection; (2) eight RAC-30 Forms, reporting off-grade raisins; (3) three RAC-32 Forms, reporting disposition of off-grade or failing raisins or residual material; (4) three RAC-35 Forms, applying to sell, ship, or dispose of raisins or raisin residual materials; and (5) three RAC-51 Forms, reporting inventory of off-grade raisins by variety.

of the Raisin Order (7 C.F.R. §§ 989.66, .242) by failing to hold raisins in reserve for the 1989-1990 crop year; (5) from October 31, 1990, to June 15, 1992, Respondents violated sections 989.66 and 989.243 of the Raisin Order (7 C.F.R. §§ 989.66, .243) by failing to hold raisins in reserve for the 1990-1991 crop year; (6) beginning in 1988, Respondents violated 989.73 of the Raisin Order (7 C.F.R. § 989.73) by failing to submit 40 reports to the Raisin Administrative Committee for crop years 1988-1989, 1989-1990, and 1990-1991; and (7) Respondents violated 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay \$557.33 in assessments for raisins handled in the 1988-1989 crop year, \$594.68 in assessments for raisins handled in the 1989-1990 crop year, and \$512.29 in assessments for raisins handled in the 1990-1991 crop year. Based on these violations, I assessed Respondents, jointly and severally, a civil penalty of \$219,000 and ordered Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments for the 1988-1989, 1989-1990, and 1990-1991 crop years. *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), *aff'd in part, denied in part & remanded*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999).

Respondents filed a petition for reconsideration of the May 7, 1996, Decision and Order, which petition I denied. *In re Saulsbury Enterprises*, 56 Agric. Dec. 82 (1997) (Order Denying Pet. for Recons.).

Respondents filed a Complaint for Review of the May 7, 1996, Decision and Order in the United States District Court for the Eastern District of California. Thereafter, the parties filed cross-motions for summary judgment, which the Court granted in part and denied in part. *Saulsbury Enterprises v. United States Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999) (Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment and Remanding Matter to USDA).

The Court affirmed the Judicial Officer's May 7, 1996, Decision and Order, with the exception of \$14,000 of the civil penalty.<sup>2</sup> However, the Court concluded that the civil penalty provision in section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) is subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and remanded the proceeding to the United States Department of Agriculture [hereinafter USDA] for findings concerning whether the civil penalty assessed in the May 7, 1996, Decision and Order, as modified by the

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<sup>2</sup>In *In re Saulsbury Enterprises*, *supra*, I found that Respondents failed to submit 40 reports to the Raisin Administrative Committee. Fourteen of these reports concern off-grade raisins. The Court concluded that I could not assess a civil penalty against Respondents for failing to submit reports concerning off-grade raisins, given my conclusion that Respondents' raisins were standard raisins. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 48.

Court, is excessive within the meaning of the Excessive Fines Clause. The Court states that it retains jurisdiction of the action pending USDA findings and instructs that the parties renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause, once the findings are final. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 1-2, 33-41, 52.

In a telephone conference with Respondents' counsel and Complainant's counsel, which I conducted on August 25, 1999, each expressed an interest in the opportunity to file a brief with supporting affidavits and attachments and a reply brief concerning the issue on remand. On August 26, 1999, I issued an Informal Order for Briefs Regarding Remand setting forth a schedule for briefs and supporting affidavits and attachments limited to the issue of whether the \$205,000 civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment. On November 5, 1999, Respondents filed Respondents' Brief Re Excessive Fines Clause of the Eighth Amendment to the United [States] Constitution [hereinafter Respondents' Remand Brief]; on November 8, 1999, Complainant filed Complainant's Brief Regarding Remand; Declaration of Terry W. Kaiser; and Declaration of Terry Wayne Stark [hereinafter Complainant's Remand Brief]; on December 1, 1999, Respondents filed Respondents' Reply to Complainant's Brief Re Remand; Objections to Declarations of Terry Kaiser and Terry Stark [hereinafter Respondents' Remand Reply Brief]; on December 6, 1999, Complainant filed Complainant's Reply to Respondents' Brief Re Excessive Fines Clause of the Eighth Amendment to the United [Sic] Constitution [hereinafter Complainant's Remand Reply Brief]; and on December 7, 1999, the Hearing Clerk transmitted the record of the proceeding to me for a decision on remand.<sup>3</sup>

#### **PERTINENT CONSTITUTIONAL PROVISION**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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<sup>3</sup>On January 5, 2000, Respondents filed Declaration of Brian C. Leighton, Attorney for Respondents, Re Death of The Respondent [hereinafter Motion to Dismiss], stating that Respondent Robert J. Saulsbury died on January 3, 2000, and requesting that the proceeding be dismissed. On February 9, 2000, Complainant filed Complainant's Response to Respondents' Motion to Dismiss opposing Respondents' Motion to Dismiss. On February 14, 2000, I denied Respondents' Motion to Dismiss stating that I have no jurisdiction to dismiss the proceeding (Ruling Denying Respondents' Motion to Dismiss).

U.S. Const. amend. VIII.

The only issue addressed in this Decision and Order on Remand is whether the civil penalty, which I assessed in the May 7, 1996, Decision and Order, as modified by the United States District Court for the Eastern District of California, is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.<sup>4</sup>

Citing *United States v. Bajakajian*, 524 U.S. 321 (1998), and *United States v. \$273,969.04 U.S. Currency*, 164 F.3d 462 (9<sup>th</sup> Cir. 1999), the United States District Court for the Eastern District of California instructs that a civil penalty is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment if the civil penalty is grossly disproportional to the gravity of a respondent's violation. The Court points out that I "made no findings specifically addressed to the contention that civil penalties sought and obtained by [Complainant] were or were not excessive as that term has been defined by the Supreme Court." *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 41.

Complainant contends that, in order to determine whether a civil penalty is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment, the factors that should be examined are: (1) the gravity of the offense and whether the civil penalty is proportionate to the offense; (2) penalties imposed for like offenses in the same and other jurisdictions; (3) the intent of the legislation authorizing the assessment of the civil penalty; (4) the respondent's ability to pay the civil penalty; and (5) the intent of the violator (Complainant's Remand Brief at 2). Complainant contends that the civil penalty assessed against Respondents is not excessive within the meaning of the Excessive Fines Clause and requests that I issue an order on remand assessing Respondents a \$205,000 civil penalty and ordering Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments for crop years 1988-1989, 1989-1990, and 1990-1991 (Complainant's Remand Brief at 2, 7-8).

Respondents contend that, in order to determine whether a civil penalty is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment, the factors that should be examined are: (1) the harm the respondent's violations caused the industry, competitors, the government, and others; (2) the respondent's ability to pay the civil penalty; (3) the burden the civil penalty would impose on the respondent and the respondent's dependents; (4) the culpability of

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<sup>4</sup>Respondents request a hearing "to develop the evidence" that the product that they shipped to Canada "was never sold as raisins" (Respondents' Remand Reply Brief at 4). I find that the identity of the product is not an issue in this Decision and Order on Remand. Therefore, Respondents' request, in Respondents' Remand Reply Brief, at 4, to reopen the hearing, is denied.

the respondent, rather than the gravity of the offense in the abstract; (5) the respondent's health; and (6) the respondent's financial problems (Respondents' Remand Brief at 1-6). Respondents contend that the civil penalty assessed against Respondents is excessive within the meaning of the Excessive Fines Clause and request that I issue an order on remand assessing Respondents a civil penalty and ordering Respondents to pay the Raisin Administrative Committee assessments, both totaling no more than \$20,000<sup>5</sup> (Respondents' Remand Reply Brief at 7).<sup>6</sup>

### **Respondents Violations of the Raisin Order**

Respondents committed the following violations of the Raisin Order: (1) Respondents violated section 989.58 of the Raisin Order on 19 occasions during the 1988-1989 crop year by receiving natural condition raisins without having them inspected; (2) Respondents violated section 989.58 of the Raisin Order on 24 occasions during the 1989-1990 crop year by receiving natural condition raisins without having them inspected; (3) Respondents violated section 989.58 of the Raisin Order on 17 occasions during the 1990-1991 crop year by receiving natural condition raisins without having them inspected; (4) Respondents violated section 989.59 of the Raisin Order on 19 occasions during the 1988-1989 crop year by shipping natural condition raisins without having them inspected; (5) Respondents violated section 989.59 of the Raisin Order on 24 occasions during the 1989-1990 crop year by shipping natural condition raisins without having them inspected; (6) Respondents violated section 989.59 of the Raisin Order on 17 occasions during the 1990-1991 crop year by shipping natural condition raisins without having them inspected; (7) from October 26, 1988, to April 26, 1990, Respondents failed to hold raisins in reserve for the 1988-1989 crop year, in violation of sections 989.66 and 989.241 of the Raisin Order; (8) from October 25, 1989, to July 12, 1991,

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<sup>5</sup>In Respondents' Remand Brief, at 6-7, Respondents request that I issue an order on remand assessing Respondents a civil penalty of less than \$15,000. I infer that Respondents abandoned the request in Respondents' Remand Brief and now request the order on remand set forth in Respondents' Remand Reply Brief, at 7.

<sup>6</sup>Respondents request that, if the civil penalty and assessments which they are ordered to pay in this Decision and Order on Remand is not \$20,000 or less, a hearing be conducted regarding: "(1) Saulsbury's ability to pay; (2) the harm, if any, to the marketing order and/or Saulsbury's competitors; (3) . . . whether or not the product shipped to Canada [was] ever sold as raisins as opposed to distillery; [and] (4) the advantage, if any, . . . Saulsbury received from the alleged violations of the marketing order" (Respondents' Remand Reply Brief at 7). The parties have thoroughly briefed the issue in this proceeding, and I find no basis for reopening the hearing. Therefore, Respondents' request, in Respondents' Remand Reply Brief, at 7, to reopen the hearing, is denied.

Respondents failed to hold raisins in reserve for the 1989-1990 crop year, in violation of sections 989.66 and 989.242 of the Raisin Order; (9) from October 31, 1990, to June 15, 1992, Respondents failed to hold raisins in reserve for the 1990-1991 crop year, in violation of sections 989.66 and 989.243 of the Raisin Order; (10) beginning in 1988, Respondents violated section 989.73 of the Raisin Order by failing to submit 26 reports to the RAC for crop years 1988-1989, 1989-1990, and 1990-1991; and (11) Respondents violated section 989.80 of the Raisin Order by failing to pay \$557.33 in assessments for raisins handled in the 1988-1989 crop year, \$594.68 in assessments for raisins handled in the 1989-1990 crop year, and \$521.29 in assessments for raisins handled in the 1990-1991 crop year.

### **Respondents' Culpability**

The culpability of the offender must be examined to determine whether a civil penalty violates the excessive fines clause. *United States v. 3814 NW Thurman Street*, 164 F.3d 1191, 1197 (9<sup>th</sup> Cir. 1999). Respondents characterize their culpability as "benign" (Respondents' Remand Brief at 6). Complainant describes Respondents' violations as intentional, deliberate, and motivated by greed, and state that Respondents committed the violations to benefit Respondents at the expense of fellow handlers (Complainant's Remand Brief at 4-5; Complainant's Remand Reply Brief at 5-6).

Respondents' culpability was not benign, as Respondents contend. Instead, Respondents knew of the Raisin Order requirements, Respondents knew that they were not complying with the Raisin Order, and Respondents engaged in a purposeful scheme to evade the requirements of the Raisin Order. Respondents' violations of the Raisin Order were motivated by profit; it was much more lucrative for Respondents to sell all of their raisins immediately, rather than to withhold a portion of their crop for 2 years in compliance with the Raisin Order. *In re Saulsbury Enterprises, supra*, 55 Agric. Dec. at 49, 52-54.

### **Gravity of Respondents' Violations**

In *United States v. Bajakajian, supra*, Bajakajian attempted to leave the United States without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than \$10,000. In connection with the Supreme Court's examination of the gravity of Bajakajian's violation, the Court stated that the statute requiring persons to report the removal of currency from the United States was principally designed to prevent money laundering, drug trafficking, and tax evasion, but that Bajakajian's violation was solely a failure to report currency and unrelated

to any other illegal activities. Hence the gravity of Bajakajian's offense was not great and the forfeiture of all of the currency, which he attempted to remove from the United States, as directed by 18 U.S.C. § 982(a)(1), violates the Excessive Fines Clause. *Bajakajian, supra*, 524 U.S. at 337.

Unlike the situation in *Bajakajian*, the Raisin Order was principally designed to prevent the very activities in which Respondents engaged, Respondents committed 205 violations of the Raisin Order over a period of almost 5 years, Respondents' violations thwart the purposes of the Raisin Order, and Respondents fit into the class of persons for whom the Raisin Order was designed. Respondents' violations are intentional and serious. *See generally In re Saulsbury Enterprises, Inc., supra*, 55 Agric. Dec. at 41-46, 50-58.

#### **Harm Caused by Respondents' Violations**

Respondents contend that their violations of the Raisin Order did not harm anyone in the industry and that the only harm to the government was Respondents' failure to pay \$1,673.30 in assessments during the 1988-1989, 1989-1990, and 1990-1991 crop years (Respondents' Remand Brief at 4, 6). Complainant contends that the government has an interest in the integrity of the Raisin Order and Respondents' violations threaten the integrity of the Raisin Order, and, by extension, harm other handlers who comply with the Raisin Order (Complainant's Remand Brief at 4-5; Complainant's Remand Reply Brief at 4-5). Further, Complainant contends that Respondents harmed the government by causing the government to expend funds to investigate and prosecute Respondents for their violations (Complainant's Remand Reply Brief at 4). Complainant states that USDA's investigative cost alone was \$76,193.08 (Complainant's Remand Brief, Affidavit of Terry W. Kaiser ¶ 5). Respondents state that the investigative costs cited by Complainant are salaries and benefits paid to the individuals who investigated Respondents and that these individuals would have been paid whether they were investigating respondents "or twiddling their thumbs in their office" (Respondents' Remand Reply Brief at 5).

I agree with Respondents that they have harmed the Raisin Administrative Committee by not paying \$1,673.30 in assessments during the 1988-1989, 1989-1990, and 1990-1991 crop years. However, I also find Respondents' violations harmed the government by requiring the government to expend funds to investigate Respondents' violations and prosecute Respondents. I agree with Respondents that, as a practical matter, salaries and benefits paid to those government employees who investigated and prosecuted Respondents would be paid even if Respondents had not violated the Raisin Order. However, if Respondents and other similarly situated

persons did not violate marketing orders, the number of government employees necessary to obtain compliance with marketing orders could be reduced. Further, there are expenses, such as travel expenses, that are incurred as a result of an investigation and subsequent prosecution that would not be incurred if those government employees were not required to conduct the investigation and subsequent prosecution.

Moreover, Respondents' violations harm other handlers subject to the Raisin Order and consumers of raisins produced from grapes grown in California and thwart the Secretary of Agriculture's implementation of Congressional policy expressly stated in section 2(3) and 2(4) of the AMAA, as follows:

**§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation**

It is declared to be the policy of Congress—

. . . .

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. § 602(3)-(4) (footnote omitted).

Finally, the most serious harm caused by Respondents' violations is the negative effect of the violations on the integrity of the Raisin Order. The legislative history

applicable to the AMAA indicates that the harm which the civil penalty provision in the AMAA is designed to deter is harm to the integrity of the marketing order program,<sup>7</sup> as follows:

*Marketing order penalties*

Under current law, any handler who violates a marketing order regulation is subject to a criminal fine of not less than \$50 or more than \$5,000 for each violation and each day during which the violation occurs. Such violations are referred by the Department of Agriculture to the U.S. Attorneys Office of the Department of Justice for prosecution. Only the U.S. Attorneys Office may enforce this section and take action against violators of marketing orders.

This criminal prosecution procedure, however, is both time-consuming and cumbersome. In addition, the U.S. Attorneys offices handle an enormous number and variety of cases on behalf of all Federal Government agencies. Because the Offices cannot effectively handle the volume of cases that they now receive, many regulatory violations are often not pursued.

In many cases, the U.S. Attorneys Offices have not taken any action against reported marketing order violations. In 1986, for example, out of 52 investigations of alleged violations of fruit, vegetable, and specialty crop marketing orders, only 11 were resolved by the U.S. Attorneys Offices.

To maintain the integrity of the marketing order program, it is necessary that civil penalties (imposed through administrative procedures) be used as an enforcement tool to respond to regulatory violations in addition to the criminal enforcement procedures currently provided. Furthermore, administrative civil penalties will ensure that regulatory violations of marketing orders will be dealt with in a timely, efficient, and effective manner.

Thus, section 1051 contains a provision that gives the Department of Agriculture the authority to initiate an administrative action to assess a civil

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<sup>7</sup>See also *Balice v. United States Dep't of Agric.*, No. 98-16766 (9<sup>th</sup> Cir. Feb. 8, 2000) (stating that in 1987, Congress amended 7 U.S.C. § 608c(14)(B) out of concern for the integrity of the market order program).

penalty of not more than \$1000 for each violation against any handler who violates a marketing order. Each day during which a violation continues would be considered a separate violation.

The Secretary would be required to give notice and an opportunity for an agency hearing before assessing a civil penalty. A penalty order would be reviewable in the U.S. district court in any district in which the handler subject to the order is an inhabitant, or has his principal place of business. The bill does not eliminate the authority to seek a criminal fine for a marketing order violation, where appropriate. It simply will authorize the Secretary of Agriculture to seek an administrative civil penalty when circumstances indicate that it would be an effective regulatory enforcement tool.

H. REP. NO. 391(I), 100th Cong., 1st. Sess. 29-30, *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-29-30.

The importance of compliance by all handlers with marketing order programs was explained by the Supreme Court in connection with a milk marketing order, as follows:

The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration. Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a "producers" fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.

*United States v. Ruzicka*, 329 U.S. 287, 293 (1946).

Although *Ruzicka* concerns a milk marketing order, the same reasoning is applicable to the Raisin Order. Respondents' 205 willful violations of the Raisin Order over almost a 5-year period are serious and threaten the integrity of the Raisin Order.

**Legislatively Authorized Penalties**

Respondents contend that the \$205,000 civil penalty assessed against them is the maximum civil penalty allowed under section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) (Respondents' Remand Brief at 4). Complainant contends that Respondents could have been assessed a civil penalty of more than \$1,914,000 (Complainant's Remand Brief at 3; Complainant's Remand Reply Brief at 2).

Section 8c(14)(B) of the AMAA provides that the Secretary of Agriculture may assess a civil penalty for violations of an order issued under the AMAA, as follows:

**§ 608c. Orders regulating handling of commodity**

....

**(14) Violation of order; penalty**

....

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding \$1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handlers' petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B).

Respondents committed 205 violations of the Raisin Order. Respondents'

violations of the reserve requirements in the Raisin Order continued for 1,768 days, and Respondents' violations of the requirement to pay assessments to the Raisin Administrative Committee continued from the date the assessments were due to at least the date the Complaint was filed. Therefore, under 7 U.S.C. § 608c(14)(B), Respondents could have been assessed a civil penalty of at least \$2,000,000. The Supreme Court of the United States and the United States Court of Appeals for the Ninth Circuit have noted that judgments about the appropriate punishment for an offense belong, in the first instance, to the legislature in determining whether a penalty is grossly disproportionate to the gravity of the offense for which it is imposed.<sup>8</sup>

Respondents, citing *Bajakajian*, also contend that I must examine the "maximum prison time that could be imposed in determining whether or . . . not the fine is disproportionate to the offense[.]" and Respondents correctly point out that the criminal penalty provision in the AMAA does not provide for imprisonment for violations of marketing orders issued under the AMAA (Respondents' Remand Brief at 3, 6). However, nothing in *Bajakajian* suggests that the \$205,000 civil penalty assessed against Respondents is disproportionate to Respondents' violations merely because the criminal penalty provision in the AMAA does not provide for imprisonment. Instead, the Supreme Court states that "[i]n considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence." *United States v. Bajakajian*, *supra*, 524 U.S. at 339 n.14.

Section 8c(14)(A) of the AMAA provides for a fine after criminal conviction, as follows:

**§ 608c. Orders regulating handling of commodity**

. . . .

**(14) Violation of order; penalty**

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than \$50 or more than \$5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and

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<sup>8</sup>*United States v. Bajakajian*, 524 U.S. 321, 336 (1998); *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Balice v. United States Dep't of Agric.*, No. 98-16766 (9<sup>th</sup> Cir. Feb. 8, 2000).

prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

7 U.S.C. § 608c(14)(A).

Thus, Congress provides for a maximum fine after criminal conviction for a violation of a marketing order issued under the AMAA that is five times greater than the maximum civil penalty that could be imposed under the AMAA. Had the United States instituted a criminal prosecution against Respondents and had Respondents been convicted of each of the violations, which I found and the United States District Court for the Eastern District of California affirmed, the minimum fine that a court could impose on Respondents would be approximately \$100,000 and the maximum fine would be approximately \$10,000,000. Congress' provision for a maximum fine after criminal conviction that is five times greater than the maximum civil penalty that could be imposed indicates that Congress considers violations of marketing orders issued under the AMAA as potentially very grave.

#### **Civil Penalties in Other AMAA Proceedings**

Complainant contends the \$205,000 civil penalty assessed against Respondents is consistent with civil penalties imposed in other AMAA disciplinary cases. As examples, Complainant cites two cases<sup>9</sup> to support Complainant's contention. (Complainant's Remand Brief at 6.) Respondents concede that the civil penalty assessed in this proceeding is consistent with the civil penalties assessed in *In re Daniel Strebin* and *In re Onofrio Calabrese*. Respondents correctly point out that the respondents in *Strebin* did not seek judicial review. However, the failure of the respondents in *Strebin* to seek judicial review is not relevant to whether the civil penalty assessed in this proceeding is consistent with the civil penalty assessed in *In re Daniel Strebin*. Respondents also contend that *Calabrese* is still pending before the United States Court of Appeals for the Ninth Circuit. However, since Respondents' filings in this proceeding, the Ninth Circuit has affirmed *Calabrese*. *Balice v. United States Dep't of Agric.*, No. 98-16766 (9<sup>th</sup> Cir. Feb. 8, 2000). In so

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<sup>9</sup>*In re Daniel Strebin*, 56 Agric. Dec. 1095 (1997); *In re Onofrio Calabrese*, 51 Agric. Dec. 131 (1992), *aff'd sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 14, 1998), *printed in*, 57 Agric. Dec. 841 (1998), *aff'd*, No. 98-16766 (9<sup>th</sup> Cir. Feb. 8, 2000).

doing, the Ninth Circuit rejected the appellant's contention that a \$225,500 civil penalty assessed by the Judicial Officer under section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) for violations of the Almond Marketing Order (7 C.F.R. pt. 981) is excessive within the meaning of the Excessive Fines Clause.

Moreover, Respondents contend that the civil penalty assessed against Respondents is not consistent with civil penalties assessed in cases that have been settled by alleged violators of marketing orders issued under the AMAA (Respondents' Remand Reply Brief at 3). However, the Judicial Officer has long held that consent orders are given no weight in determining the sanction in a litigated case.<sup>10</sup> In a case where the parties agree to the entry of a consent decision, there is generally no record or argument to establish the basis for the sanction. The sanction may appear to be less than warranted because of problems of proving the allegations of the complaint or because of unrevealed mitigating circumstances. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause the sanction in a consent decision to appear less severe than appropriate. Conversely, the sanction in a consent decision may seem more severe than appears warranted because of unrevealed aggravating circumstances. Thus, I do not find that sanctions agreed to by parties and embodied in consent decisions are relevant to the issue of whether a sanction assessed in a litigated case is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

Finally, a review of civil penalties assessed in other cases is of limited assistance in determining whether a civil penalty is excessive within the meaning of the Excessive Fines Clause.<sup>11</sup> Thus, even if I found that the civil penalty assessed

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<sup>10</sup>See *In re Onofrio Calabrese*, 51 Agric. Dec. 131, 155 (1992), *aff'd sub nom. Balice v. United States Dep't of Agric.*, No. CV-F-92-5483-GEB (E.D. Cal. July 14, 1998), *printed in*, 57 Agric. Dec. 841 (1998), *aff'd*, No. 98-16766 (9<sup>th</sup> Cir. Feb. 8, 2000); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9<sup>th</sup> Cir. 1987); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974); *In re Dean Witter & Co.*, 33 Agric. Dec. 11, 13 (1973).

<sup>11</sup>See *United States v. Emerson*, 107 F.3d 77, 81 n.9 (1<sup>st</sup> Cir.), *cert. denied*, 522 U.S. 814 (1997), in which the First Circuit states that a review of penalties in other cases is of limited assistance in judging whether a given fine exceeds constitutional bounds, as follows:

Emerson argues that in determining excessiveness we must consider whether the penalty imposed here is disproportionate to such penalties in similar cases, and offers in comparison several cases involving regulatory violations that he claims demonstrate the unfairness of his punishment. We note, firstly, that the proportionality concern in an excessive fines case is generally considered to be a question of "whether the fine imposed is disproportionate to the crime committed," *Harmelin v. Michigan*, 501 U.S. 957, 1009, 111 S.Ct. 2680, 2709, 115 (continued...)

against Respondents is disproportionate to civil penalties in similar cases, I would give that finding much less weight in determining whether the civil penalty assessed against Respondents is excessive within the meaning of the Excessive Fines Clause, than I give to the gravity of Respondents' violations and Respondents' culpability.

### **Respondents' Ability to Pay**

Respondents contend that they do not have the ability to pay the \$205,000 civil penalty and that Respondents' ability to pay should be considered in determining the amount of the civil penalty (Respondents' Remand Brief at 4-6 and Exhibit B; Respondents' Remand Reply Brief at 4-5, Supplemental Declaration of Tom Collins, CPA in Response to Complainant's Brief, and Specifically the Affidavit of Terry W. Kaiser Re "Excessive Fines Clause"). Respondents state that many statutes authorizing civil penalties describe the factors an agency must consider in imposing civil penalties, including the violator's ability to pay. Respondents cite a number of cases in which the courts required consideration of a violator's ability to pay the civil penalty (Respondents' Remand Brief at 5). However, none of the cases cited by Respondents concern whether the Excessive Fines Clause of the Eighth Amendment requires consideration of the violator's ability to pay a civil penalty.<sup>12</sup> Complainant, citing *Badders v. United States*, 240 U.S. 391 (1916),

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<sup>11</sup>(...continued)

L.Ed.2d 836 (1991) (White, J., dissenting), not whether a given fine is disproportionate to other fines imposed on other defendants. Although review of penalties in similar cases may be instructive in evaluating the range of penalties appropriate for a given crime, we think it of limited assistance in judging whether a given fine exceeds constitutional bounds.

<sup>12</sup>Specifically, Respondents cite: *United States v. Anthony Dell'Aquila Enterprises & Subsidiaries*, 150 F.3d 329, 338-39 (3<sup>d</sup> Cir. 1998) (holding that, under the Clean Air Act, a violator's ability to pay must be considered in determining the amount of the fine because the Clean Air Act requires consideration of the economic impact of the penalty on the business); *Corder v. United States*, 107 F.3d 595, 597-98 (8<sup>th</sup> Cir. 1997) (stating that when determining the amount of a civil penalty to be imposed for violations of the Food Stamp Act of 1977, as amended, Congress generally directed Food and Consumer Services to exercise discretion so that the punishment will more closely fit the crime; this general direction is a signal that Food and Consumer Services should follow principals of fairness that have been clearly delineated in other laws, such as the Packers and Stockyards Act); *Merritt v. United States*, 960 F.2d 15, 17-18 (2<sup>d</sup> Cir. 1992) (stating that section 13(c) of the Shipping Act (46 U.S.C. app. § 1712(c)) requires the Federal Maritime Commission to consider the violator's ability to pay a civil penalty for violations of the Shipping Act and concluding that the Federal Maritime Commission erred by failing to require production of evidence and make findings regarding a violator's ability to pay the civil penalty); *First American Bank of Virginia v. Dole*, 763 F.2d 644, 651-52 (4<sup>th</sup> Cir. 1985) (stating that the quasi-criminal nature of civil penalties counsels caution and pause before resorting to such a  
(continued...)

agrees with Respondents that a respondent's ability to pay is a factor to be considered under the Excessive Fines Clause to determine whether a civil penalty is excessive, but contends that Respondents are able to pay a \$205,000 civil penalty (Complainant's Remand Brief at 2, 7, Affidavit of Terry W. Kaiser ¶ 4; Complainant's Remand Reply Brief at 6-7). However, *Badders* does not concern whether the Excessive Fines Clause of the Eighth Amendment requires consideration of the violator's ability to pay a civil penalty.

However, it does appear that courts consider a violator's financial condition and the effect of the civil penalty on that financial condition when determining whether a civil penalty is excessive within the meaning of the Excessive Fines Clause.<sup>13</sup>

Tom Collins, a certified public accountant acting on behalf of Respondents, estimated Respondents' net worth to be, at most, \$270,976 (Respondents' Remand Reply Brief, letter dated November 17, 1999, from Tom Collins to Brian C. Leighton). Terry W. Kaiser, a USDA compliance officer acting on behalf of Complainant, estimated Respondents' net worth to be \$1,413,429 (Complainant's Remand Brief at 7, Affidavit of Terry W. Kaiser ¶ 4). Mr. Collins has been a certified public account for 19 years and has been Mr. and Mrs. Saulsbury's certified public accountant for approximately 16 years (Respondents' Remand Brief, Declaration of Tom Collins, CPA In Support of Respondent's [sic] Brief Re "Excessive Fines Clause" ¶ 1). Mr. Kaiser is a compliance officer employed by the Agricultural Marketing Service, USDA, who was assigned to assist the Office of the General Counsel, USDA, "in investigating the financial assets held by Robert J. Saulsbury and Saulsbury Enterprises" on August 25, 1999 (Complainant's Remand Brief, Affidavit of Terry W. Kaiser ¶¶ 1-2). Mr. Kaiser's estimate of Respondents' net worth includes as assets, the civil penalty and assessment, which I ordered

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<sup>12</sup>(...continued)

drastic remedy); *FAA v. Landy*, 705 F.2d 624, 635 & n.15 (2<sup>d</sup> Cir.) (stating that the violator attacks the \$567,000 civil penalty for violations of the Federal Aviation Act as "grossly disproportionate" and "unreasonably harsh" under the circumstances, but "[w]e put aside [the violator's] Eighth Amendment claim, finding it frivolous in light of the Supreme Court's rulings in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), and *Hutto v. Davis*, 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed.2d 782 (1980) (vacating) *Davis v. Davis*, 601 F.2d 153 (4<sup>th</sup> Cir. 1979) (en banc)", *cert. denied*, 464 U.S. 895 (1983)).

<sup>13</sup>*See generally United States v. 25445 Via Dona Christa*, 138 F.3d 403, 409 (9<sup>th</sup> Cir. 1998) (stating that in assessing proportionality, the hardship to the defendant, including the effect of forfeiture on defendant's family or financial condition, should be considered); *United States v. \$69,292 In United States Currency*, 62 F.3d 1161, 1167 (9<sup>th</sup> Cir. 1995) (stating that in a civil forfeiture context, whether value of property is proportional to the culpability of the owner so that there is no violation of the Excessive Fines Clause requires consideration of, among other factors, hardship to defendant and defendant's family).

Respondents to pay in the May 7, 1996, Decision and Order and the “[p]resent value of unauthorized revenue and avoidance of RAC costs by sale of raisins to a Canadian customer, plus estimated interest accrued from 1988 to 1998” (Complainant’s Remand Brief, Attachment to Affidavit of Terry W. Kaiser). These items, which Mr. Kaiser lists as assets with an estimated market value of \$741,932, are clearly not assets. Given the respective backgrounds of Messrs. Collins and Kaiser and their relative experience with Mr. Saulsbury’s and Mrs. Saulsbury’s finances and the apparent errors in Mr. Kaiser’s estimate of Respondents’ net worth, I give more weight to Mr. Collins’ estimate of Respondents’ net worth than to Mr. Kaiser’s estimate of Respondents’ net worth.

However, even using Mr. Collins’ estimate of Respondents’ net worth, \$270,976, Respondents are able to pay the \$205,000 civil penalty assessed against them. While I do find that Respondents’ payment of the civil penalty may significantly damage Respondents’ financial condition, I do not find that the amount of the civil penalty is so disproportionate to Respondents’ circumstances that there is no realistic expectation that Respondents will be able to pay the civil penalty.

Moreover, Respondents’ ability to pay the civil penalty is not dispositive of the issue of whether the civil penalty is excessive within the meaning of the Excessive Fines Clause. Therefore, even if I found that Respondents were unable to pay the civil penalty, I would not reduce the civil penalty assessed in the May 7, 1996, Decision and Order, in light of the gravity of Respondents’ violations, Respondents’ high degree of culpability, the harm caused by Respondents’ violations, and the maximum civil and criminal penalties that could have been assessed against Respondents.

#### **Respondent Robert J. Saulsbury’s Health**

Respondents contend that Respondent Robert J. Saulsbury has a number of serious health problems and that Respondent Robert J. Saulsbury’s health problems should be considered in determining whether the civil penalty is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment (Respondents’ Remand Brief at 6, Exhibit A, and Exhibit B). Complainant contends that Mr. Saulsbury’s health is not relevant to the issue of whether the civil penalty is excessive within the meaning of the Excessive Fines Clause (Complainant’s Remand Reply Brief at 7).

Respondents support their contention that Mr. Saulsbury had serious health problems. However, Mr. Saulsbury’s unfortunate death renders Respondents’ argument moot. Even if Mr. Saulsbury was alive and the issue of his health was not moot, I would agree with Complainant’s position that Mr. Saulsbury’s health is not

relevant to the issue of whether the civil penalty assessed against Respondents is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment. Respondents do not cite any authority for their contention that the health of one of the violators is a factor to be considered when determining whether a civil penalty is excessive within the meaning of the Excessive Fines Clause, and I can find no authority which supports Respondents' contention that the health of the violator is a factor to be considered when determining whether a civil penalty is excessive within the meaning of the Excessive Fines Clause. Therefore, even if Mr. Saulsbury was alive, I would not consider Mr. Saulsbury's health when determining whether the civil penalty, which I assessed in the May 7, 1996, Decision and Order, as modified by the United States District Court for the Eastern District of California, is excessive within the meaning of the Excessive Fines Clause.

#### **Burden on Robert J. Saulsbury and His Dependents**

Respondents contend that the burden the civil penalty would place on Respondent Robert J. Saulsbury and his dependents is a factor to be considered when determining whether a civil penalty is excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment (Respondents' Remand Brief at 2).

Again, due to Mr. Saulsbury's unfortunate death, the burden that the civil penalty would place on Mr. Saulsbury and his dependents is moot. Moreover, Respondents do not indicate what dependents would be burdened by a civil penalty imposed on Mr. Saulsbury, and Mr. and Mrs. Saulsbury did not claim any dependents on their joint 1997 and 1998 federal income tax returns, which Respondents attached to Respondents' Remand Brief.

#### **Order Requiring Payment to the Raisin Administrative Committee**

In the May 7, 1996, Decision and Order, I found that Respondents failed to pay the Raisin Administrative Committee \$557.33 in assessments for raisins handled in the 1988-1989 crop year, \$594.68 in assessments for raisins handled in the 1989-1990 crop year, and \$521.29 in assessments for raisins handled in the 1990-1991 crop year. Based on these findings, I ordered Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments, which Respondents had failed to pay for crop years 1988-1989, 1989-1990, and 1990-1991. *In re Saulsbury Enterprises, Inc., supra*, 55 Agric. Dec at 20, 58. The Court, in *Saulsbury Enterprises v. United States Dep't of Agric., supra*, does not indicate that my order

that Respondents pay the Raisin Administrative Committee \$1,673.30 in assessments, which Respondents failed to pay in crop years 1988-1989, 1989-1990, and 1990-1991, is a civil penalty subject to the Excessive Fines Clause.

The Excessive Fines Clause of the Eighth Amendment does not apply to a monetary penalty whose purpose is other than punitive or penal.<sup>14</sup> The Order requiring Respondents to pay the Raisin Administrative Committee assessments Respondents were required to pay and failed to pay, is not punishment for Eighth Amendment purposes because the Order is only remedial and has no deterrent, rehabilitative, or retributive purposes. Moreover, even if I found that the Excessive Fines Clause applies to the Order requiring Respondents to pay the Raisin Administrative Committee, I would not find that the Order requiring Respondents to pay \$1,673.30 in assessments to the Raisin Administrative Committee is excessive within the meaning of the Excessive Fines Clause because proportionality is inherent in an order requiring a respondent to pay assessments which the respondent is required to pay and has failed to pay, and restitution of the exact amount owed by a respondent is inherently linked to the culpability of the respondent.<sup>15</sup>

#### **Findings and Conclusion Relevant to the Excessive Fines Clause**

I find: (1) Respondents' 205 violations of the Raisin Order over almost a 5-year period are grave violations of the Raisin Order; (2) Respondents are highly culpable for the violations; (3) Respondents' violations harmed the Raisin Administrative Committee, handlers subject to the Raisin Order, the United States government, consumers of raisins produced from grapes grown in California, the Secretary of Agriculture's implementation of the policies expressly stated in the AMAA, and the integrity of the Raisin Order; (4) the \$205,000 civil penalty assessed against Respondents is authorized by the AMAA and is approximately 10 per centum of the maximum civil penalty that could have been assessed against Respondents; (5) the \$205,000 civil penalty assessed against Respondents is consistent with civil penalties assessed in similar cases; (6) Respondents have the ability to pay the

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<sup>14</sup>See generally *Little v. C.I.R.*, 106 F.3d 1445, 1454-55 (9<sup>th</sup> Cir. 1997).

<sup>15</sup>See *United States v. Dubose*, 146 F.3d 1141, 1145-46 (9<sup>th</sup> Cir.) (stating that where the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is built into the order; in a restitution context, because the full amount of restitution is inherently linked to culpability of the offender, restitution orders that require full compensation in the amount of the loss are not excessive), *cert. denied sub nom. Dean v. United States*, 525 U.S. 975 (1998).

assessed civil penalty; and (7) Respondents' financial condition may be significantly damaged by the payment of the \$205,000 civil penalty, but the civil penalty is not so disproportionate to Respondents' circumstances that there is no realistic expectation that Respondents will be able to pay the civil penalty.

I conclude that the assessment of a \$205,000 civil penalty against Respondents, jointly and severally, is not excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment.

For the foregoing reasons, the reasons in *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), the reasons in *In re Saulsbury Enterprises*, 56 Agric. Dec. 82 (1997) (Order Denying Pet. for Recons.), and the reasons in *Saulsbury Enterprises v. United States Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999) (Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment and Remanding Matter to USDA), the following Order should be issued.

#### **Order**

Respondents, Robert J. Saulsbury and Saulsbury Enterprises, jointly and severally, are assessed a civil penalty of \$205,000 and are ordered to pay to the Raisin Administrative Committee \$1,673.30 in assessments for crop years 1988-1989, 1989-1990, and 1990-1991. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

Colleen A. Carroll  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
Room 2014-South Building  
1400 Independence Avenue, SW  
Washington, DC 20250-1417

The Raisin Administrative Committee shall be paid by certified check or money order.

The certified check or money order for the civil penalty shall be forwarded to, and received by, Colleen A. Carroll, and the certified check or money order for the assessments shall be forwarded to, and received by, the Raisin Administrative Committee, within 100 days after service of this Order on Respondents.

The United States District Court for the Eastern District of California has retained jurisdiction over this proceeding, pending the findings in this Decision and

Order on Remand, and has instructed the parties to renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause. Therefore, simultaneously with the issuance of this Decision and Order on Remand, I am filing a Stay Order which stays this Order pending proceedings for judicial review.

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**In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED  
ASSOCIATION; AND ROBERT J. SAULSBURY, AN INDIVIDUAL.  
AMAA Docket No. 94-0002.  
Stay Order filed February 14, 2000.**

Colleen A. Carroll, for Complainant.  
Brian C. Leighton, Fresno, California, for Respondents.  
*Order issued by William G. Jenson, Judicial Officer.*

On May 7, 1996, I issued a Decision and Order concluding that Saulsbury Enterprises and Robert J. Saulsbury [hereinafter Respondents] violated the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California; assessed Respondents, jointly and severally, a civil penalty of \$219,000; and ordered Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments. *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), *aff'd in part, denied in part & remanded*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999).

Respondents filed a Complaint for Review of the May 7, 1996, Decision and Order in the United States District Court for the Eastern District of California. Thereafter, the parties filed cross-motions for summary judgment, which the Court granted in part and denied in part. *Saulsbury Enterprises v. United States Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999) (Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment and Remanding Matter to USDA).

The Court affirmed the May 7, 1996, Decision and Order, with the exception of \$14,000 of the civil penalty.<sup>1</sup> However, the Court concluded that the civil penalty

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<sup>1</sup>In *In re Saulsbury Enterprises*, *supra*, I found that Respondents failed to submit 40 reports to the Raisin Administrative Committee. Fourteen of these reports concern off-grade raisins. The Court concluded that I could not assess a civil penalty against Respondents for failing to submit reports  
(continued...)

provision in section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, is subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and remanded the proceeding to the United States Department of Agriculture [hereinafter USDA] for findings concerning whether the civil penalty assessed in the May 7, 1996, Decision and Order, as modified by the Court, is excessive within the meaning of the Excessive Fines Clause. The Court states that it retains jurisdiction of the action pending USDA findings and instructs that the parties renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause, once the findings are final. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 1-2, 33-41, 52.

Simultaneously with the issuance of this Stay Order, I am issuing a Decision and Order on Remand in which I conclude that a \$205,000 civil penalty assessed against Respondents, jointly and severally, is not excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment; assess Respondents, jointly and severally, a civil penalty of \$205,000; and order Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments. However, since the United States District Court for the Eastern District of California has retained jurisdiction over this proceeding, pending the findings in *In re Saulsbury Enterprises* (Decision and Order on Remand), 59 Agric. Dec. \_\_\_ (Feb. 14, 2000), and has instructed the parties to renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause, I am issuing this Stay Order to stay the Order in *In re Saulsbury Enterprises* (Decision and Order on Remand), 59 Agric. Dec. \_\_\_ (Feb. 14, 2000), pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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<sup>1</sup>(...continued)  
concerning off-grade raisins, given my conclusion that Respondents' raisins were standard raisins. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 48.

**In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED  
ASSOCIATION; AND ROBERT J. SAULSBURY, AN INDIVIDUAL.  
AMAA Docket No. 94-0002.  
Ruling Denying Respondents' Motion to Dismiss filed February 14, 2000.**

Colleen A. Carroll, for Complainant.  
Brian C. Leighton, Fresno, California, for Respondents.  
*Ruling issued by William G. Jenson, Judicial Officer.*

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California [hereinafter the Raisin Order] (7 C.F.R. pt. 989); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) by filing a Complaint on May 23, 1994. The Complaint alleges that Saulsbury Enterprises and Robert J. Saulsbury [hereinafter Respondents] violated the Raisin Order.

On June 13, 1994, Respondents filed an Answer denying the material allegations of the Complaint. After a hearing, Administrative Law Judge James W. Hunt [hereinafter the ALJ], issued an initial decision in which the ALJ concluded that Respondents violated the Raisin Order and assessed Respondents, jointly and severally, a \$3,000 civil penalty. Complainant appealed to the Judicial Officer, and on May 7, 1996, I issued a Decision and Order concluding that Respondents violated the Raisin Order, assessing Respondents, jointly and severally, a \$219,000 civil penalty, and ordering Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments. *In re Saulsbury Enterprises*, 55 Agric. Dec. 6 (1996), *aff'd in part, denied in part & remanded*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999).

Respondents filed a Complaint for Review of the May 7, 1996, Decision and Order in the United States District Court for the Eastern District of California. Thereafter, the parties filed cross-motions for summary judgment, which the Court granted in part and denied in part. *Saulsbury Enterprises v. United States Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. June 29, 1999) (Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment and Remanding Matter to USDA).

The Court affirmed the May 7, 1996, Decision and Order, with the exception of

\$14,000 in civil penalties.<sup>1</sup> However, the Court concluded that the civil penalty provision in section 8c(14)(B) of the AMAA (7 U.S.C. § 608c(14)(B)) is subject to the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and remanded the proceeding to the United States Department of Agriculture [hereinafter USDA] for findings concerning whether the civil penalty assessed in the May 7, 1996, Decision and Order, as modified by the Court, is excessive within the meaning of the Excessive Fines Clause. The Court states that it retains jurisdiction of the action pending USDA findings and instructs that the parties renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause, once the findings are final. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 1-2, 33-41, 52.

The parties filed briefs concerning whether the \$205,000 civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause of the Eighth Amendment, and on December 7, 1999, the Hearing Clerk transmitted the record of the proceeding to me for a decision on remand.

On January 5, 2000, Respondents filed Declaration of Brian C. Leighton, Attorney for Respondents, Re Death of The Respondent [hereinafter Motion to Dismiss], stating that Respondent Robert J. Saulsbury died on January 3, 2000, and requesting that the proceeding be dismissed. On February 9, 2000, Complainant filed Complainant's Response to Respondents' Motion to Dismiss opposing Respondents' Motion to Dismiss, and on February 11, 2000, the Hearing Clerk transmitted the record of the proceeding to me for a ruling on Respondents' Motion to Dismiss.

The United States District Court for the Eastern District of California remanded this proceeding to me for findings concerning whether the civil penalty assessed in the May 7, 1996, Decision and Order, as modified by the Court, is excessive within the meaning of the Excessive Fines Clause. The Court explicitly states that it retains jurisdiction of the action pending USDA findings and instructs that the parties renew their motions for summary judgment before the Court on the issue of whether the civil penalty assessed against Respondents is or is not excessive within the meaning of the Excessive Fines Clause, once the findings are final. Therefore, I find that I do not have jurisdiction to dismiss this proceeding.

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<sup>1</sup>In *In re Saulsbury Enterprises*, *supra*, I found that Respondents failed to submit 40 reports to the Raisin Administrative Committee. Fourteen of these reports concern off-grade raisins. The Court concluded that I could not assess a civil penalty against Respondents for failing to submit reports concerning off-grade raisins, given my conclusion that Respondents' raisins were standard raisins. *Saulsbury Enterprises v. United States Dep't of Agric.*, *supra*, slip op. at 48.

If Respondents seek to dismiss this proceeding, they should file their Motion to Dismiss in the United States District Court for the Eastern District of California, which has retained jurisdiction over this proceeding and has remanded the proceeding to me for the limited purpose of issuing a decision regarding whether the civil penalty assessed in the May 7, 1996, Decision and Order, as modified by the Court, is excessive within the meaning of the Excessive Fines Clause.

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**In re: STEW LEONARD'S.  
98 AMA Docket No. M 1-1.  
Decision and Order filed March 16, 2000.**

**Milk marketing order – New England milk marketing order – Producer-handler – Burden of proof – Strict construction of exceptions – Agency construction of rules – Equal protection.**

The Judicial Officer affirmed Judge Baker's decision dismissing Petitioner's petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer held that the Petitioner failed to prove that the Market Administrator's denial of Petitioner's request for producer-handler status under the New England Milk Marketing Order (7 C.F.R. pt. 1001) was not in accordance with law. The Judicial Officer stated that the burden of proof was on Petitioner; that because producer-handler status was an exception to the general regulatory framework of the Agricultural Marketing Agreement Act of 1937 and the New England Milk Marketing Order, it must be strictly construed; that the Market Administrator's determination regarding Petitioner's status must be given deference; and that the Market Administrator's determination regarding Petitioner's status was consistent with the purpose of the definition of "producer-handler" within the New England Milk Marketing Order (7 C.F.R. § 1001.10) and prior case law. The Judicial Officer rejected Petitioner's contentions that the Market Administrator's determination was arbitrary and capricious, conflicted with the goal of having an adequate supply of pure and wholesome milk, and violated Petitioner's right to equal protection of the law.

Donald A. Tracy, for Respondent.  
James A. Wade and Brian O'Donnell, Hartford, Connecticut, for Petitioner.  
Sydney Berde, St. Paul, Minnesota, for Agri-Mark, Inc.  
John H. Vetne, Newburyport, Massachusetts, for New England Dairies, Inc.  
Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## **I. Introduction**

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New

England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice] by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner sought relief from the February 6, 1998, determination by Erik F. Rasmussen, Market Administrator for the New England Milk Marketing Order [hereinafter the Market Administrator], that a December 10, 1997, lease by Petitioner of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner. Petitioner alleged the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order has no rational basis in the law, is arbitrary and capricious, is an abuse of the Market Administrator's administrative discretion, and deprives Petitioner of property without due process of law in violation of the Fifth Amendment to the United States Constitution (Pet. ¶ 15(3)-(4)). Petitioner requested that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. at 5).

On April 24, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be granted (Answer at 3).

Thereafter, Petitioner submitted to the Market Administrator a lease, dated June 16, 1998, executed by Petitioner and Oakridge Farm on the basis of which Petitioner again sought the Market Administrator's determination that Petitioner meets the definition of "producer-handler" under the New England Milk Marketing Order. On July 31, 1998, the Market Administrator advised Petitioner that its June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities did not qualify Petitioner as a producer-handler under the New England Milk Marketing Order.

On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements

of a handler under the federal statutes, regulations, and milk orders” (Amended Pet. at 5-6). On August 21, 1998, Respondent filed Respondent’s Reply to Motion to Amend Petition and Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner’s Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] granted Petitioner’s Motion to Amend Petition and accepted Petitioner’s Amended Petition (Ruling on Motion to Amend).

On January 11-12, 1999, the ALJ conducted a hearing on the Amended Petition, in Hartford, Connecticut. James A. Wade and Brian O’Donnell, Robinson & Cole, LLP, Hartford, Connecticut, represented Petitioner. Donald A. Tracy, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On March 30, 1999, Petitioner filed Petitioner’s Proposed Findings of Fact, Conclusions and Order and Petitioner’s Post-Hearing Brief; on May 17, 1999, Agri-Mark, Inc., and National Milk Producers Federation [hereinafter Intervenors]<sup>1</sup> filed Proposed Findings of Fact, Conclusions and Order Submitted on Behalf of Agri-Mark, Inc. and National Milk Producers Federation; on June 11, 1999, Respondent filed Respondent’s Proposed Findings of Fact, Conclusions of Law, Order, and Brief [hereinafter Respondent’s Post-Hearing Brief]; and on July 15, 1999, Petitioner filed Petitioner’s Reply Brief.

On September 10, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ concluded that the Market Administrator’s determination that Petitioner is not a producer-handler is in accordance with law and dismissed Petitioner’s Petition (Initial Decision and Order at 37-38).

On October 13, 1999, Petitioner filed Appeal and Request for Argument; on December 13, 1999, Intervenors filed Brief of Agri-Mark, Inc. and National Milk Producers Federation in Support of Motion to Dismiss Appeal of Petitioner; on December 15, 1999, Respondent filed Respondent’s Reply to Appeal [hereinafter Respondent’s Cross-Appeal]; on February 28, 2000, Petitioner filed Petitioner’s

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<sup>1</sup>On June 8, 1998, Intervenors filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Intervenors requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57). On July 9, 1998, the ALJ granted the Motion to Intervene “to the extent that [Intervenors] may file briefs” (Ruling on Motion for Leave to Participate in Proceeding).

Reply to Respondent's Cross-Appeal; and on March 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and ruling on Petitioner's motion for oral argument before the Judicial Officer.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit pursuant to section 900.65(b) of the Rules of Practice (7 C.F.R. § 900.65(b)), is refused because the issues have been fully briefed by Petitioner, Respondent, and Intervenors; thus, oral argument would appear to serve no useful purpose.

While I agree with the ALJ's conclusion, many of the ALJ's findings of fact, and some of the ALJ's discussion, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order because I disagree with much of the ALJ's discussion.<sup>2</sup>

## II. Applicable Statutory and Regulatory Provisions

7 U.S.C.:

### TITLE 7—AGRICULTURE

....

#### CHAPTER 26—AGRICULTURAL ADJUSTMENT

....

#### SUBCHAPTER III—COMMODITY BENEFITS

....

#### § 608c. Orders regulating the handling of commodity

....

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<sup>2</sup>I also disagree with the ALJ's Order dismissing Petitioner's Petition (Initial Decision and Order at 38). Petitioner filed its Petition on February 17, 1998. On August 12, 1998, Petitioner filed its Motion to Amend Petition and Amended Petition. On September 10, 1998, the ALJ granted Petitioner's Motion to Amend Petition and accepted Petitioner's Amended Petition (Ruling on Motion to Amend). I infer that Petitioner withdrew its Petition and substituted in its stead Petitioner's Amended Petition. Therefore, I find that the ALJ's dismissal of Petitioner's Petition is error. Instead, I dismiss Petitioner's Amended Petition (Decision and Order, *infra*).

**(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

....

**CHAPTER X—AGRICULTURAL MARKETING SERVICE  
(MARKETING AGREEMENTS AND ORDERS; MILK)  
DEPARTMENT OF AGRICULTURE**

....

**PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA**

**Subpart —Order Regulating Handling**

....

**DEFINITIONS**

....

**§ 1001.10 Producer-handler.**

*Producer-handler* means any person who, during the month, is both a dairy farmer and a handler who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001.10(a).

**III. Findings of Fact**

1. Petitioner is a "handler," as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9), and at all times material to this proceeding, Petitioner operated as a handler (Tr. 44-45, 51, 133, 142-44, 178-79, 260).

2. Petitioner is a partnership which has operated a grocery business since 1969. Petitioner is engaged in the business of selling milk and other dairy and food products to consumers at retail food stores in Norwalk and Danbury, Connecticut, with a principal place of business located at 100 Westport Avenue, Norwalk, Connecticut. (Amended Pet. ¶¶ 1-2, 4.)

3. At its retail food store in Norwalk, Connecticut, Petitioner distributes fluid milk products processed at its fluid milk processing plant located on the same premises. At a second retail food store in Danbury, Connecticut, Petitioner distributes fluid milk products processed at the Norwalk fluid milk processing plant. (Tr. 22-23.)

4. Petitioner's Norwalk, Connecticut, retail food store and fluid milk processing plant is owned by a partnership consisting of Marianne Leonard and the Marianne Leonard 1993 Trust (PX 1; Tr. 21-22). Petitioner has no ownership interest in the Danbury, Connecticut, retail food store through which it distributes a portion of the fluid milk products processed at its Norwalk fluid milk processing plant. The Danbury, Connecticut, store is owned by a limited liability corporation whose ownership is divided among various members of the Leonard family other than the partnership owners of Petitioner. (PX 1; Tr. 22-25.)

5. Petitioner represents itself as operating the world's largest dairy store (Tr. 128). Petitioner receives and processes about two-thirds of a tanker truck of milk each day and sells approximately 1.2 million gallons of milk per year (Tr. 119,

493-94).

6. Prior to January 1, 1998, Petitioner received its entire raw milk supply from Agri-Mark, Inc., a cooperative association, whose dairy farmer members supply milk to handlers regulated by the New England Milk Marketing Order (Tr. 215-16).

7. Oakridge Farm is a dairy farm in Ellington, Connecticut, which owns approximately 550 cows (Tr. 56-57). Prior to January 1, 1998, Oakridge Farm was a member of Agri-Mark, Inc. (Tr. 210).

8. Oakridge Farm is owned by Atlas Associates, a partnership whose partners, according to public records in Ellington, Connecticut, are Corbin Bahler, Kenneth Bahler, and S. Owen Bahler. There is a second certificate which lists Atlas Associates, d/b/a Oakridge Farm. (Tr. 267.)

9. Bahler Farms, Inc., is a corporation that operates a dairy farm which is contiguous to Oakridge Farm (Tr. 102, 267).

10. Vern Bahler is the president and a director of Bahler Farms, Inc.; David Bahler is the secretary and a director of Bahler Farms, Inc.; and Corbin Bahler is the agent for Bahler Farms, Inc. (Tr. 267). Petitioner has no interest in Bahler Farms, Inc. (Tr. 48).

11. On December 10, 1997, Kenneth Bahler, as "Partner" on behalf of Oakridge Farm and Stewart J. Leonard, Jr., as "President" on behalf of Petitioner, executed a document entitled "Lease Agreement." Pursuant to the Lease Agreement, Petitioner agreed to: (1) lease Oakridge Farm's entire herd of milking cows, barns, milking parlors, personal property, and all equipment necessary to produce raw milk and its related products; (2) transport the milk products from Oakridge Farm to Petitioner's facilities for processing, packaging, sale, and distribution at its own expense; (3) pay for all ordinary and necessary expenses relating to production, processing, and packaging of milk and its related products; (4) pay Bahler Farms, Inc., a management fee; and (5) buy corn silage from Bahler Farms, Inc. (PX 2.)

12. On December 18, 1997, Petitioner notified the Market Administrator that Petitioner had entered into an agreement to receive milk directly from Oakridge Farm with the intention of becoming a producer-handler. On December 30, 1997, the Market Administrator responded to Petitioner's letter by quoting the requirements in 7 C.F.R. § 1001.10 for producer-handler status under the New England Milk Marketing Order and by advising Petitioner that the versions of the proposed lease agreement with "Bahler Oak Ridge Farm" that had been provided to the Market Administrator's office, failed to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

Stewart J. Leonard  
100 Westport Avenue  
Norwalk, CT 06851-3999

Gentlemen:

We have received your letter dated December 18, 1997 stating that you have entered into an agreement to receive milk directly from the Bahler Oak Ridge Farm and that your intention is to become a producer-handler.

Section 1001.10 of Federal Order No. 1 requires in part that a producer-handler *“provides as the person’s own enterprise and at the person’s own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler’s own plant, and to distribute it as route disposition.”*

We have discussed this matter on several occasions during the past four months. To date, the versions of the proposed lease agreement between Stew Leonard’s Dairy and the Bahler Oak Ridge Farm which you have provided to this office have failed to meet the order requirements.

The status of Stew Leonard’s Dairy will not be changed to that of a producer-handler until you submit for review and approval a signed copy of the lease which fully meets the requirements of section 1001.10.

Stew Leonard’s Dairy will continue to be a pool handler and file monthly Form 1 reports and make equalization payments into the New England Market Order pool.

PX 10 (emphasis in original).

13. On January 5, 1998, Petitioner’s counsel sent a copy of the executed December 10, 1997, Lease Agreement to the Market Administrator with a letter requesting that the Market Administrator identify the manner in which the lease fails to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

Mr. Erik F. Rasmussen  
Market Administrator  
U.S. Department of Agriculture  
P.O. Box 1478  
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy Store**

Dear Mr. Rasmussen:

This office represents Stew Leonard's Dairy of Norwalk, Connecticut. We are in receipt of your letter dated December 30, 1997 addressed to Stewart J. Leonard in which you state that the lease between Stew Leonard's Dairy Store and Bahler Oak Ridge Farm fails to meet the requirement of Section 1001.10 of Federal Order No. 1.

I am enclosing a copy of the signed lease as requested. Would you please advise in what respects the lease fails to meet the requirements of the aforesaid Federal order. We will consider your comments and take such steps as we deem appropriate.

PX 12.

14. On January 15, 1998, the Market Administrator responded, advising Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, as follows:

Robinson & Cole LLP  
One Commercial Plaza  
280 Trumbull Street  
Hartford, CT 06103-3597

Attention: Mr. James A. Wade

Gentlemen:

We have reviewed the copy of the signed lease agreement between Stew Leonard's Dairy and Oakridge Farm of Ellington, Connecticut.

As written, the proposed lease fails to meet the Order requirement that the handler “*provides as the person’s own enterprise and risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler’s own plant, and to distribute it as route distribution.*”

Specifically, Paragraph 3 states that the parties “agree to review and adjust the payments called for herein on a quarterly basis.” This provision, in effect, eliminates any risk of loss to Stew Leonard’s Dairy as a result of “uncertainties that relate to the cost of farming.” Such risk is inherent to a producer-handler’s operation and must be assumed by Stew Leonard’s Dairy before that handler’s status is changed to that of a producer-handler.

In addition, the fixed amount and the frequency of the management fee to be paid to Bahler Farms, Inc., by Stew Leonard (also noted in Paragraph 3) must be specified in the lease.

PX 11 (emphasis in original).

15. On January 20, 1998, Petitioner’s counsel sent a letter and a proposed new lease between Petitioner and Oakridge Farm to the Market Administrator inquiring whether Petitioner would meet the requirements for a producer-handler if it re-executed the December 10, 1997, lease with Oakridge Farm with modifications indicated on the proposed lease, as follows:

Mr. Erik F. Rasmussen  
Market Administrator  
U.S. Department of Agriculture  
P.O. Box 1478  
Boston, MA 02205-1478

Re: **Stew Leonard’s Dairy Store**

Dear Mr. Rasmussen:

Enclosed please find a copy of the lease between Stew Leonard’s and Oakridge Farm which incorporates the changes thereto suggested in your letter of January 15, 1998. Assuming the parties re-execute the lease with these modifications therein, will that meet the requirements of the Federal Milk Order? Please advise at once and I will take the necessary steps to

have the lease re-executed and forward a signed copy to you.

PX 13.

16. On February 6, 1998, the Market Administrator notified Petitioner by letter that he had reviewed the various leases that Petitioner had proposed to change its status from a handler under the New England Milk Marketing Order to a producer-handler, exempt from the regulatory provisions applicable to handlers. The letter states that, in contrast to currently operating producer-handlers who meet the regulatory requirements for producer-handler status under the New England Milk Marketing Order, Petitioner proposes a legal construct merely to circumvent the AMAA, as follows:

Stew Leonard's Dairy  
100 Westport Avenue  
Norwalk, CT 06851-3999

Dear Mr. Leonard:

This office has reviewed the various leases you have proposed. The stated purpose of the leases is to change the regulatory status of Stew Leonard's Dairy from a handler operating a pool distributing plant that purchases pool milk from producers to status as a producer-handler.

There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes.

The situation at Stew Leonard's Dairy is distinct from proposals received by some producer-handlers. You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S.C. 608(c)(5) [sic]. The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.

Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision, refer to 7 U.S.C. (608)(c)(15)(A) [sic].

PX 14.

17. On February 17, 1998, Petitioner filed its Petition, seeking relief from the Market Administrator's February 6, 1998, determination that Petitioner's December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner (Pet.).

18. In response to the Market Administrator's comments in his January 15, 1998, letter (PX 11), Petitioner executed a new Lease Agreement with Oakridge Farm on June 16, 1998 (PX 3, PX 13, PX 15).

19. Vern Bahler, as "Partner" on behalf of Oakridge Farm and Stew Leonard, Jr., as "President" on behalf of Petitioner, executed the June 16, 1998, Lease Agreement. The Lease Agreement contains the following operative terms:

1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of \$1.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew Leonard's agrees to replace culls and/or attrition with newly bred heifers.
2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for \$12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.
3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk. Also, Stew Leonard's agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of \$2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice, 60 days prior to change, is required in the event of any change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

PX 3.

20. On June 22, 1998, Petitioner's counsel sent a letter and a copy of the June 16, 1998, lease between Petitioner and Oakridge Farm to the Market Administrator, requesting that the Market Administrator determine that Petitioner is a producer-handler under the New England Milk Marketing Order based on the June 16, 1998, lease, as follows:

Mr. Erik F. Rasmussen  
Market Administrator  
U.S. Department of Agriculture  
P.O. Box 1478  
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy**

Dear Mr. Rasmussen:

As requested by Attorney Don Tracy during a telephone conversation with Joan Grear of my office, enclosed please find a copy of the revised and executed lease between Stew Leonard's and Oakridge Farm. We understand from Mr. Tracy that the enclosed lease together with the Grade A Milk Production License issued by the State of Connecticut, will provide you with sufficient basis to confirm Stew Leonard's designation as a producer-handler.

Mr. Tracy also told Joan Grear that upon your receipt of the enclosed lease, we could expect to receive a letter from you confirming the producer-handler designation. We would appreciate it if you would forward same at your earliest convenience. We will withdraw our 15(A) petition upon our receipt of documentation confirming the producer-handler designation.

PX 15.

21. On July 31, 1998, the Market Administrator notified Petitioner's counsel that the June 16, 1998, lease between Petitioner and Oakridge Farm did not alter the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order, as follows:

Mr. James A. Wade  
Robinson & Cole LLP  
One Commercial Plaza  
280 Trumbull Street  
Hartford, CT 06103-3597

Dear Mr. Wade:

I have received your letter dated June 22, lease agreement, and Grade A Milk Production License. A review of this additional information has not altered the determination of February 6 that Stew Leonard's Dairy is not a producer-handler.

Please continue to have your client file handler reports and producer payrolls as they have in the past.

PX 16.

22. On August 12, 1998, Petitioner filed its Amended Petition, seeking relief from the February 6, 1998, notice, and continuing determination by the Market Administrator that Petitioner is not a producer-handler under the New England Milk Marketing Order (Amended Pet.).

23. Since leasing Oakridge Farm's milking cows and milk production facilities, Petitioner has paid the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinary services, and services to keep track of animals (Tr. 188-90). Petitioner has purchased insurance to cover its obligations with respect to Oakridge Farm, with a policy providing a benefit of \$1 million per occurrence, \$2 million per year, and with an umbrella benefit of \$45 million per year (Tr. 498-99).

24. Oakridge Farm and Bahler Farms, Inc., are operated jointly in that they "share equipment and a full-time calf raiser, a mechanic and full-time milkers" (Tr. 102, 266-68).

25. Vern Bahler and Dave Bahler, who operate Bahler Farms, Inc., have check-writing authority for Oakridge Farm (Tr. 97-98).

26. The Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04).

27. Records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69).

28. Oakridge Farm and Bahler Farms, Inc., share the financial risk of a loan for which they jointly pledged security to First Pioneer Farm Credit (Tr. 269).

29. Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71).

30. Petitioner has no leasehold or other interest in the actual farmland of Oakridge Farm (PX 3).

31. Every producer-handler in the New England Milk Marketing Order is a dairy farmer who owns a dairy farm (Tr. 252).

32. Of the 20 producer-handlers in the New England Milk Marketing Order, three have leased extra cows and milk production facilities to increase their milk production by no more than 25 per centum (Tr. 252-54). The terms of these leases are reflected in PX 9, PX 17, and PX 18. The Market Administrator permits these three enterprises, which were producer-handlers at the time they entered into their respective leases, to obtain up to 25 per centum of their milk from leased cows without jeopardizing their status as producer-handlers (Tr. 253). The Market Administrator concedes these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk from the leased cows (Tr. 317, 425, 441).

33. Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145).

34. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-45, 250). Petitioner would have avoided, if it had been a producer-handler, payments as high as 37 cents per gallon (RX C; Tr. 247-52). If Petitioner were a producer-handler, Petitioner would have as much as a 25-cent per gallon advantage over its competitor, Stop & Shop Supermarket Companies. Differences of less than one cent per gallon can have a competitive impact in the dairy industry. (Tr. 451-52, 482-85.)

35. The competitive advantage to Petitioner, described in Findings of Fact No. 34, would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing

area<sup>3</sup> (Tr. 245).

36. The quality control that Petitioner seeks by leasing Oakridge Farm's milking cows and milk production facilities are completely independent of Petitioner's status. As a handler, Petitioner has accomplished its desired quality control goals while accounting to the pool for the use of its milk. (Tr. 50-51, 54-55, 93-96, 171-72, 258-59.)

37. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.)

38. The record establishes that the Market Administrator's determination was in accordance with law.

39. The record does not establish that Petitioner is a dairy farmer.

40. The record does not establish that Petitioner provides, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of Oakridge Farm's dairy herd and Oakridge Farm's resources and facilities used to produce milk.

41. The record does not establish that Petitioner is a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

#### **IV. Discussion**

##### **A. The Issue**

The issue to be resolved in this proceeding is whether the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Petitioner now obtains its entire milk supply by leasing milking cows and milk production facilities and maintains that it is now producing and processing milk as its own enterprise and at its own risk, as required for producer-handler status. Respondent denies that Petitioner operates a dairy farm as its own enterprise and at its own risk.

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<sup>3</sup>The term "New England marketing area" is defined in 7 C.F.R. § 1001.2.

## B. The Burden of Proof

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner, and in order to prevail in this proceeding, Petitioner has the burden of proving that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not in accordance with law.<sup>4</sup> I find that Petitioner has not met its burden. Moreover, the evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not

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<sup>4</sup>*United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3<sup>rd</sup> Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2<sup>nd</sup> Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4<sup>th</sup> Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963), *cert. denied*, 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3<sup>rd</sup> Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8<sup>th</sup> Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860 (3<sup>rd</sup> Cir. 1945); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Jet Farms, Inc.*, 50 Agric. Dec. 1373, 1406 (1991); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.*, 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom. Farmers Alliance for Improved Regulations (FAIR) v. Madigan*, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1374 (1987), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7<sup>th</sup> Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 140 (1977); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms, Dairy, Inc.*, 41 Agric. Dec. 7, 8-9 (1982); *In re Fitchett Bros., Inc.*, 34 Agric. Dec. 1, 3 (1975); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D. D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.*, 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd*, *United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973); *In re Hawthorn-Mellody, Inc.*, 30 Agric. Dec. 1774, 1791-92 (1971); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 191 (1968), *aff'd*, *Neugebauer v. Secretary of Agriculture*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Dade County Dairies, Inc.*, 24 Agric. Dec. 1567, 1571 (1965); *In re Adam L. Liptak*, 24 Agric. Dec. 1176, 1181 (1965); *In re Cecil Duncan*, 19 Agric. Dec. 1110, 1115 (1960); *In re Newark Milk & Cream Co.*, 18 Agric. Dec. 211, 214 (1959), *aff'd*, *Newark Milk & Cream Co. v. Benson*, Civil Action No. 242-59 (D.N.J. Dec. 30, 1959), *printed in* 19 Agric. Dec. 54 (1960); *In re Valley Creamery Co., Inc.*, 13 Agric. Dec. 979, 981 (1954); *In re M.H. Renken Dairy Co.*, 11 Agric. Dec. 264, 272 (1952); *In re St. Charles Dairy*, 7 Agric. Dec. 943, 946 (1948).

provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41). Thus, Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

**C. The Historical Necessity For Milk Market Regulations Dictate That Producer-Handler Status Is An Exception To Be Strictly Construed**

Milk market regulations are rooted in two characteristics: (1) fluid milk commands a higher price than milk put to other uses, even though the quality of the milk is the same; and (2) milk production varies with the season, so that a herd of cows large enough to meet consumer demand in the winter will, in the more productive warmer months, produce an oversupply of milk. *Zuber v. Allen*, 396 U.S. 168, 172-73 (1969). Prior to regulation, milk processors were able to demand bargain prices during the summer. Milk producers increased production to maintain their income and a disequilibrium snowballed. In response, Congress enacted a series of laws ending with the AMAA, which is the statutory basis for the price regulation involved in this proceeding. One goal of price regulation is to discourage cutthroat competition among milk producers to sell their milk for use as fluid milk. *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939). The AMAA and the New England Milk Marketing Order are designed to achieve a fair division of the more profitable fluid milk market among all milk producers, thus eliminating the disequilibrium which had been a consequence of cutthroat competition among milk producers striving for the fluid milk market. By use of equalization payments, milk producers receive the same price regardless of the ultimate use to which their milk is put. The procedure for achieving equalization generally is that the market administrator computes the value of milk used by each handler by multiplying the quantity of milk the handler uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to milk producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than that handler's total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than that handler's total payments to milk producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus, a composite or uniform

price is effectuated by means of the equalization or producer-settlement fund.

Most handlers are fully regulated by milk marketing orders. However, some milk producers process the milk which they produce. A milk producer which is also a handler of the milk which it produces and which strictly conforms to the definition of "producer-handler," under the milk marketing order that is applicable to that milk producer, is exempt from a number of the milk marketing order provisions applicable to fully regulated handlers. Historically, producer-handlers were normally "family-type" operations (25 Fed. Reg. 5494 (1960); 25 Fed. Reg. 7825 (1960)). Customarily, a producer-handler has a relatively small operation, is operating in a self-sufficient manner, and is not a major competitive factor in the market for regulated handlers. The milk that is processed, packaged, and distributed by a producer-handler is obtained from the producer-handler's own production. Any fluctuation in a producer-handler's milk needs is met through the producer-handler's own production, and the producer-handler disposes of any excess milk supply at his or her own expense.<sup>5</sup>

The Secretary of Agriculture could elect to fully regulate producer-handlers under the AMAA. The exemption allowed producer-handlers arises not from the lack of authority under the AMAA to regulate producer-handlers, but from the determination that full regulation of a handler meeting the definition of a producer-handler is not necessary to achieve the declared policy of the AMAA in the marketing area.<sup>6</sup> Producer-handler status is an exception to the general regulatory framework of the AMAA, and therefore, it must be strictly construed.<sup>7</sup>

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<sup>5</sup>*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805, 850 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3<sup>d</sup> Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 63-64 (1995).

<sup>6</sup>*See Freeman v. Vance*, 319 F.2d 841 (5<sup>th</sup> Cir. 1963) (*per curiam*), *cert. denied*, 377 U.S. 930 (1964); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3<sup>d</sup> Cir. 1961), *cert. denied*, 372 U.S. 965 (1964); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 141-42 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 992-93 (1974); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 963 (1972); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 192 (1968), *aff'd*, *Neugebauer v. Secretary of Agriculture*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Independent Milk Producer-Distributors' Ass'n*, 18 Agric. Dec. 881, 882-83 (1959) (Denial of Interim Relief); *In re Benbush Dairy*, 17 Agric. Dec. 1185, 1188 (1958); *In re Acme Breweries, Inc.*, 9 Agric. Dec. 1418, 1427-30 (1950), *aff'd*, *Acme Breweries v. Brannan*, 109 F. Supp. 116 (N.D. Cal. 1952).

<sup>7</sup>*In re Kreider Dairy Farms, Inc.*, 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3<sup>d</sup> Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In* (continued...)

In order to obtain producer-handler status, a petitioner must strictly comply with the definition of “producer-handler” in the milk marketing order that is applicable to that petitioner. The evidence in this proceeding does not establish that Petitioner is a “producer-handler,” as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10). The evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not provide, as Petitioner’s own enterprise and at Petitioner’s own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41).

#### **D. The Market Administrator’s Determination is Accorded Deference**

An administrative agency’s interpretation of its own regulations must be accorded deference in any administrative or court proceeding, and an agency’s construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.<sup>8</sup>

The Market Administrator is the official responsible for administering the New England Milk Marketing Order, and the Market Administrator is specifically authorized to make rules and regulations to effectuate the terms and provisions of the New England Milk Marketing Order (7 C.F.R. § 1000.3(b)(2); Tr. 234). The Market Administrator has been working with milk marketing orders for 25 years and has been the New England Milk Marketing Order market administrator for 9 years (Tr. 231-34). The Market Administrator makes monthly determinations regarding the producer-handler status of enterprises regulated under the New England Milk Marketing Order (Tr. 241-43).

It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations.

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<sup>7</sup>(...continued)  
*re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yagur Farms, Inc.*, 33 Agric. Dec. 389, 405 (1974); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff’d*, *United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

<sup>8</sup>*Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

Moreover, the interpretation of that official is entitled to great weight.<sup>9</sup>

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2<sup>d</sup> Cir. 1943) (footnotes omitted):

The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

Therefore, I give considerable weight to the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order.

**E. The Market Administrator's Determination Is Consistent With Purpose of the Regulation Defining "Producer-Handler"**

The definition of the term "producer-handler," in what subsequently became the New England Milk Marketing Order, was amended on August 31, 1960, by adding the requirement that "the maintenance, care and management of the dairy herd and

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<sup>9</sup>*Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6<sup>th</sup> Cir. 1966); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 876 (1989); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 58-60 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7<sup>th</sup> Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 137 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055-56 (1973), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

other resources and facilities necessary to produce the milk . . . [must be] the personal enterprise and risk of such person” (25 Fed. Reg. 8283, 8285 (1960)). This amendment was preceded by a Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, and published on June 18, 1960 (25 Fed. Reg. 5488 (1960)), and by a Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Acting Secretary, United States Department of Agriculture, and published on August 16, 1960 (25 Fed. Reg. 7819 (1960)). Both of these *Federal Register* publications describe the purpose of the amendment, as follows:

In order to maintain producer-handler status, it is provided that the maintenance, care and management of the dairy animals and other resources necessary to produce the milk, and the processing, packaging and distribution of the milk shall be the personal enterprise of and the personal risk of the person involved. These standards are intended to distinguish the family-type operation normally involved, and to bring under full regulation operations which attempt to masquerade as those of<sup>[10]</sup> producer-handlers in their normal concept through leases, rental arrangements, and other devices designed to circumvent regulation by the order.

25 Fed. Reg. at 5494; 25 Fed. Reg. at 7825.

Petitioner represents itself as operating the world’s largest dairy store, Petitioner receives and processes about two-thirds of a tanker truck of milk each day, and Petitioner sells approximately 1.2 million gallons of milk per year (Tr. 119, 128, 493-94). Petitioner is not a small operation, but, small operations are generally characteristic of producer-handlers. Moreover, Petitioner is engaging in the very activity which the “own enterprise” and “own risk” amendment is designed to prevent; *viz.*, Petitioner is posing as a producer-handler through a lease to circumvent regulation as a handler under the New England Milk Marketing Order.

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<sup>10</sup>The words “those of” appear in the Acting Secretary’s Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders (25 Fed. Reg. 7819, 7825 (1960)), but do not appear in Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture (25 Fed. Reg. 5488, 5494 (1960)).

#### **F. The Market Administrator's Determination Is Consistent With Prior Cases**

This case is another in a long line of cases in which handlers have sought to avoid full regulation under milk marketing orders by leases and other devices employed to claim producer-handler status. The Judicial Officer and the courts have consistently upheld determinations by market administrators that leases and similar devices do not create producer-handler status.<sup>11</sup> Although the cases do not explicitly state that leases can never create producer-handler status, the overall rationale of these cases is that leases and similar devices do not create producer-handler status.

Petitioner relies on *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in support of its contention that its lease of Oakridge Farm's milking cows and milk production facilities qualifies Petitioner as a producer-handler under the New England Milk Marketing Order (Petitioner's Post-Hearing Brief at 12-17).

Petitioner's reliance on *Klocker* is misplaced. The facts in *Klocker* bear no resemblance to the facts presented in this proceeding. In *Klocker*, the Judicial Officer held that the petitioner, who was a producer-handler under a milk marketing order, did not lose his producer-handler status by reason of a contract in which the petitioner sold and leased back his dairy herd and hired the lessor as his employee, due to the unique facts presented and the setting in which the contract was created. In arriving at such conclusion, the Judicial Officer stated:

We do not have here any elements of a sham transaction to effect a bogus producer-handler status. *Cf., e.g., Elm Spring Farm, Inc. v. United States, supra.* Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the

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<sup>11</sup>See *United States v. Elm Spring Farm, Inc.*, 38 F. Supp. 508 (D. Mass. 1941), *aff'd*, 127 F.2d 920 (1<sup>st</sup> Cir. 1942); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986); *In re Pleasant View Farms, Inc.*, 36 Agric. Dec. 1262 (1977); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm, Inc.*, 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964), *aff'd*, *Brown v. United States*, 367 F.2d 907 (10<sup>th</sup> Cir. 1966); *In re Eugene M. Olson*, 22 Agric. Dec. 877 (1963); *In re John Velozo*, 5 Agric. Dec. 739 (1946); *In re Martin & Costa*, 4 Agric. Dec. 636 (1945); *In re Antone Amaral*, 3 Agric. Dec. 367 (1944); *In re Henshaw*, 1 Agric. Dec. 721 (1942); *In re Martin S. Cosgrove & Sons, Inc.*, 1 Agric. Dec. 510 (1942), *aff'd*, *Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Martin S. Cosgrove*, 1 Agric. Dec. 503 (1942), *aff'd*, *Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943).

period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, “any person who operates a dairy farm and a distributing plant.” It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

*In re Jerome Klocker, supra*, 26 Agric. Dec. at 1057.

Unlike the petitioner in *Klocker*, Petitioner in this proceeding never owned a dairy farm, does not know how to operate a dairy farm (Tr. 145), was not a producer-handler at the time Petitioner leased Oakridge Farm’s milking cows and milk production facilities (Tr. 44-45, 51, 133, 142-44, 178-79, 260), and never managed or operated Oakridge Farm (Tr. 93).

The case law also supports the proposition that a handler does not achieve producer-handler status if the handler merely engages in a sham transaction designed to circumvent the milk pricing regulations or if the lessee fails to assume the risks of milk production. *See, e.g., In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 604-05 (1972) (“In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation.”). For example:

- In *Elm Spring Farm, Inc. v. United States*, 127 F.2d 920 (1<sup>st</sup> Cir. 1942), a handler “purchased” cows from various sellers, but paid for the cows with a combination of promissory notes and stock, and the “sellers” were entitled to “repurchase” the cows under liberal terms. 127 F.2d at 923. The “sellers” agreed under separate contracts to maintain the cows and deliver milk to the handler and further guaranteed that the cost of producing milk, including the expense of cattle illness or death, would not exceed the blend price plus a specified figure. *Id.* The court called this scheme an “elaborate camouflage” in which the handler “avoid[ed] the risks of production.” *Id.* at 927. *See also Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943) (invalidating a similar scheme in which cows were “purchased” with a small cash payment and substantial note on which no payments were made and where the only payments made on a purported lease were based on the quantity and butterfat content of milk produced).

- In *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986), the petitioner leased a farm, but had a joint checking account with the lessor and various related

businesses, including two other dairy farms, which thereby pooled their resources. *Id.* at 45. The lessor controlled the bank account. *Id.* The ledger sheet of Echo Spring did not reflect whether it had withdrawn more from the account than it had deposited, or vice versa, and Echo Spring frequently withdrew more than it deposited. *Id.* at 44, 46. The lease payments by Echo Spring were made from the same checking account, *Id.* at 47, meaning the related businesses subsidized Echo Spring's lease payments.

- In *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972), the Judicial Officer denied a petition for producer-handler status where the petitioner claimed to be purchasing a herd at Bringhurst farm and claimed that the operation of the milk production facilities was under the petitioner's control. *Id.* at 954. The evidence showed, however, that the petitioner merely accepted milk from the farm, never agreed to a purchase price, and never identified the cows to be "purchased." *Id.* at 954-55. Furthermore, "Petitioner carried no insurance on the cows or on any of the equipment on the Bringhurst farm [and] Petitioner gave Bringhurst no instruction on feeding or caring for the cows." *Id.* at 955.

- In *In re Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (1970), the Judicial Officer found that the petitioner was not a producer-handler where the petitioner leased cows that were delivered to the petitioner's property during lactation and returned when they stopped lactating. In that case, the petitioner was not responsible for loss of cows and, when the cows were not on the petitioner's property, the petitioner took no interest in their breeding, care, sale, or health. *Id.* at 1008-09.

[I]t is plain that the dairy farmers who own the cows suffer the risks of the cows going dry and dying even when the cows are under lease and on the petitioner's premises. Too, the petitioner has no responsibilities for the care of the cows, the breeding of the cows, the health of the cows or any other risk involving the cows when they are not under lease and being fed and milked at petitioner's dry lot.

*Id.* at 1010.

- In *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964), the Judicial Officer denied a petition for producer-handler status where the petitioner "purchased" an undivided one-tenth interest in cows for \$15 per cow, under an arrangement that would return the \$15 to the petitioner upon the sale of each cow. *Id.* at 22-23. The petitioner obtained the absolute right to all milk produced by the cows, which stayed in the possession of the majority owner, and the petitioner paid the majority owner a fee "for the services required" that was the same as the price of milk. The

Judicial Officer noted that the petitioner assumed no risk, since the \$15 fee per cow would be returned. The Judicial Officer stated:

The record as a whole and the contracts relied upon by petitioners *even if accepted at face value* indicate that petitioners do not operate a dairy farm and do not bear any risk of producing the milk handled by them and that the production facilities, as distinguished from the milk processing facilities, are not the personal enterprise of petitioners.

*Id.* at 27-28.

*Elm Spring Farm, Inc. v. United States, supra; Cosgrove v. Wickard, supra; In re Echo Spring Dairy, Inc., supra; In re Clyde Lisonbee, supra; In re Willow Crossing Dairy Farm, supra; and In re Fred A. Brown, supra,* all support the proposition that a handler that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not obtain producer-handler status.

The record establishes that Petitioner leased Oakridge Farm's milking cows and milk production facilities for the purpose of changing its status from that of a fully regulated handler to that of a producer-handler exempt from the provisions of the New England Milk Marketing Order applicable to fully regulated handlers. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.) Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145). Petitioner did not become a dairy farmer by virtue of its lease of Oakridge Farm's milking cows and milk production facilities, and I conclude that Petitioner is a handler that is trying to circumvent the provisions of the New England Milk Marketing Order applicable to fully regulated handlers by claiming to lease milking cows and milk production facilities, while in reality simply buying milk from Oakridge Farm. Under these circumstances, Petitioner is not a producer-handler under the New England Milk Marketing Order.

There are no cases precisely on point to support the proposition that a handler, which leases a dairy farm, dictates the essential elements of the dairy farm's management, and assumes substantially the entire risk of dairy farming, is nevertheless still not a producer-handler. Respondent maintains Petitioner was not operating "at its own risk" because there were numerous risks not assumed or borne by Petitioner in that Petitioner had no interest in the land and anything that happened to the land (such as toxic waste) was at the risk of the dairy farm owner.

Moreover, Respondent argues that the capital risk inherent in property ownership remains with the Bahlers. (Respondent's Post-Hearing Brief at 10.)

In December of 1997, Petitioner entered into a lease with Oakridge Farm, an approximately 550-cow dairy farm in Ellington, Connecticut, operated by Vern Bahler and members of his family (PX 2). The operative lease, which is a modification of the December 1997 lease, was signed on June 16, 1998. The lease was for the milking cows and milk production facilities of Oakridge Farm. Specifically, Petitioner leased the herd of milking cows, barns, milking parlors, personal property, and "all equipment necessary to produce raw milk and its related products" (PX 3 ¶¶ 1-2). Petitioner also agreed to pay all ordinary and necessary expenses related to the production of milk and "to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor" (PX 3 ¶ 3). The risk and responsibility "include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance" (PX 3 ¶ 3). The lease has a term of 2 years (PX 3 ¶ 4).

Petitioner argues that the lease of Oakridge Farm's milking cows and milk production facilities imposes on Petitioner every identifiable expense of dairy farming, from labor costs to building maintenance and also every risk of dairy farming, whether identified in the lease or not. Under the lease, Petitioner dictates all crucial elements of the operation of the enterprise. (Petitioner's Post-Hearing Brief at 9.)

Sample invoices demonstrate that Petitioner pays the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinarian services, and services to keep track of animals (Tr. 188-89). Petitioner also maintains liability insurance on Oakridge Farm, with a benefit of \$1 million per occurrence and \$2 million per year, plus an umbrella policy with a benefit of \$45 million (Tr. 498-99).

Respondent maintains that Petitioner's relationship with Oakridge Farm is effectively "no different than the ordinary relationship between a handler buying milk from producers" (Respondent's Post-Hearing Brief at 13). All of the conditions of the purchase of milk are ones for which any handler may contract with any milk producer. The evidence was uncontroverted that the operation of Oakridge Farm did not change after the lease. The Bahlers operated Oakridge Farm before the execution of the lease and they operated Oakridge Farm after the execution of the lease (Tr. 93). The record does not contain any evidence indicating that Petitioner ever took over operation of the Oakridge Farm milk production facilities. After the June 16, 1998, lease, the Bahlers retained complete control over

the operation of Oakridge Farm milk production facilities, including the maintenance, care, and management of the Oakridge dairy herd and other Oakridge Farm resources and facilities that are used to produce milk. Under these circumstances, Petitioner's June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities is not consistent with the "dairy farmer," and "own enterprise" requirements in the definition of "producer-handler" in the New England Milk Marketing Order.

Respondent also maintains that the lease fails to support Petitioner's contention that it is a producer-handler because the connections between Oakridge Farm and Bahler Farms, Inc., invalidate any effort at producer-handler status, independent of the principle that a handler cannot become a producer-handler merely by leasing a herd of cows (Respondent's Post-Hearing Brief at 10).

The Bahlers own and operate two contiguous farms, Oakridge Farm and Bahler Farms, Inc. (Tr. 56, 102, 267). Petitioner has no role in the operation of and no interest in Bahler Farms, Inc. (Tr. 48). Therefore, to the extent that Bahler Farms, Inc., and Oakridge Farm are operated jointly, Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk.

The record establishes that Oakridge Farm and Bahler Farms, Inc., share equipment, a full-time calf raiser, a mechanic, and full-time milkers (Tr. 102, 266-68); the Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04); the records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69); Oakridge Farm and Bahler Farms, Inc., jointly share the financial risk of a loan for which they pledged security to First Pioneer Farm Credit (Tr. 269); and Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71). Since Oakridge Farm is operated, in part, by Bahler Farms, Inc., an entity in which Petitioner has no interest, Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk. Thus, Petitioner is not a "producer handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Petitioner maintains that the Market Administrator's decision that Petitioner is not a producer-handler is arbitrary, capricious, and an abuse of the Market Administrator's administrative authority. Petitioner claims that the Market Administrator's determination denied Petitioner equal protection of the laws and due process because Petitioner contends it has demonstrated that it has assumed the full risk of dairy farming and the Market Administrator has granted

producer-handler status to others (already producer-handlers) who have leased farms but plainly assumed less of the risk of dairy farming than has Petitioner. (Petitioner's Post-Hearing Brief at 18-28, 38-41.)

Additionally, Petitioner notes that the Market Administrator admitted that the term "dairy farmer" is not defined anywhere in the New England Milk Marketing Order (Tr. 298); thus, making the Market Administrator the sole power to decide what is and is not a dairy farmer (Petitioner's Post-Hearing Brief at 10 n.5).

The Market Administrator based his decision that Petitioner was not a producer-handler on the definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), which requires that, in order to be a producer-handler, a person must be both a dairy farmer and a handler who provides, as the person's own enterprise and at the person's own risk, the maintenance, care, and management of a dairy herd and other resources and facilities that are used to produce milk.

The Market Administrator has permitted three enterprises to lease cows and milk production facilities and retain their designations as producer-handlers, even though these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (Tr. 317, 425, 441).

In one instance, a dairy farmer and milk processor retained its producer-handler status despite the existence of three leases pursuant to which the dairy "will be leasing [redacted] head of cattle . . . and [redacted] cattle barn(s)" and "will be responsible for all bills related to the feed, health care and management of the said [redacted] cattle." (PX 9(a), 9(b), and 9(c)). Each lease is terminable by either party on 30 days' notice. *Id.* The leases do not contain any provision relating to risks associated with the farms, such as the risk that cows might perish, or that employees might cause harm, or that acts of God might cause damage. Rather, the lessee is responsible to pay only for feed, health care, and management.

The Market Administrator testified that a milk processor, such as the one involved in the leases in PX 9(a)-(c), could obtain up to 25 per centum of its milk by way of such leases without jeopardizing its producer-handler status (Tr. 253). The Market Administrator conceded that the lessee had not assumed the full risks of the maintenance, care, and management of facilities used to produce milk, but nevertheless retained producer-handler status (Tr. 316-17). Therefore, the milk processor would be escaping significant risks relating to up to one-quarter of the farm operation that supplies its milk.

Another lease which did not cause the Market Administrator to remove the lessee's producer-handler status simply "assigned and transferred" milk produced on a dairy farm to the producer-handler that was leasing the cows (PX 17 Section

II(c)). There is not even any pretense that the lessee is providing, as the lessee's own enterprise and at the lessee's own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk.

In the third lease, the lessee assumed the risk of loss or damage to milk and also agreed to indemnify the lessor against liability for injuries to workers, but did not otherwise assume the risks of the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (PX 18 at 1; Tr. 441).

The Market Administrator justified the distinction between Petitioner and the three other lessees by stating that the other lessees were producer-handlers prior to entering into leases and that they are limited to acquiring 25 per centum of their milk from leased cows (Tr. 252-55, 317, 427, 441). Unlike the three lessees, which have been allowed to retain their producer-handler status, Petitioner was not a producer-handler at the time it entered into the June 16, 1998, lease; Petitioner was not a dairy farmer at the time it entered into the June 16, 1998, lease; and Petitioner acquired 100 per centum of its milk supply from the milking cows and milk production facilities which Petitioner leased from Oakridge Farm.

While the three unidentified lessees arguably do not strictly conform to the definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), correction of their status would not be accomplished by designating Petitioner, who does not conform to the definition of "producer-handler," as a producer-handler.

#### **V. Petitioner's Appeal**

Petitioner raises five issues in Petitioner's Appeal. First, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order is arbitrary and capricious (Petitioner's Appeal at 6-18).

I disagree with Petitioner's contention that the Market Administrator's determination, that Petitioner is not a producer-handler under the New England Milk Marketing Order, is arbitrary and capricious. As fully explicated in this Decision and Order, *supra*, the Market Administrator's determination carries out the purposes of the AMAA and the New England Milk Marketing Order, is consistent with other cases involving the lease of milk production facilities by handlers, and is supported by the facts. I conclude that the Market Administrator's determination is rational and that Petitioner failed to prove that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10),

is not in accordance with the law.

Second, Petitioner contends that the ALJ erroneously found that if Petitioner was recognized as a producer-handler under the New England Milk Marketing Order, Petitioner would have a competitive advantage over handlers of 25 to 37 cents per gallon of milk, which advantage would interfere with the orderly operation of the New England Milk Marketing Order. Petitioner points out that there is evidence which supports a finding that Petitioner would, as a producer-handler, enjoy a competitive advantage over handlers, but Petitioner states the finding is based on such "thin evidence as to be unsupported" and the estimates of price advantage "do not account for the cost to Stew Leonard's of operating Oakridge Farm, and therefore have no relationship with the amount of money Stew Leonard's would save -- if any -- by becoming a handler." (Petitioner's Appeal at 11 n.4.)

The ALJ found, as follows:

33. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-245, 250). The payment amount that Petitioner would have avoided if it had been a producer-handler was as high as thirty-seven cents per gallon (RX-C; Tr. 247-252).

34. This advantage would interfere with the orderly operation of the Order and of the marketing of milk in Order No. 1. (Tr. 245).

35. If Petitioner were a producer-handler, it would have as much as a twenty-five cent per gallon advantage over his [sic] competitor, Stop & Shop. This is an industry where differences of less than one cent per gallon can have a competitive impact in this industry. (Tr. 452, 482, 484).

Initial Decision and Order at 10-11.

The record supports the ALJ's findings regarding competitive advantages that Petitioner would obtain if Petitioner were found to be a producer-handler and the effect of that competitive advantage on the operation of the New England Milk Marketing Order (RX C; Tr. 244-52, 451-52, 482-85). Moreover, the record does not support a finding that Petitioner paid more for milk after it leased Oakridge Farm's milking cows and milk production facilities than Petitioner paid for milk before Petitioner executed the lease. I do not find that the ALJ's findings regarding potential competitive advantages to Petitioner were error, and I do not find that the

ALJ erred by failing to find that Petitioner incurred costs in connection with Petitioner's lease which offset competitive advantages that Petitioner would have obtained had the Market Administrator determined Petitioner to be a producer-handler.

Third, Petitioner contends that case law supports Petitioner's Petition (Petitioner's Appeal at 18-24).

Petitioner cites only one case, *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in which the Judicial Officer concluded that a person who leased cows was a producer-handler. In all of the other cases cited by Petitioner, the Judicial Officer or the courts upheld market administrators' denials of producer-handler status.<sup>12</sup>

In *Klocker*, the Judicial Officer concluded that Klocker, who had been a *bona fide* producer-handler for a number of years, did not lose that status by reason of an April 1, 1964, lease of a dairy herd. Klocker had purchased a farm in 1949, started a dairy farm operation on the premises in 1955, and constructed a milk processing plant on the premises in 1956. The Judicial Officer found that Klocker had been the sole owner of all lands, buildings, machinery, equipment, and facilities of both the dairy farm and the milk processing plant since 1962. In addition, prior to April 1, 1964, Klocker owned 200 dairy cows located on the dairy farm. Then, on April 1, 1964, Klocker sold the dairy cows to Darrel Rausch and on the same day leased back the cows and employed Rausch as a farm employee. The cows were never removed from Klocker's premises and Klocker retained ownership of the equipment, buildings, and land devoted to the production of milk. *Id.* at 1051, 1055.

The Judicial Officer found that, due to the unique facts presented and the setting in which the lease of the cows was created, Klocker's status as a producer-handler under Order No. 76 was not changed by virtue of the sale and lease back of the dairy herd, as follows:

We do not have here any elements of a sham transaction to effect a bogus producer-handler status. Cf., e.g., *Elm Spring Farm, Inc. v. United States*, *supra*. Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the

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<sup>12</sup>*Elm Spring Farm v. United States*, 127 F.2d 920 (1<sup>st</sup> Cir. 1942); *Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986); *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964).

order in effect during part of the period in controversy, that is, during the period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

Effective May 1, 1965, more specific requirements for producer-handler status were enacted. (See Finding of Fact 8.) Briefly, section 1076.9 requires, in pertinent part, that a "producer-handler" be a dairy farmer and that the "maintenance, care and management of the dairy animals and other resources necessary to produce the milk . . . are the personal enterprise and risk of" the producer-handler. It appears to us that the production of the milk utilized at petitioner's plant continued to be the enterprise and risk of petitioner subsequent to the agreement of April 1, 1964. That agreement did not deprive petitioner of the responsibility for the management, supervision and control of the dairy herd and farm and the risks incident to the production of milk or alter the fact that the production of milk on petitioner's farm was the "personal enterprise" of petitioner.

"The regulatory scheme embodied in the Order is an intensely practical business, and the question now before us is not to be determined by a purely abstract inquiry as to who had 'title' to the cows which produced the milk." *Elm Spring Farm, Inc. v. United States*, *supra*, at p. 926. It is concluded, on the basis of the peculiar or unique facts set forth in the record and especially in view of *the setting* in which the contract of April 1, 1964, was created, that petitioner was a producer-handler as defined in the order. . . . Accordingly, the pertinent contested obligations imposed upon petitioner are not "in accordance with law".

*In re Jerome Klocker*, *supra*, 26 Agric. Dec. at 1057-58 (emphasis in original) (footnote omitted).

I disagree with Petitioner's contention that the case law supports Petitioner's Petition. In fact, the cases cited by Petitioner, except *Klocker*, uphold

determinations by various market administrators that leases and similar devices do not create producer-handler status. Moreover, *Klocker* concerns a petitioner who was a producer-handler prior to his sale and lease back of the cows, was the owner of the farm on which the cows were located, was responsible for the management, supervision, and control of the dairy herd and farm, and bore the risks incident to the production of milk. Petitioner in this proceeding was not a producer-handler at the time it executed the lease with Oakridge Farm, does not own Oakridge Farm and has not leased Oakridge Farm, and is not responsible for the management, supervision, or control of Oakridge Farm or the dairy herd or milk production facilities located on Oakridge Farm. I find *Klocker* inapposite.

Fourth, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order conflicts with the AMAA. Specifically, Petitioner asserts that one of the goals of the AMAA is to ensure a sufficient quantity of pure and wholesome milk to meet current needs and that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order undermines that goal of the AMAA. (Petitioner's Appeal at 24-25.)

I agree with Petitioner's contention that one of the goals of the AMAA is to ensure an adequate supply of pure and wholesome milk. Section 8c(18) of the AMAA provides, as follows:

**§ 608c. Orders regulating handling of commodity**

...

**(18) Milk prices**

... Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, *he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs* and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity

for hearing, make adjustments in such prices.

7 U.S.C. § 608c(18) (emphasis added).

Moreover, the USDA publication which describes the Dairy Division, Agricultural Marketing Service, makes clear that one of the purposes of the Federal milk order provisions is to ensure that consumers have an adequate supply of pure and wholesome milk, as follows:

### **Objectives**

The objective of the Order Formulation Branch is to develop Federal milk order provisions that stabilize market conditions. This is accomplished through assisting dairy farmers in developing steady, dependable markets by providing prices for their milk that are reasonable in relation to economic conditions. Consumers are then assured of an adequate supply of pure and wholesome milk.

PX 8 at 1.

However, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of an adequate supply of pure and wholesome milk, as Petitioner contends. Producer-handler status is not a prerequisite to having control over the quality of milk that a person receives for processing. Each handler may contract with milk producers for milk that meets that handler's quality standards. (Tr. 273.) The record establishes that Petitioner, a handler under the New England Milk Marketing Order, sought and obtained milk that met its quality standards. The Market Administrator's determination that Petitioner was not a producer-handler under the New England Milk Marketing Order had no effect on the purity and wholesomeness of the milk obtained, processed, packaged, and sold by Petitioner. Therefore, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of ensuring an adequate supply of pure and wholesome milk, as Petitioner contends.

Fifth, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order violates Petitioner's right to equal protection of the laws (Petitioner's Appeal at 25-28). Specifically, Petitioner contends that the Market Administrator's determination "— denying producer-handler status to Stew Leonard's on the basis of inadequate risk while granting such status to others who bear demonstrably less

risk – is most alarming because it violates the constitutional guarantees of due process and equal protection under the law” (Petitioner’s Appeal at 25-26).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.<sup>13</sup> Equal protection requires that persons similarly situated be treated alike.<sup>14</sup> However, Petitioner has failed to establish that the

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<sup>13</sup>See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court’s approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

<sup>14</sup>It should be noted that virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that the Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (continued...)

Market Administrator granted producer-handler status to persons that are similar to Petitioner. The Market Administrator has permitted three producer-handlers to obtain additional milk supplies by leasing cows and milk production facilities (PX 9, PX 17, PX 18). These three producer-handlers owned and operated a dairy farm as their own enterprise and at their own risk at the time they leased additional cows and milk production facilities. Moreover, these three producer-handlers may only obtain up to 25 per centum of their milk from leased cows without jeopardizing their status as producer-handlers (Tr. 253).

Petitioner is not similarly situated to these three producer-handlers. Petitioner did not own or operate a dairy farm as its own enterprise and at its own risk at the time Petitioner leased Oakridge Farm's milking cows and milk production facilities. Instead, at the time Petitioner executed the lease, Petitioner was a handler under the New England Milk Marketing Order and did not own or have any interest in a dairy farm, milk production facilities, or cows. Moreover, unlike the three producer-handlers who maintain that status despite their lease of cows and milk production facilities, Petitioner's leased milking cows and milk production facilities provide Petitioner with 100 per centum of the milk which Petitioner processes.

Petitioner has not established that the Market Administrator determined that persons similar to Petitioner are producer-handlers. Therefore, I conclude that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not a violation of Petitioner's right to equal protection of the laws.

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<sup>14</sup>(...continued)

(holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

## VI. Respondent's Cross-Appeal

Respondent raises six issues in Respondent's Cross-Appeal. First, Respondent contends that, in Findings of Fact No. 23, the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (Respondent's Cross-Appeal at 2). Specifically, Respondent states:

The ALJ says that the market administrator said that Stew Leonard's could not be a producer-handler "until" certain changes were made, possibly suggesting that Stew Leonard's would be a producer-handler if the changes were made. In fact, the market administrator, in that January 15, 1999 [sic], letter (PX 11), stated that the changes would have to be made "before" Stew Leonard's could be a producer-handler. The market administrator is not saying that the changes would create a producer-handler, i.e. Stew Leonard's would still have to meet the "own enterprise and risk" standard of the order. The market administrator is saying only that without the noted changes, Stew Leonard's could not begin to meet the standards.

Respondent's Cross-Appeal at 2.

Petitioner contends that the ALJ's reading of the Market Administrator's January 15, 1998, letter is correct (Petitioner's Reply to Respondent's Cross-Appeal at 4).

I agree with Respondent's contention that the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (PX 11). The Market Administrator's letter does not contain the word "until," and I do not adopt the ALJ's Findings of Fact No. 23. Instead, I state, in Findings of Fact No. 14, *supra*, that the Market Administrator's January 15, 1998, letter (PX 11) advises Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, and I quote the January 15, 1998, letter from the Market Administrator to Robinson & Cole, LLP.

Second, Respondent contends that, in Findings of Fact No. 25, the ALJ incorrectly states that Petitioner had assumed all risks arising from the operation of Oakridge Farm (Respondent's Cross-Appeal at 2-3). Petitioner contends that the ALJ's Findings of Fact No. 25 is correct and should remain undisturbed (Petitioner's Reply to Respondent's Cross-Appeal at 4-6).

I agree with Respondent that the ALJ erroneously found, in Findings of Fact No. 25, "Stew Leonard's has also assumed, pursuant to the June 16, 1998, lease, all

risks arising from the operation of Oakridge Farm.” As an initial matter, under the June 16, 1998, lease (PX 3), Petitioner did not assume all risks “arising from the operation of Oakridge Farm.” Instead, the lease provides that Petitioner agrees to “assume all risk . . . of the cows, equipment, buildings, and labor” (PX 3 ¶ 3). Moreover, the record reveals a linkage between Bahler Farms, Inc., and Oakridge Farm such that Petitioner’s June 16, 1998, lease did not result in Petitioner assuming all risks associated with the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Tr. 97-102, 266-72). Therefore, I do not adopt the ALJ’s finding, in Findings of Fact No. 25, that, pursuant to the June 16, 1998, lease, Petitioner assumed “all risks arising from the operation of Oakridge Farm.”

Third, Respondent contends that, on page 16 of the Initial Decision and Order, the ALJ makes misleading assertions (Respondent’s Cross-Appeal at 3). Specifically, Respondent contends, as follows:

On page 16 of the decision, the ALJ asserts that Stew Leonard’s would not ride the pool if it were a producer-handler, and thus not contribute to cutthroat competition. This is misleading. Whether Stew Leonard’s would ride the pool or not is not the issue concerning competition. As the ALJ found in findings number 33 and 34, if Stew Leonard’s were a producer-handler it would have “a competitive advantage vis-a-vis fully regulated handlers” and this “advantage would interfere with the orderly operation of the Order and the marketing of milk in Order No. 1.”

Respondent’s Cross-Appeal at 3.

Petitioner contends that the ALJ’s observation concerning Petitioner’s involvement in the pool is correct (Petitioner’s Reply to Respondent’s Cross-Appeal at 6-8).

I agree with Respondent that whether Petitioner would ride the pool, as a producer-handler, is not relevant to the issue of the competitive advantage Petitioner would have vis-a-vis fully regulated handlers. Moreover, I agree with the ALJ’s findings, in Findings of Fact Nos. 33 and 34, that if Petitioner were designated a producer-handler, it would have a competitive advantage vis-a-vis fully regulated handlers and that Petitioner’s advantage would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing area. Therefore, I have not adopted the ALJ’s statements, on page 16 of the Initial Decision and Order, that “Stew Leonard’s would not contribute to cutthroat competition” nor have I adopted the ALJ’s statements regarding whether Petitioner rides the pool.

Fourth, Respondent contends that, while the ALJ implicitly held that the Market Administrator's determination regarding Petitioner's producer-handler status is not arbitrary and is not the result of unequal treatment, the ALJ failed to explicitly state that the Market Administrator's determination is not arbitrary and is not the result of unequal treatment (Respondent's Cross-Appeal at 3-4).

I disagree with Respondent's contention that the ALJ's conclusion regarding the Market Administrator's determination is not explicit. The ALJ concludes, as follows:

For reasons set forth above, I conclude that the evidence herein shows that the Market Administrator, in the subject case, made a reasoned decision in denying producer-handler status to Petitioner and that the Petitioner has not carried the burden of showing that the Market Administrator's determination was not in accordance with law. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that the Respondent has exercised reasonable discretion, for articulated reasons that do not deviate from nor ignore the ascertainable goal of the Marketing Order. Accordingly, the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law.

Initial Decision and Order at 37-38.

While the ALJ did not use the words that Respondent would choose, I find that the ALJ's conclusion that "the Market Administrator . . . made a reasoned decision in denying producer-handler status to Petitioner" is an explicit conclusion that the Market Administrator's denial of Petitioner's status as a producer-handler under the New England Milk Marketing Order, is not arbitrary. Moreover, the ALJ's conclusion that "the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law" is an explicit conclusion that the Market Administrator violated no law, including the Fifth Amendment guarantee of equal protection of the law, when he determined that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Fifth, Respondent states that the ALJ quotes misleading testimony given by the Market Administrator, as follows:

On page 30 of the Decision, the ALJ includes some cross examination of the market administrator where the market administrator says that the factors he discovered concerning joint ownership of an insurance policy did

not color his thinking. This is misleading. Although the market administrator did not know all of this information when he initially denied Stew Leonard's request for producer-handler status, it became part of his decision when he did learn of it. As described in respondent's initial Brief, the market administrator makes his final determinations on handler obligations based on audits conducted subsequent to the actual deliveries of milk. Moreover, the general provisions governing all federal milk marketing orders provide that a handler remains obligated for payments for two years after each month's handler reports are received by the market administrator. 7 C.F.R. 1000.6. Therefore, these factors were ultimately included in the market administrator's determination. In addition, the determination of producer-handler status is done monthly, i.e. the grant of status one month does not automatically carry over to the net [sic] month. So, as of approximately December, 1998, the market administrator knew of these facts before each of his succeeding denials of Stew Leonard's request for producer-handler status.

Respondent's Cross-Appeal at 4-5.

I disagree with Respondent's contention that the ALJ's quotation of the Market Administrator's testimony is misleading. The ALJ's quotation of the Market Administrator's testimony is accurate and is not taken out of context. Therefore, while I do not quote the testimony in question in this Decision and Order, I do not find that the ALJ erred by accurately quoting the Market Administrator's testimony.

The Market Administrator testified that, when he made his determinations in February 1998 and July 1998 regarding Petitioner's producer-handler status, he did not take into account the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm (Tr. 278-79). However, even without these two factors, I find that the Market Administrator had a rational basis for his February 1998 and July 1998 determinations that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10). Moreover, the Market Administrator's determination of producer-handler status is made monthly (7 C.F.R. § 1001.10). Once the Market Administrator became aware of the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm, those factors could become part of the basis for the Market Administrator's continuing refusal to determine that Petitioner is a producer-handler under the New England Milk Marketing Order.

Sixth, Respondent asserts that "[t]he most significant element of the ALJ's

Decision that needs to be amended are the ‘concerns’ the ALJ expresses over the [M]arket [A]dministrator’s exercise of discretion in administering the order. *See* [Initial Decision and Order at] 28, 29, 36-38.” (Respondent’s Cross-Appeal at 5-6.) Petitioner contends that the ALJ’s expression of doubt concerning the Market Administrator’s use of discretion in denying Petitioner’s Petition is valid and should be preserved (Petitioner’s Reply to Respondent’s Cross-Appeal at 10).

The ALJ concluded that the Market Administrator’s determination that Petitioner was not a producer-handler was a reasoned decision, was correct, and was in accordance with law (Initial Decision and Order at 37-38). I agree with the ALJ’s conclusions. In light of the ALJ’s conclusions regarding the Market Administrator’s determination of Petitioner’s status and my agreement with the ALJ’s conclusions, I find the ALJ’s concerns about the Market Administrator’s exercise of discretion are not relevant to the issue in this proceeding; *viz.*, whether the Market Administrator’s determination that Petitioner is not a “producer-handler,” as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Therefore, I do not adopt the ALJ’s discussion regarding the concerns the ALJ has with the Market Administrator’s use of discretion.

I have considered all the contentions of the parties and based upon the facts and existing case law, conclude that Petitioner is not entitled to producer-handler status under the New England Milk Marketing Order. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that Petitioner has not carried its burden of showing that the Market Administrator’s determination was not in accordance with law.

## **VII. Conclusions of Law**

1. Petitioner is a “handler,” as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9).

2. Petitioner is not a dairy farmer.

3. Petitioner does not provide, as Petitioner’s own enterprise and at Petitioner’s own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk, which Petitioner leases from Oakridge Farm.

4. Petitioner is not a “producer-handler,” as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

5. The Market Administrator’s determination that Petitioner is not a “producer-handler,” as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law.

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

### VIII. Order

Petitioner's Amended Petition is dismissed.

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**In re: STEW LEONARD'S.  
98 AMA Docket No. M 1-1.  
Order Granting Petitioner's Motion To Withdraw Motion To Stay filed  
May 1, 2000.**

Donald A. Tracy, for Respondent.  
James A. Wade and Brian O'Donnell, Hartford, CT, for Petitioner.  
Sydney Berde, St. Paul, MN, for Agri-Mark, Inc.  
John H. Vetne, Newburyport, MA, for New England Dairies, Inc.  
*Order issued by William G. Jenson, Judicial Officer.*

On March 16, 2000, I issued a Decision and Order: (1) concluding the Market Administrator's determination that Stew Leonard's [hereinafter Petitioner] is not a "producer-handler" as defined in section 1001.10 of the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. § 1001.10), is in accordance with law; and (2) dismissing Petitioner's Amended Petition in which Petitioner requested that the Secretary of Agriculture designate Petitioner as a producer-handler. *In re Stew Leonard's*, 59 Agric. Dec. \_\_\_\_, slip op. at 3, 62-63 (Mar. 16, 2000).

On April 10, 2000, Petitioner filed Petitioner's Motion To Stay, which states in its entirety:

The petitioner in the above-captioned case, Stew Leonard's, hereby respectfully requests that the Secretary stay enforcement of its March 16, 2000 Decision And Order. As support for this motion, the petitioner states that it has this day filed a Petition For Review with the United States District Court for the District of Connecticut pursuant to 7 U.S.C. 608c(15)(B).

On April 18, 2000, Petitioner filed Withdrawal of Petitioner's Motion To Stay, requesting leave to withdraw Petitioner's Motion To Stay. On May 1, 2000, Donald A. Tracy, counsel for the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], orally informed the Judicial Officer that Respondent would not be filing a response to Petitioner's

Withdrawal of Petitioner's Motion To Stay. On May 1, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Petitioner's Withdrawal of Petitioner's Motion To Stay.

A party does not have the power to withdraw a motion filed with the Hearing Clerk as a matter of right.<sup>1</sup> However, based upon a careful consideration of the record, I find no reason to deny Petitioner's Withdrawal of Petitioner's Motion To Stay.

For the foregoing reason, Petitioner's Withdrawal of Petitioner's Motion To Stay is granted.

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<sup>1</sup>See generally *In re Apex Meat Co., Inc.*, 46 Agric. Dec. 14, 16-17 (1987) (stating that, under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, a party does not have the right to withdraw a motion filed with the Hearing Clerk).

**ANIMAL WELFARE ACT**  
**DEPARTMENTAL DECISION**

**In re: SUSAN DeFRANCESCO AND EAST COAST EXOTICS, INC., A  
CONNECTICUT CORPORATION.**

**AWA Docket No. 99-0036.**

**Decision and Order filed May 1, 2000.**

**Failure to file answer – Exhibitor – Animal facilities – Housekeeping – Records – Ventilation –  
Veterinary care – Identification – Recordkeeping – Stay order – Due process – Place of hearing  
– First amendment – Ability to pay – Correction of violations – New evidence – Civil penalty –  
License suspension – Cease and desist order.**

The Judicial Officer affirmed the Default Decision by Administrative Law Judge Edwin S. Bernstein (ALJ) assessing a \$20,000 civil penalty against Respondents, suspending Respondents' Animal Welfare Act (Act) license for 70 days, and directing Respondents to cease and desist from violating the Act and the Regulations and Standards issued under the Act. Respondents' failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the Default Decision was properly issued. The Judicial Officer rejected Respondents' request to stay the ALJ's Default Decision. The ALJ's Default Decision did not become effective because Respondents filed a timely appeal to the Judicial Officer (7 C.F.R. § 1.139) and a stay of the ALJ's Default Decision would be a nullity. The Judicial Officer rejected Respondents' contention that they were denied due process because they did not receive the Complaint or the Motion for a Default Decision. The Judicial Officer stated that due process is satisfied if notice of a proceeding is sent in a manner reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Judicial Officer concluded that the Rules of Practice, which provides for service by ordinary mail to a respondent's last known principal place of business or last known residence after certified mail is returned marked by the postal service as "unclaimed" or "refused" (7 C.F.R. § 1.147(c)(1)), which procedure was followed in the proceeding, meets the requirements of due process. The Judicial Officer rejected Respondents' contention that their inability to travel to Washington, DC, denied them due process. The Judicial Officer stated that, while the Hearing Clerk is located in Washington, DC, the Rules of Practice do not require Respondents to personally deliver documents to the Hearing Clerk. Instead, 7 C.F.R. § 1.147(g) provides only that a document is deemed to be filed at the time the document reaches the Hearing Clerk and Respondents could have used the mail to effectuate filing. The Judicial Officer also stated the Administrative Procedure Act (5 U.S.C. § 554(b)) requires administrative law judges to give due regard to the convenience and necessity of the parties with respect to the location of a hearing and rejected Respondents' speculation that the ALJ would have responded to a request for a hearing by scheduling the hearing in Washington, DC. The Judicial Officer found there was no basis for Respondents' contention that their First Amendment rights were violated. The Judicial Officer rejected Respondents' offer of evidence regarding corrections, stating that, while corrections of violations of the Act are encouraged and can be taken into account when determining the sanction to be imposed, Respondents cannot for the first time on appeal offer evidence of corrections. Finally, the Judicial Officer did not reduce or set aside the civil penalty based on Respondents' allegation that they cannot afford to pay a \$20,000 civil penalty. A respondent's ability to pay the civil penalty is not one of the factors that must

be considered when determining the amount of the civil penalty to be assessed for violations of the Act (7 U.S.C. § 2149(b)).

Sharlene A. Deskins, for Complainant.

Respondent, Pro se.

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

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] by filing a Complaint on July 28, 1999.

The Complaint alleges that on May 21, 1998, August 27, 1998, and September 3, 1998, Susan DeFrancesco and East Coast Exotics, Inc. [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-IV).

The Hearing Clerk served Respondents with a copy of the Complaint and a copy of the Rules of Practice on September 29, 1999.<sup>1</sup> Respondents failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On November 2, 1999, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on January 4, 2000.<sup>2</sup> Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On February 1, 2000, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Initial Decision and Order]: (1) finding that, at all times

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<sup>1</sup>See memorandum of TMFisher dated September 29, 1999.

<sup>2</sup>See memorandum of TMFisher dated January 4, 2000.

material to this proceeding, Respondents were licensed under the Animal Welfare Act and operated as an exhibitor, as defined in the Animal Welfare Act and the Regulations; (2) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Complaint; (3) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (4) assessing Respondents, jointly and severally, a \$20,000 civil penalty; and (5) suspending Respondents' Animal Welfare Act license for 70 days (Initial Decision and Order at 2-11).

On April 3, 2000, Respondents appealed to the Judicial Officer; on April 28, 2000, Complainant filed Opposition to the Appeal Petition of the Respondents; and on April 28, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions, as restated.

**ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

The Hearing Clerk served Respondents with a copy of the Complaint and a copy of the Rules of Practice on September 29, 1999.<sup>3</sup> Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Complaint are adopted as findings of fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact and Conclusions of Law**

I.

A. Susan DeFrancesco is an individual whose mailing address is 5 Osborne Hill

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<sup>3</sup>See note 1.

Extension, Sandy Hook, Connecticut 06482. East Coast Exotics, Inc., is a Connecticut corporation and has the same mailing address.

B. At all times material to this proceeding, Respondents were licensed under the Animal Welfare Act and operated as an exhibitor as defined in the Animal Welfare Act and the Regulations, and Susan DeFrancesco, as the owner, directed, managed, and controlled the actions of East Coast Exotics, Inc.

## II.

A. On September 3, 1998, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], inspected Respondents' premises and records and found that Respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

B. On September 3, 1998, APHIS inspected Respondents' premises and records and found that Respondents had failed to individually identify animals, in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).

C. On September 3, 1998, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

D. On September 3, 1998, APHIS inspected Respondents' facility and found the following willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph II(D)(1)-(9) of these Findings of Fact and Conclusions of Law:

1. Provisions were not made for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards (9 C.F.R. §§ 3.1(f), .50(d), .125(d));

2. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.126(b));

3. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. §§ 3.6(a)(2), .53(a), .125(a));

4. Primary enclosures were not kept clean, as required (9 C.F.R. §

3.131(a));

5. Supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.1(e), .25(c), .50(c), .125(c));

6. Water receptacles were not kept clean and sanitary (9 C.F.R. §§ 3.10, .55, .130);

7. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. §§ 3.11(c), .31(b), .56(c), .131(c));

8. Cats in outdoor housing facilities were not provided with adequate protection from the elements in that outdoor housing facilities lacked wind and rain breaks (9 C.F.R. § 3.4(b)); and

9. Food receptacles for animals were not kept clean and sanitized (9 C.F.R. §§ 3.9(b), .29(d), .54(b), .129(b)).

### III.

A. On August 27, 1998, APHIS inspected Respondents' premises and records and found that Respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

B. On August 27, 1998, APHIS inspected Respondents' premises and records and found that Respondents had failed to individually identify animals, in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).

C. On August 27, 1998, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

D. On August 27, 1998, APHIS inspected Respondents' facility and found the following willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph III(D)(1)-(11) of these Findings of Fact and Conclusions of Law:

1. Indoor housing facilities were not sufficiently cooled when necessary to protect the animals from heat and to provide for their health and comfort (9 C.F.R. §§ 3.26(a), .126(a));

2. Indoor housing facilities were not adequately ventilated to provide for the health and comfort of the animals at all times (9 C.F.R. §§ 3.26(b), .126(b));
3. Sufficient shade was not provided to allow animals to protect themselves from the direct sunlight (9 C.F.R. § 3.127(a));
4. Primary enclosures were not kept clean, as required (9 C.F.R. § 3.131(a));
5. Supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.1(e), .25(c), .50(c), .125(c));
6. Water receptacles were not kept clean and sanitary (9 C.F.R. §§ 3.10, .55, .130);
7. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. §§ 3.11(c), .31(b), .56(c), .131(c));
8. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. §§ 3.6(a), .53(a), .125(a));
9. Outdoor housing facilities for rabbits were not fenced or otherwise enclosed in order to minimize the entrance of predators (9 C.F.R. § 3.52(a));
10. Food receptacles for animals were not kept clean and sanitized (9 C.F.R. §§ 3.9(b), .29(d), .54(b)); and
11. Respondents did not have enough employees to carry out the required level of husbandry practices and care (9 C.F.R. §§ 3.12, .32, .57, .132).

#### IV.

A. On May 21, 1998, APHIS inspected Respondents' premises and records and found that Respondents had failed to maintain complete records showing the acquisition, disposition, and identification of animals, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

B. On May 21, 1998, APHIS inspected Respondents' premises and records and found that Respondents had failed to individually identify animals, in willful violation of section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50).

C. On May 21, 1998, APHIS inspected Respondents' premises and found that Respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a

doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).

D. On May 21, 1998, APHIS inspected Respondents' facility and found the following willful violations of section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in paragraph IV(D)(1)-(5) of these Findings of Fact and Conclusions of Law:

1. Supplies of food and bedding were not stored so as to adequately protect them against deterioration, molding, or contamination by vermin (9 C.F.R. §§ 3.1(e), .25(c), .50(c), .125(c));

2. Housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (9 C.F.R. § 3.125(a));

3. Water receptacles were not kept clean and sanitary (9 C.F.R. §§ 3.55, .130);

4. Primary enclosures were not kept clean, as required (9 C.F.R. §§ 3.56(a), .131(a)); and

5. The premises (buildings and grounds) were not kept clean and in good repair and free of accumulations of trash (9 C.F.R. §§ 3.11(c), .31(b), .56(c), .131(c)).

#### **Conclusions**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact and Conclusions of Law, Respondents have violated the Animal Welfare Act and the Regulations and Standards.

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

On April 3, 2000, Respondents filed a letter dated March 30, 2000, and on April 5, 2000, Respondents filed a letter dated March 29, 2000, and a videotape. Complainant contends Respondents' April 3, 2000, filing is not an appeal petition and Respondents' April 5, 2000, filing is a late-filed appeal petition which cannot be considered by the Judicial Officer (Opposition to the Appeal Pet. of the Respondents at 4-5). Based on the content of Respondents' filings, I infer that the April 3, 2000, and April 5, 2000, filings constitute Respondents' appeal petition. Moreover, the record establishes that the Hearing Clerk served Respondents with

the Initial Decision and Order on March 22, 2000.<sup>4</sup> Section 1.145(a) of the Rules of Practice provides that a party may file an appeal petition with the Hearing Clerk within 30 days after receiving service of an administrative law judge's decision, as follows:

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

In accordance with 7 C.F.R. § 1.145(a), Respondents were required to file their appeal petition with the Hearing Clerk no later than April 21, 2000. Thus, I find Respondents' April 3, 2000, and April 5, 2000, filings constitute a timely-filed appeal petition.

Respondents raise six issues in their appeal petition.

First, Respondents request that I stay the ALJ's Initial Decision and Order (Respondents' letter dated March 30, 2000). Respondents' request is denied. Section 1.139 of the Rules of Practice provides that an administrative law judge's decision does not become final and effective if a party to the proceeding files a timely appeal to the Judicial Officer, as follows:

**§ 1.139 Procedure upon 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 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. Copies

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<sup>4</sup>See memorandum of TMFisher dated March 22, 2000.

of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

Respondents filed a timely appeal petition pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145). Therefore, the ALJ's Initial Decision and Order has not and will not become final and effective, and a stay of the ALJ's Initial Decision and Order is unnecessary and would have no effect.

Second, Respondents contend they first received notice of this proceeding on March 23, 2000, and they have been denied due process (Respondents' letters dated March 29, 2000, and March 30, 2000).

I disagree with Respondents' contention that they were denied due process. The record reveals that the Hearing Clerk sent each Respondent a letter dated July 29, 1999, a copy of the Complaint, and a copy of the Rules of Practice, by certified mail, return receipt requested.<sup>5</sup> The United States Postal Service marked the envelopes containing the July 29, 1999, mailings "unclaimed" and returned the July 29, 1999, mailings to the Hearing Clerk. Thereafter, on September 29, 1999, the Hearing Clerk, using the same address as the Hearing Clerk used for the July 29, 1999, mailings, mailed Respondents a copy of the Complaint and a copy of the Rules of Practice by ordinary mail.<sup>6</sup>

Section 1.147(c)(1) of the Rules of Practice provides for service by ordinary mail, as follows:

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

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or

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<sup>5</sup>See Domestic Return Receipt for Article Number P 093 174 873 and Domestic Return Receipt for Article Number P 093 174 874.

<sup>6</sup>See note 1.

other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, 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, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

In addition, sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the consequences of a failure to file an answer within 20 days after service, as follows:

**§ 1.136 Answer.**

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for 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.

**§ 1.139 Procedure upon 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 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.

**§ 1.141 Procedure for hearing.**

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint served on Respondents on September 29, 1999, clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq. (1993)). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 8.

On October 25, 1999, the Acting Hearing Clerk sent a letter to Respondents informing them that their answer to the Complaint had not been received within the allotted time (Letter dated October 25, 1999, from Regina A. Paris, Acting Hearing Clerk, to Respondents).

On November 2, 1999, Complainant filed a Motion for Default Decision and a Proposed Default Decision. On November 3, 1999, the Hearing Clerk sent Respondents a letter, a copy of Complainant's Motion for Default Decision, and a copy of Complainant's Proposed Default Decision, by certified mail, return receipt

requested.<sup>7</sup> The United States Postal Service returned the November 3, 1999, mailing to the Hearing Clerk, and on January 4, 2000, the Hearing Clerk, using the same address as the Hearing Clerk used for the November 3, 1999, mailing, mailed Respondents a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision by ordinary mail.<sup>8</sup> Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On February 1, 2000, the ALJ issued the Initial Decision and Order in which the ALJ found that Respondents admitted the allegations in the Complaint by reason of default. On February 2, 2000, the Hearing Clerk sent Respondents a letter and a copy of the ALJ's Initial Decision and Order, by certified mail, return receipt requested.<sup>9</sup> The United States Postal Service marked the envelope containing the February 2, 2000, mailing "unclaimed" and returned the February 2, 2000, mailing to the Hearing Clerk. Thereafter, on March 22, 2000, the Hearing Clerk, using the same address as the Hearing Clerk used for the February 2, 2000, mailing, mailed Respondents a copy of the ALJ's Initial Decision and Order by ordinary mail.<sup>10</sup>

Respondents contend that they first received notice of this proceeding on March 23, 2000, when "Mr. Jim Finn of USDA" delivered "a copy of these proceedings" to Respondents (Respondents' letter dated March 30, 2000).

In accordance with section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), Respondents are deemed to have received: (1) the Complaint and the Rules of Practice on September 29, 1999, when the Hearing Clerk mailed them to Respondents by ordinary mail; (2) Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 4, 2000, when the Hearing Clerk mailed them to Respondents by ordinary mail; and (3) the ALJ's Initial Decision and Order on March 22, 2000, when the Hearing Clerk mailed it to Respondents by ordinary mail. Respondents' actual notice of this proceeding and the documents sent to Respondents is not required under the Rules of Practice or under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Service in accordance with the Rules of Practice affords Respondents due

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<sup>7</sup>See Domestic Return Receipt for Article Number P 368 427 197.

<sup>8</sup>See note 2.

<sup>9</sup>See Domestic Return Receipt for Article Number P 368 427 146.

<sup>10</sup>See note 4.

process. To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2<sup>d</sup> Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state’s obligation to use notice “reasonably certain to inform those affected” does not mean that all risk of non-receipt must be eliminated); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5<sup>th</sup> Cir. 1972) (due process does not require receipt of actual notice in every case).

The Rules of Practice, which provides for service by ordinary mail to a respondent’s last known principal place of business or last known residence after a certified mailing is returned marked by the postal service as unclaimed or refused, which procedure was followed in this proceeding, meets the requirements of due process of law. As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3<sup>d</sup> Cir. 1979):

Whether a method of service of process accords an intended recipient with due process depends on “whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard.” *Milliken*, 311 U.S. at 463, 61 S.Ct. at 343 (emphasis added); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant’s last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Spiegel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3<sup>d</sup> 79, 455 N.E. 2<sup>d</sup> 1344, 1346 (1982), the court held:

It is immaterial that the certified mail receipt was signed by the defendant’s brother, and that his brother was not specifically authorized to

do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Accordingly, the Hearing Clerk properly served Respondents with the Complaint, the Rules of Practice, Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and the ALJ's Initial Decision and Order. Respondents failed to file a timely answer to the Complaint and failed to file timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, the ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution.<sup>11</sup>

Third, Respondents contend the "case was not held in [their] district," Respondent Susan DeFrancesco "cannot afford to fly to Washington[,] D.C.," and Respondent Susan DeFrancesco is not "able to take care of [her] children and animals by being in Washington[,] D.C." (Respondents' letter dated March 29, 2000). I infer that Respondents contend the location of the Hearing Clerk in Washington, DC, violates their right to due process and, had a hearing been conducted, the scheduling of that hearing in Washington, DC, would have violated their right to due process.

Respondents have not been required to travel to Washington, DC, for this proceeding. Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) requires that Respondents file their answer with the Hearing Clerk and section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) requires that Respondents file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision with the Hearing Clerk. While the Hearing Clerk is located in

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<sup>11</sup>See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6<sup>th</sup> Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9<sup>th</sup> Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

Washington, DC, the Rules of Practice do not require that Respondents personally deliver their answer or objections to the Hearing Clerk. Instead, section 1.147(g) of the Rules of Practice provides only that a document or paper is deemed to be filed at the time the document or paper 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; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

The record establishes that Respondents mailed their appeal petition to the Hearing Clerk, which appeal petition was deemed to be filed at the time it reached the Hearing Clerk. Similarly, Respondents could have used the mail to effectuate the filing of their answer to the Complaint and objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Moreover, Respondents have no basis on which to speculate that the ALJ would have responded to a timely request for a hearing by scheduling the hearing in Washington, DC. The Administrative Procedure Act requires administrative law judges to give due regard to the convenience and necessity of the parties with respect to the location of a hearing, as follows:

**§ 554. Adjudications**

. . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing[.]

. . . .

. . . In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

5 U.S.C. § 554(b).

Since no hearing is required in this proceeding and no hearing was held, the issue of the effect on Respondents' right to due process if the ALJ had scheduled a hearing in Washington, DC, is moot.

Fourth, Respondents contend that their First Amendment rights are being "raped" (Respondents' letter dated March 29, 2000). I infer that Respondents contend this proceeding violates their First Amendment rights. The First Amendment to the United States Constitution provides, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

This proceeding does not affect Respondents' free exercise of religion, freedom of speech, right to assemble, or right to petition the Government. Moreover, this proceeding does not affect freedom of the press. Therefore, I reject Respondents' contention that this proceeding violates their First Amendment rights.

Fifth, Respondents state as follows:

. . . I have met with our USDA inspector, Jan Puzas, and have made great strides in doing what she wants us to do. We've accomplished a lot [sic]. So we are working with Jan.

Respondents' letter dated March 29, 2000.

I infer that Respondents contend they have corrected some of the violations alleged in the Complaint. Corrections of violations of the Animal Welfare Act and the Regulations and Standards are encouraged and can be taken into account when determining the sanction to be imposed.<sup>12</sup> However, Respondents should have filed

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<sup>12</sup>However, it is well-settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred. *In re Michael A. Huchital*, 58 Agric. Dec. \_\_\_, slip op. at 55 n.6 (Nov. 4, 1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5<sup>th</sup> Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (Table) (3<sup>d</sup> Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6<sup>th</sup> Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997),  
(continued...)

a timely answer and requested a hearing at which Respondents could have offered evidence of corrections. Respondents cannot, for the first time on appeal, offer evidence of corrections. Similarly, Respondents cannot, on appeal, offer a videotape of their premises. Again, Respondents should have filed a timely answer and requested a hearing at which Respondents could have offered the videotape which they filed for the first time on April 5, 2000, as part of their appeal petition.

Sixth, Respondents contend they cannot afford to pay a \$20,000 civil penalty (Respondents' letter dated March 29, 2000). Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondents' inability to pay a \$20,000 civil penalty is not a basis for setting aside or reducing the \$20,000 civil penalty assessed against Respondents.<sup>13</sup>

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<sup>12</sup>(...continued)

*aff'd*, 156 F.3d 1227 (3<sup>d</sup> Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6<sup>th</sup> Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7<sup>th</sup> Cir. 1995) (not to be cited per 7<sup>th</sup> Circuit Rule 53(b)(2)).

<sup>13</sup>The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re Mary Meyers*, 58 Agric. Dec. \_\_\_, slip op. at 10 n.13 (Oct. 14, 1999) (Order Denying Pet. for Recons.) (stating that the respondent's and the respondent's husband's inability to pay the \$26,000 civil penalty is not a basis for setting aside or reducing the civil penalty assessed against the respondent); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. \_\_\_, slip op. at 16 (July 12, 1999) (stating that the respondent's inability to pay the \$16,000 civil penalty assessed by the administrative law judge is not a basis for setting aside or reducing the civil penalty); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating that the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act and the Regulations and Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating that a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal docketed*, Nos. 99-2640, 99-2665 (8<sup>th</sup> Cir. June 1 and June 25, 1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating that the Judicial Officer has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. \_\_\_, slip op. at 16 (July 12, 1999) (continued...)

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

### Order

1. Respondents, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued under the Animal Welfare Act, and in particular, shall cease and desist from:

- (a) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks;
- (b) Failing to store supplies of food and bedding so as to adequately protect them against infestation or contamination by vermin;
- (c) Failing to maintain housing facilities for animals in a structurally sound condition and in good repair;
- (d) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;
- (e) Failing to keep food and water receptacles clean and sanitized;
- (f) Failing to provide adequate cooling for animals in indoor and sheltered housing facilities when necessary to provide for their health and comfort;
- (g) Failing to provide for the removal and disposal of animal wastes so as to minimize vermin infestation, odors, and disease hazards;
- (h) Failing to provide animals with adequate shelter from the elements, including the sun;

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<sup>13</sup>(...continued)

Dec. 1401, 1416 (1997) (stating that a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating that ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating that ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating that the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7<sup>th</sup> Cir. 1995) (not to be cited per 7<sup>th</sup> Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating that the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

- (i) Failing to maintain primary enclosures for animals in a clean and sanitary condition;
- (j) Failing to establish and maintain an effective program for the control of pests;
- (k) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses, and bushes;
- (l) Failing to identify animals in accordance with the Regulations;
- (m) Failing to provide proper veterinary care; and
- (n) Failing to maintain records as required by the Regulations.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a civil penalty of \$20,000. Respondents shall pay the civil penalty by a certified check or money order, made payable to the Treasurer of United States. Respondents shall send the certified check or money order to:

Sharlene A. Deskins  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Sharlene A. Deskins within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 99-0036.

3. Respondents' Animal Welfare Act license is suspended for a period of 70 days and continuing thereafter until Respondents demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Animal Welfare Act, the Regulations and Standards issued under the Animal Welfare Act, and this Order, including payment of the civil penalty assessed in paragraph 2 of this Order. When Respondents demonstrate to the Animal and Plant Health Inspection Service that they have satisfied this condition, a supplemental order terminating the suspension of Respondents' Animal Welfare Act license will be issued upon the motion of the Animal and Plant Health Inspection Service.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 60<sup>th</sup> day after service of this Order on Respondents.

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**BEEF PROMOTION AND RESEARCH ACT**

**COURT DECISION**

**JERRY GOETZ, d/b/a JERRY GOETZ AND SONS v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE, DAN GLICKMAN, INDIVIDUALLY AND AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; AND THE ACTING ADMINISTRATOR OF THE AGRICULTURAL MARKETING SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE.**

**No. 98-1155-JTM.**

**Decided May 23, 2000.**

**(Cite as 99 F. Supp.2d 1308 (D. Kan.)).**

**Beef promotion - Civil penalty - Equal protection.**

The United States District Court for the District of Kansas held that the evidence supported the Judicial Officer's findings that a beef producer committed 21,690 violations of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) and the Beef Promotion Order (7 C.F.R. pt. 1260). The Court rejected the beef producer's contention that a Collection Compliance Reference Guide establishes a 3-year limitation after each cattle transaction on the collection of assessments, late payment charges, and civil penalties and that requiring the beef producer to maintain records for more than 3 years violates his equal protection rights. The Court rejected the beef producer's contention that the Judicial Officer lacked the authority under the Beef Promotion and Research Act to assess a civil penalty of more than \$5,000 after an administrative proceeding and affirmed the Judicial Officer's assessment of a \$69,804.49 civil penalty. The Court also rejected the beef producer's contention that a late-payment charge is a penalty and affirmed the Judicial Officer's order requiring the beef producer to pay past-due assessments and late-payment charges of \$66,913 in addition to the civil penalty.

**UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

**MEMORANDUM AND ORDER**

Plaintiff Jerry Goetz brings this appeal pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.* Under the Beef Promotion and Research Act ("BPA"), the Secretary of Agriculture ("Secretary") has ordered Goetz to pay assessments, late charges and a civil penalty. Goetz filed a separate civil rights action challenging the constitutionality of the Secretary's decision, which has been separately terminated in the Secretary's favor. The present action involves the Secretary's imposition of civil penalties against Goetz.

## I. Factual Background

Goetz has been in the cattle buying business in Kansas since 1949. He does some farming and does his cattle buying and selling as the owner and operator of Jerry Goetz and Sons. He visits a different sale barn each day, where he buys and sells cattle. He keeps some cattle at his feedlot, but often promptly resells the cattle he purchases. Goetz buys up to 200 cattle per day.

In the BPA, Congress declared it to be “in the public interest to authorize the establishment . . . of an orderly procedure for financing . . . and carrying out a coordinated program of promotion and research designed to strengthen the beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.” 7 U.S.C. § 2901(b). The BPA directs the Secretary to establish, by way of a Beef Promotion and Research Order, such a program and to provide for its financing “through assessments [paid by cattle producers and importers] on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States.” *Id.* §§ 2901(b), 2903, 2904(8)(A)-(C). The BPA specifies the required terms and conditions of any such order, *id.* § 2904, and empowers the Secretary to include any terms and conditions necessary to effectuate an order’s provisions. *Id.* § 2904(12).

The Beef Research and Promotion Order (“Beef Promotion Order”), 7 C.F.R. Part 1260, Subpart A, promulgated pursuant to notice and comment, establishes the Beef Promotion and Research Board (“Board”) and the Beef Promotion Operation Committee (“Committee”), both comprised of private parties, to maintain the Beef Promotion Order under the oversight of the Secretary. *Id.* §§ 2904(1)-(7); 7 C.F.R. §§ 1260.141, 1260.161.

The BPA requires cattle producers in the United States to pay a \$1.00 per head assessment on cattle sold in this country.<sup>1</sup> 7 U.S.C. §§ 2904(8)(A), (C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310. Each person making payment to a cattle producer for cattle is designated as a “collecting person” under the BPA and Beef Promotion Order and is required to collect per-head assessments and remit them to a qualified state beef council in the state in which the collecting person resides or, if there is no qualified state beef council within such state, to the Board. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.311(a), 1260.312(c). The assessment, deducted from the money the purchaser pays to the seller, is commonly referred to as a “checkoff.” Each collecting person must report to the Board specified information for each calendar month at the time assessments are remitted, 7 U.S.C. § 2904(11); 7 C.F.R. §§

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<sup>1</sup>The collection of assessment provisions of the Beef Promotion Order became effective October 1, 1986.

1260.201, 1260.312(a)-(c), and must maintain and make available for inspection by the Secretary the records necessary to verify the required reports. 7 U.S.C. § 2904(11); 7 C.F.R. § 1260.202.

The Secretary is authorized to conduct investigations and to issue subpoenas to determine whether any person subject to the BPA has engaged in or is about to engage in any act that constitutes or will constitute a violation of the BPA, the Beef Promotion Order or implementing rules and regulations. 7 U.S.C. § 2909. The Secretary, after providing an opportunity for an administrative hearing, may issue an order to restrain or prevent a person from violating the Beef Promotion Order and may assess a civil penalty of up to \$5,000 for violation of the BPA and Beef Promotion Order. *Id.* § 2908(a). Alternatively, or in addition, the Secretary may request that the Attorney General initiate a civil action to enforce, and to restrain a person from violating, any order or regulation promulgated by the Secretary under the BPA. *Id.* §§ 2908(b), (c).

Goetz allegedly failed to remit assessments as the “collecting person” in transactions involving over 24,000 cattle. Goetz’s alleged failure to remit assessments was first brought to his attention in a letter dated June 1, 1987 from the Kansas Beef Council. In February and June 1992, the Kansas Beef Council again sent Goetz letters concerning his alleged failure to comply with the Beef Promotion Order.

More facts will be discussed as they become relevant to the court’s analysis.

## **II. Procedural History**

By filing a complaint on October 29, 1993, the Acting Administrator of the Agricultural Marketing Service, United States Department of Agriculture (“Administrator”), instituted this proceeding under the BPA (7 U.S.C. §§ 2901-2911; the Beef Promotion Order (7 C.F.R. §§ 1260.101-.217); the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) (“Beef Promotion Regulations”); and 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”).

The complaint alleged that Jerry Goetz, d/b/a Jerry Goetz and Sons (“Goetz”): (1) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit required reports; (2) willfully violated section 1260.201 of the Beef Promotion Order (7 C.F.R. § 1260.201) and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. § 1260.312) by failing to submit necessary information in required reports; and (3) willfully violated section 1260.172 of the Beef Promotion Order (7 C.F.R. § 1260.172) and sections

1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312) by failing to remit the assessments due for the purchase and sale of cattle. The Administrator sought the issuance of an order or orders as authorized under the BPA, including an order requiring Goetz to cease and desist from violating the Beef Promotion Order and Beef Promotion Regulations and assessing civil penalties against Goetz in accordance with section 9 of the BPA (7 U.S.C. § 2908). On December 10, 1993, Goetz filed an answer denying the material allegations of the complaint and contending that the BPA, the Beef Promotion Order, and the Beef Promotion Regulations are unconstitutional, unauthorized, unreasonable, arbitrary, void and unenforceable.

On August 2, 1994, Goetz filed an action in the United States District Court for the District of Kansas challenging the constitutionality of the BPA and seeking a temporary restraining order to prevent a hearing from being held in the administrative proceeding. The court issued an order requiring an audit by the accounting firm of Wendling, Noe, Nelson & Johnson of Topeka, Kansas of Goetz's books and records pertaining to his raising, buying, selling, and trading of cattle and Goetz's collection of monies, if any, under the BPA and enjoined the administrative proceeding pending the completion of the audit. The accounting firm completed the audit on November 23, 1994,<sup>2</sup> and the court issued a decision on February 28, 1996, rejecting each of Goetz's constitutional challenges to the BPA and set aside prior orders which enjoined and stayed the administrative proceeding.<sup>3</sup> The Tenth Circuit affirmed this decision and the Supreme Court denied Goetz's petition for certiorari. *See Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

On September 25 and 26, 1996, Administrative Law Judge James W. Hunt

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<sup>2</sup>Darrell D. Loyd conducted the audit and submitted a report entitled, "Kansas Beef Council Compliance Report for Jerome (Jerry) Goetz October 1, 1986 Through June 30, 1994" ("Compliance Report"). Loyd examined Goetz's purchase invoices, sale invoices, canceled checks, deposit slips, and non-producer status forms to determine the head count for cattle that Goetz purchased and for which he should have collected and remitted assessments. Loyd estimated the number of cattle involved in the transactions for October 1, 1986 to December 31, 1989, a period for which Goetz no longer had records, by using the average sales for the period January 1, 1990 to June 30, 1994, a period for which Goetz had records. Loyd estimated in the Compliance Report that Goetz had failed to remit assessments in transactions involving 24,672 head of cattle between October 1, 1986 through June 30, 1994. He determined that Goetz owed \$24,672 in assessments and a late payment charge of \$51,847.48.

<sup>3</sup>The court followed the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3<sup>d</sup> Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S.Ct. 1168, 107 L.Ed.2d 1070 (1990), which rejected a virtually identical challenge to the BPA. *Goetz*, 920 F. Supp. at 1178.

(“ALJ”) conducted a hearing in Wichita, Kansas. On February 26, 1997, he filed a decision and order, which (1) concluded that Goetz failed to collect and remit assessments to a State Cattlemen’s Beef Promotion and Research Board for 22,118 cattle during the period October 1, 1986 through June 30, 1994 in violation of section 1260.172 of the Beef Promotion Order (7 C.F.R. §1260.172) and sections 1260.311 and .312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.311, .312); (2) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (3) assessed a civil penalty of \$46,624 against Goetz; and (4) ordered Goetz to pay past-due assessments and penalties to the Kansas Beef Council in the amount of \$68,742.

Both Goetz and the Administrator appealed the ALJ’s decision and order to the Judicial Officer (“JO”) to whom the Secretary has delegated authority to act as the final decision-maker in the Department’s adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557. On November 3, 1997, the JO issued a decision and order, which: (1) concluded that Goetz willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to collect and remit assessments to a qualified state beef council for 21,516 cattle during the period October 1, 1986 through June 30, 1994; (2) concluded that Goetz willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late payment charges for assessments that Goetz failed to remit to a qualified state beef council during the period October 1, 1986 through June 30, 1994; (3) concluded that Goetz willfully violated section 1260.201 of the Beef Promotion Order and section 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.201, .312) by failing to transmit monthly reports of assessments to the Kansas Beef Council during the period October 1, 1986 through June 30, 1994; (4) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (5) assessed Goetz a civil penalty of \$69,244.51;<sup>4</sup> and (6) ordered Goetz to pay past-due assessments and late payment charges in the amount of \$66,577 to the Kansas Beef Council.

Goetz and the Administrator both filed motions for reconsideration of the JO’s decision and order. On April 3, 1998, the JO issued a second decision and order which denied Goetz’s motion for reconsideration and denied in part and granted in part the Administrator’s motion for reconsideration. In his second decision and order, the JO (1) ordered Goetz to cease and desist from violating the BPA, the Beef Promotion Order, and the Beef Promotion Regulations; (2) assessed a civil

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<sup>4</sup>Based on the Administrator’s suggestion, the JO assessed Goetz a civil penalty of \$3.2182798 per violation for a total penalty of \$69,244.51.

penalty of \$69,804.49;<sup>5</sup> and (3) ordered Goetz to pay past-due assessments and late payment charges in the amount of \$66,913.<sup>6</sup>

Goetz now seeks judicial review of the JO's final decision pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* The court has been asked to resolve the following six issues on appeal: (1) whether there was sufficient evidence for the JO to find Goetz liable for past-due assessments, late payment charges, and civil penalties in the amount of \$71,788.89 for the period of October 1, 1986 through December 31, 1989; (2) whether the Collection Compliance Reference Guide establishes a three-year limitation after each cattle transaction on the collection of assessments, late payment charges, and civil penalties thereon under the BPA; (3) whether Goetz produced sufficient evidence to show he should not be liable for past-due assessments, late payment charges, or civil penalties on any cattle he sold at sale barns; (4) whether Goetz produced sufficient evidence to show he should not be liable for any past-due assessments, late payment charges, or civil penalties on any cattle purchases listed on page 29 of exhibit CX-18; (5) whether the Administrator produced sufficient evidence to show Goetz liable as a collecting person for the collection of the assessment in private treaty sales; and (6) whether the JO misinterpreted and misapplied 7 U.S.C. § 2908(a)(2) when he assessed civil penalties against Goetz in the amount of \$69,804.49.

### III. Standard of Review

A person who has suffered a legal wrong because of an agency action, or has been adversely affected or aggrieved by an agency action within the meaning of a relevant statute, is entitled to judicial review thereof under Section 702 of the APA. *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1055 (10<sup>th</sup> Cir. 1993). This court's review of the Secretary's decision is governed by Section 706 of the APA. Under the APA, the court must afford considerable deference to the agency's findings and set aside the decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bryan v. Office of Personnel Management*, 165 F.3d 1313, 1319 (10<sup>th</sup> Cir. 1999) (citing 5 U.S.C. § 706(2)(A)). Furthermore, the court must set aside any of the Secretary's findings that are not supported by substantial evidence. 5 U.S.C. § 706(2)(E), *see also Olenhouse v.*

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<sup>5</sup>The JO found that Goetz should have collected and remitted assessments on an additional 174 cattle. Therefore, this amount represents the adjustment from his prior order assessing the civil penalty (174 x \$3.2182798).

<sup>6</sup>This amount reflects the amount of past-due assessments and late charges after the JO made the adjustment for the additional 174 cattle.

*Commodity Credit Corp.*, 42 F.3d 1560, 1575 n.25 (10<sup>th</sup> Cir. 1994) (noting scope of review provisions of § 706(2) are cumulative; “The arbitrary or capricious standard of § 706(2)(A) is thus a catch-all, picking up administrative conduct not covered by the more specific paragraphs.”). “Review under § 706(2)(A) is narrow, and the agency need only demonstrate that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonably based on that consideration.” *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1453 (10<sup>th</sup> Cir. 1994); *see also Mountain Side Mobile Estates Partnership v. Secretary of Hous. and Urban Dev.*, 56 F.3d 1243, 1250 (10<sup>th</sup> Cir. 1995) (“When we review an agency’s decision under the arbitrary, capricious or abuse of discretion standard, ‘our review is narrow and deferential; we must uphold the agency’s action if it has articulated a rational basis for the decision and has considered relevant factors.’”) (citation omitted). Normally, an agency’s action is set aside as arbitrary and capricious only “if the agency has relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Rapp v. United States Dep’t of Treasury*, 52 F.3d 1510, 1515 (10<sup>th</sup> Cir. 1995).

An agency’s findings of fact are conclusive when they are supported by a substantial evidence in the record. *Copsey v. National Transp. Safety Bd.*, 993 F.2d 736, 738 (10<sup>th</sup> Cir. 1993); *see also Rapp*, 52 F.3d at 1515 (“Evidence is substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion.”). “Under the substantial evidence test, [the court] consider[s] conflicts in the record and specifically define[s] those facts which support the agency’s decision.” *Rapp*, 52 F.3d at 1515. An agency’s findings are supported by the evidence if they are a logical interpretation of the facts; they need not be the only possible reading of the evidence. *Copsey*, 993 F.2d at 738. “While it is permissible for a court to engage in substantial inquiry into the facts, absent clear error, it must be wary to substitute its judgment for that of an expert agency.” *Foust v. Lujan*, 942 F.2d 712, 719-20 (10<sup>th</sup> Cir. 1991). The court’s function is not to weigh the evidence or to evaluate witnesses’ credibility. *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10<sup>th</sup> Cir. 1989). As long as there is substantial evidence to support the Secretary’s findings, this court will not reverse, even though it might reach a different result if it were making the initial decision on the matter. *Long v. Board of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1151 (10<sup>th</sup> Cir. 1997).

#### **IV. Analysis**

##### **A. Past-Due Assessments, Late Payment Charges and Civil Penalties for October 1, 1986 through December 31, 1989**

On advice from his accountant, Goetz claims he never maintained business records for more than three years due to a shortage of space. According to Goetz, he began this practice many years before the Administrator brought proceedings against him. As a result of this business practice, he did not maintain any records relevant to the BPA for any cattle transactions prior to January 1, 1990. Goetz contends that without records pertaining to cattle transactions prior to January 1, 1990, no evidence exists to show whether he is liable for any assessments or penalties under the BPA for any period prior to January 1, 1990.

The Administrator argues that the JO's determinations regarding pre-1990 transactions are supported by substantial evidence. Based on the uncontroverted testimony of Bryce Schumann, Coordinator of Industry Relations for the Kansas Beef Council, Goetz did not transmit reports of assessments to the Kansas Beef Council as required by 7 C.F.R. §§ 1260.201 and .312. The Administrator contends this evidence is relevant to prove Goetz did not comply with the BPA prior to 1990. Because Goetz did not submit reports to the Kansas Beef Council, there are no records showing he paid the assessments. Based on this evidence, the Administrator argues that a reasonable mind could conclude, as did the ALJ and the JO, that Goetz had not paid the assessments during the period for which he had no records and for which he did not submit reports to the Kansas Beef Council.

The Administrator argues that Loyd's (the CPA) estimates are the best evidence of the amount Goetz owes for assessments due for the period October 1, 1986 through December 31, 1989, especially since Goetz has not offered any evidence of his own. To determine the amount Goetz owes for that period, Loyd averaged records by year and month based on the data he did have to determine the range of transactions for years for which Goetz provided no data. Goetz does not argue that the number and types of transactions he made during the period for which he maintained records are completely unrepresentative of the number and types of transactions he made during the period for which he failed to keep records.

Given the applicable standard of review, the court concludes that the JO's decision must be upheld. Schumann testified that Goetz had failed to submit the required reports during this period. Because he did not submit the required reports, a rational fact finder could reasonably conclude Goetz failed to remit the assessments that were due. It is also reasonable to conclude Goetz failed to pay the assessments for this period, considering he failed to submit the reports and

assessments for the period in which he did have records, *i.e.*, after January 1, 1990. Why would he pay the assessments from October 1, 1986 through December 31, 1989 and then stop paying them on January 1, 1990? In addition, the Kansas Beef Council sent him a letter on June 1, 1987, advising him that he needed to collect and remit the assessments. If he was submitting the reports and paying the assessments, there would have been no need for this letter. The court finds that the accountant's method of estimation is a fair way to determine an accurate estimate of the amount due for the period in which Goetz has no records. The court finds that Goetz's arguments are without merit, and are hereby rejected.

#### **B. Collection/Compliance Guide**

Goetz next argues that the Collection/Compliance Guide, which was prepared by the compliance manager of the Board and provided by the Board to all qualified state beef councils, establishes a three-year limitation after each cattle transaction on the collection of assessments, late payment charges and civil penalties. The Collection/Compliance Guide states that collecting persons must “[m]aintain records and documentation pertaining to the checkoff for at least three years following each transaction.” Record Tab 81, exh. RX-168. Goetz claims that “[o]n their face, the three-year-record-keeping provisions contained in the Collection/Compliance Guide establish a three-year statute of limitations from and after each transaction for the collection of any assessments related thereto, and any late payment charges and civil penalties thereon.” Plf. Mem. at 14.

Monte Reese, Executive Director of the Board, testified at the hearing before the ALJ. During his testimony, he stated the purpose of the guide was to insure consistent collection procedures among the state beef councils. According to him, the guide is not part of the order or the rules and regulations. “It is merely a guide to assist in consistency.” Record Tab 79, p. 240; *see also id.* at 255 (“[I]t is a guide. It is not a regulation. It is a collection compliance reference guide and it was intended as nothing more nor less than a guide.”). “It is sent to State Beef Councils to assist them in insuring compliance with the collection requirements.” *Id.*

The provisions on which Goetz relies to establish a three-year statute of limitations pertain to the maintenance of records only. Neither the BPA, the order, nor the Collection/Compliance Guide provisions set forth a statute of limitations on collecting assessments and late charges that have not been properly submitted.

Goetz further argues that requiring him to maintain records for more than three years violates his equal protection rights. However, as the JO pointed out, there is no evidence that suggests Goetz was required to maintain records for a longer period than other similarly situated persons or that his burden with respect to his

defense is any greater than it would have been for others charged with the same violations.

The court must reject Goetz's arguments on this issue. The Collection/Compliance Guide is clearly a document to assist state beef councils in their collection efforts. It is not a rule or regulation that is binding on the Secretary's enforcement proceedings. Further, the Guide merely pertains to how long collecting persons should maintain records ("for at *least* three years"). It says nothing about limiting the time in which the Secretary can collect assessments and late charges.

### **C. Sale Barn Transactions**

Goetz argues he produced sufficient evidence in the administrative proceedings to show he should not be liable for any past-due assessments, late payment charges, or civil penalties on any cattle he sold at any sale barns because with regard to those transactions he was not a producer within the meaning of the regulations. As part of his business, Goetz engages in an operation known as cattle "swapping." His cattle-swapping operation consists of buying cattle at one sale barn and directly moving them to another sale barn where they are sold. According to Goetz, the cattle involved in his swapping operation are never brought to his feedlot; they are immediately moved to the next sale barn and resold within ten days.

Individuals may obtain non-producer status for certain transactions:

- (a) The assessment levied on each head of cattle sold shall not apply to cattle owned by a person . . .
- (2) If the person:
  - (i) Certifies that the person acquired ownership of cattle to facilitate the transfer of ownership of such cattle from the seller to a third party,
  - (ii) Establishes that such cattle were resold not later than 10 days from the date on which the person acquired ownership; and
  - (iii) Certifies that the assessment levied upon the person from whom the person purchased the cattle, if an assessment was due, and had been collected and has been remitted, or will be remitted in a timely fashion.

7 C.F.R. § 1260.314(a)(2); see also 7 C.F.R. § 1260.116(b) (describing persons who are not considered producers).

The JO found Goetz was liable for past-due assessments, late payment charges, and civil penalties on certain cattle sold at sale barns because he failed to show they were sold within ten days. Goetz claims that the auditor erred in finding he held the

“swapping” cattle for more than ten days and that Ms. Goetz’s record keeping caused this error. The sale invoices pertaining to the transactions in question indicate the cattle were resold after the ten-day period. Ms. Goetz claims the date on some of the sale invoices was the date she prepared the invoices, not the dates on which the cattle were resold. Although Ms. Goetz claimed she sometimes inadvertently used an incorrect sale date, she did not testify that all sale invoices had a wrong sale date.

Goetz claims that the feedlot records indicate the resales occurred earlier than the dates appearing on the invoices. However, Goetz did not offer the testimony of anyone who prepared the feedlot records to explain the information on them or how the actual dates that cattle were bought or sold can be determined from the feedlot records. Furthermore, Goetz testified that he sometimes kept cattle for more than thirty days after buying them. The auditor relied on Goetz’s sale invoices rather than the feedlot records to determine resale dates because he found the feedlot records “contained conflicting information and that it is the practice of auditors to rely on sale invoices to determine when title to cattle changes.” JO First Dec. and Order at 23.

The JO found that the dates appearing on the sale invoices were the presumptive resale dates in the absence of evidence showing that such dates were incorrect. Therefore, Goetz failed to establish he resold the cattle within ten days. The court finds that the sale invoices would be the best evidence to determine when sales occurred. Based on those, it appears Goetz held some of the cattle for more than ten days, thus disqualifying him from the exemption found in Section 1260.314(a)(2).

#### **D. Transactions Involving Certification of Non-Producer Status Forms**

This argument is an extension of the preceding argument because the transactions for which Goetz complains also occurred at sale barns. However, the transactions he is referring to specifically are those occurring at Record Tab 80, page 29 of exhibit CX-18. For each of the purchases listed, there was a Certification of Non-Producer Status form signed by Goetz on which the box indicating “I collected \$1.00 per head” was checked. Goetz claims he did not collect the assessment on the cattle purchases listed, that he signed the Certification of Non-Producer Status forms before they had been completed, and that someone at the sale barns must have checked the wrong box when they were completing the forms.

Goetz supports his position with four arguments. First, he argues that the Administrator produced several other Certification of Non-Producer Status forms

he signed, none of which had the boxes checked. This, according to Goetz, suggests that he was signing the forms while they were blank and “the sale barns were completing them but sometimes failed to complete them.” Pl. Mem. at 18. The court concludes, however, that this argument weighs against Goetz, who is effectively saying the sale barns failed to complete the forms when they did not check the boxes. But, on the other hand, he argues it was a mistake when the boxes were checked.

Second, Goetz claims there is a noticeable difference between his signature and the handwriting which completed the remainder of the forms. These forms contain little writing. On several of them, it appears that Goetz may very well have completed them. However, it is difficult to determine because of the lack of writing on the forms.

Third, Goetz claims the purchases listed on page 29 of exhibit CX-18 were part of his cattle “swapping” operations. As such, he was not the collecting person because the purchases were made at sale barns. As discussed above, Goetz was unable to show these cattle were resold within ten days of purchasing them.

Finally, Goetz argues the sales and purchases invoices relating to several transactions (listed on page 29 of exhibit CX-18) indicate that there were no deductions withheld by Goetz for the checkoffs. *See* Pl. Mem. at 19-20.

In his first decision and order, the JO found that since Goetz resold the cattle within ten days, he was not required to remit an assessment on the cattle. On reconsideration, however, the JO reversed his decision, finding that all three provisions of 7 C.F.R. § 1260.314(a)(2) had not been met. Section 1260.314(a)(2) provides that an assessment is not required when three conditions are met: (1) the person certifies that he facilitated the transfer of ownership to a third party; (2) the person establishes that the cattle were resold within ten days; and (3) the person certifies that the assessment has been collected and remitted. 7 C.F.R. § 1260.314(a)(2). The Administrator claims Goetz failed to comply with the third element.

On reconsideration, the JO dedicated about five pages to this issue. *See* JO’s Recon. Order at 11-16. He concluded that the Certification of Non-Producer Status forms contained Goetz’s signature. They also had the box checked that certified Goetz had collected the \$1.00 assessments. Because it appears Goetz collected the assessments, he was required to turn them over to the Kansas Beef Council. The JO rejected Goetz’s argument that he signed the forms before the boxes were checked.

The JO was in a superior position to assess Goetz’s credibility, and the court will affirm on this issue as well. The forms that contain Goetz’s signature with the box checked provide sufficient evidence to establish that Goetz did collect the

assessments but failed to remit them to the Kansas Beef Council.

#### **E. Private Treaty Sales<sup>7</sup>**

Goetz argues that many of his cattle transactions were “private treaty sales,” which are sales between producers. In such transactions, Goetz argues, both the seller and the buyer are liable for the collection and remittance of the assessment.<sup>8</sup> He claims that the Administrator, by attempting to collect assessments from him, may be trying to collect twice for the same transactions since the Administrator has not proven that the cattle sellers have not paid the assessments. The ALJ found that the Administrator demonstrated that Goetz was the “collecting person” as defined by Section 1260.106 of the Regulations because he was “the person making payment to a producer” in these transactions. ALJ Dec. and Order pp. 6-7. Therefore, the Administrator established a prima facie case that Goetz either collected or should have collected assessments involving transactions in which he was the “collecting person” and that he did not remit such assessments. The JO agreed with the ALJ and found that Goetz was the “collecting person” in the transactions involving the private treaty sales. The JO found that Goetz could have rebutted the Administrator’s prima facie case by demonstrating he was not responsible for the assessments in the private treaty sales by showing that the assessments had been paid by the producer/seller.

Once again, the court finds that the JO’s decision should be upheld. Section 1260.106 defines a “collecting person” as “the person making payment to a producer for cattle, or any other person who is responsible for collecting and remitting an assessment pursuant to the Act, the order and regulations prescribed

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<sup>7</sup>The Administrator argues the court should not consider this issue because Goetz failed to raise it in his motion for reconsideration. Goetz did raise this issue in his initial appeal of the ALJ’s decision to the JO. The Administrator would have a plausible argument if Goetz had raised this issue for the first time in the motion to reconsider, but since he raised it initially, the court can and will consider it.

<sup>8</sup>Goetz seems to base his argument on 7 C.F.R. § 1260.310(c), which provides: “Failure of the collecting person to collect the assessment on each head of cattle sold as designated in § 1260.311 shall not relieve the producer of his obligation to pay the assessment to the appropriate qualified State beef council or the Cattlemen’s board as required in § 1260.312.” He seems to suggest that because he did not pay the assessment, the producer should have. However, it is very possible Goetz collected the assessment but failed to remit it. If that was the case, the producer would have assumed the assessments had been paid. In addition, even if both seller and purchaser were ultimately liable, it would make more sense to go after the purchaser first if no payment had been made because the purchaser seems to have primary responsibility for remitting the assessment as the “collecting person.” It appears there was no evidence submitted to show the seller had in fact paid the assessments. Therefore, the Administrator was not getting a double recovery as Goetz suggests.

by the Board and approved by the Secretary.” 7 C.F.R. § 1260.106. Although Goetz claims he was a producer buying cattle from another producer, the fact remains he was the one making payment to the producer, that is, he was the buyer, not the seller.

#### **F. Assessment of Civil Penalties in Excess of \$5,000**

Section 2908(a) of the BPA states: “If the Secretary believes that the administration and enforcement of this chapter or an order would be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary may--assess a civil penalty of not more than \$5,000 for violation of such order.” 7 U.S.C. § 2908(a)(2). Pursuant to this section, the JO ordered Goetz pay a civil penalty in the amount of \$69,804.49, which represents \$3.2182798 for each of the 21,690 violations.

Goetz feels the JO misinterpreted and misapplied 7 U.S.C. § 2908(a)(2) when he assessed the civil penalty against him. He claims the Administrator asked for the civil penalty at the end of the administrative hearings -- *i.e.*, not during his case in chief but rather during rebuttal. Goetz contends 7 U.S.C. § 2908(a)(2) requires “that in order to assess such a civil penalty, an administrative hearing on the record about that very assessment must be afforded to the person against whom such assessment is intended.” Pl. Mem. at 23. Goetz also claims the JO lacked statutory authority to assess a civil penalty of over \$5,000 at one time for violation of the Beef Promotion Order. He claim 7 U.S.C. § 2908(a)(2) clearly only allows the imposition of one penalty, not to exceed \$5,000, after any administrative hearing. He further argues that the late charge is already a penalty and that making him pay an additional \$69,804.49 would break him financially and destroy his business. Finally, he argues that the evidence does not support the imposition of a civil penalty.

The Administrator first argues that the plain language of the statute controls and that the interpretation of a statute by the agency charged with its administration is entitled to great deference. The Administrator contends that the plain language of the statute permits a civil penalty when the Beef Production Order is violated. According to the Administrator, the Beef Production Order is violated every time a person subject to it fails to comply with its provisions. Therefore, the JO could have assessed a penalty of up to \$5,000 for each time Goetz failed to remit assessments (21,690) and for each time he failed to transmit reports of assessments (93), which could have resulted in a penalty of up to \$108,915,000. Finally, the Administrator argues that the evidence supported the imposition of the civil penalty.

The court will affirm the imposition of the civil penalty. The Tenth Circuit has

stated the following about statutory interpretation:

In interpreting a statute, the starting point is the statutory language. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Id.* “In other words, ‘[u]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control.’” *United States v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10<sup>th</sup> Cir. 1992) (quoting *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11<sup>th</sup> Cir. 1991)), *cert. denied*, 507 U.S. 951, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993).

....

Where the plain language of a statute is ambiguous and Congress has not spoken on the issue, we must give considerable deference to an agency’s interpretation of a statute it is charged with administering. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). We must sustain the agency’s construction of the statute as long as its construction is reasonable. *Id.* at 845, 104 S.Ct. at 2783.

*Long v. Board of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1157 (10<sup>th</sup> Cir. 1997); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (“The interpretation of a statute by the agency charged with its administration generally is entitled to great deference.”)

The plain language of the statute supports the JO’s determination. The statute provides that the Secretary may impose a civil penalty not to exceed \$5,000 for “violation of such order.” Every time Goetz failed to collect and remit assessments and failed to provide monthly reports, he violated the order. Other courts agree with this interpretation. *See Frame*, 885 F.2d at 1124 (“The Secretary may, after an administrative hearing, issue an order to restrain or prevent a person from violating the Beef Order, and assess a civil penalty of up to \$5,000 for a violation already committed.”) (emphasis added); *Goetz*, 920 F. Supp. at 1177 (“After an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to \$5,000 for *each* violation of the Act and the Order.”) (emphasis added). Even if the court were to find the language of the statute ambiguous, it would conclude that the JO’s interpretation is not unreasonable.

Goetz’s argument that the late charge is a sufficient penalty is without merit. If

that were the case, why does 7 U.S.C. § 2908(a)(2) even exist? As the Administrator points out, the purpose of the late charge is to reimburse the Board for the time value of assessments not timely remitted and the purpose of the civil penalty is to deter those who violate any order issued under the BPA.

In sum, the court cannot find that the JO acted arbitrarily or capriciously in his decisions, and his findings are clearly supported by substantial evidence. Therefore, there are no grounds for reversal in this case.

The present matter has been extensively briefed. Further, given the careful review given to the extensive arguments and evidence submitted by the parties, the court does not encourage the filing of motions for reconsideration. Accordingly, any such motion and accompanying memoranda may not exceed ten double-spaced pages in length, including supporting arguments and authorities, regardless of the number of points raised. Any response shall also be limited to five pages. No replies may be filed.

IT IS ACCORDINGLY ORDERED this 23d day of May, 2000, that the decision of the Secretary is affirmed in all respects.

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**EQUAL ACCESS TO JUSTICE ACT**

**DEPARTMENTAL DECISIONS**

**In re: SANFORD SKARSTEN AND CAROL SKARSTEN.  
EAJA-FSA Docket No. 1999EEA0215.  
Decision and Order filed May 10, 2000.**

**EAJA application – Prevailing party – Substantial justification – Fees and expenses.**

The Director, National Appeals Division [Secretary of Agriculture delegated Equal Access to Justice Act (EAJA) authority to Director by memorandum dated June 14, 1999], affirmed award of appraisal fees and expenses and reversed Adjudication Officer's denial of fees for services of legal service organizations sought by Applicants under EAJA. The Adjudicating Officer determined that the Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, and the fees and expenses associated with an independent appraisal were reasonable. The Adjudicating Officer determined that the Agency's decision was not substantially justified when it relied upon a flawed appraisal, but found that fees for legal services performed by nonprofit organizations were not compensable under EAJA. The Director reversed as to such fees, awarding limited fees as reasonable and documented, agreeing that the Applicants were prevailing parties and the Agency was not substantially justified in its action.

Alice A. Peterson, for Respondent.

Brian L. Boysen, Appleton, Minnesota, for Applicant.

Karen R. Kkrub, Appleton, Minnesota, for Applicant.

Initial decision issued by Michael W. Shea, Adjudicating Officer.

*Decision and Order issued by Norman G. Cooper, Director, National Appeals Division.*

Sanford Skarsten and Carol Skarsten [hereinafter Applicants] instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504 (1994 suppl. 3)) [hereinafter EAJA] and the Procedures Relating to Awards under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203 (2000)) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture [hereinafter USDA], National Appeals Division, [hereinafter NAD], on August 7, 1999.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, in which Applicants appealed the decision by the Farm Service Agency [hereinafter FSA], USDA [also hereinafter Respondent], as to payment under a Shared Appreciation Agreement (SAA) (7 C.F.R. § 1951 (1999)); (2) Applicants request the award of appraisal fees and expenses of \$1,210 be affirmed; and (3) Applicants request that the denial of fees as to the organizations providing

certain assistance be reversed and that fees be awarded. The denial of fees for services provided by two legal services attorneys, one paralegal and one farm advocate was determined by the Hearing Officer, serving as EAJA Adjudicating Officer, on November 5, 1999.

On September 9, 1999, Respondent filed an Answer to Application for Fees and Expenses [hereinafter Answer] in which Respondent: (1) denies Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215; (2) states Respondent's position in the adverse decision appealed from in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, was substantially justified; (3) states Applicants' EAJA Application does not comply with the requirements of EAJA or the EAJA Rules of Practice; (4) states Applicants request relief that is not available under EAJA; and (5) states Applicants' request for fees is not supported by documentation.

Applicants filed their response to Respondent's Answer on September 23, 1999.

On November 5, 1999, Michael W. Shea, Hearing Officer, NAD, USDA, serving as EAJA Adjudicating Officer, issued an EAJA Determination [hereinafter Initial Decision and Order] in which he determined that: (1) Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 6); (2) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215 (Initial Decision and Order at 7); (3) Respondent's actions and decisions were not substantially justified (Initial Decision and Order at 7); (4) the fees and expenses associated with the independent appraisal were reasonable (Initial Decision and Order at 7); and (5) the fees requested for services provided to Applicants by two legal services attorneys, one legal services paralegal and one farm advocate were denied (Initial Decision and Order at 6).

Applicants requested \$1,210 in appraisal expenses and fees; attorney fees at a rate of \$140 to \$170 an hour for 23.5 hours; paralegal fees at a rate of \$50 to \$70 an hour for 28 hours; and farm advocate fees at a rate of \$50 to \$70 an hour for 32.04 hours. The Hearing Officer awarded only \$1,210 in appraisal fees.

On December 7, 1999, Applicants appealed to the Director, NAD, to whom the Secretary of Agriculture has delegated authority to act as final deciding officer on matters pertaining to EAJA in USDA proceedings covered by the EAJA Rules of Practice (7 C.F.R. § 1.189 (2000)).<sup>1</sup> On December 27, 1999, Respondent filed a Response in Opposition to Appeal Petition of the Applicants, and on January 10, 2000, Applicants submitted a Reply Memorandum in Support of Appeal Petition.

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<sup>1</sup>The Secretary of Agriculture delegated EAJA authority to the Director, NAD by memorandum dated June 14, 1999.

**Applicable Statutory Provisions**

5 U.S.C.:

**Title 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES**

....

**CHAPTER 5 – ADMINISTRATIVE PROCEDURE  
SUBCHAPTER I – GENERAL PROVISIONS**

....

**§ 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.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from an attorney, agent or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of a adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reasons or basis therefor. The decision of the agency on the application for fees and other

expenses shall be final administrative decision under this section.

. . . .

(b)(1) For the purposes of this section—

(A) “fees and other expenses” includes the reasonable expenses of expertwitnesses, the reasonable costs of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party’s case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of \$125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies the higher fee.);

(B) “party” means a party, defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated. . . .;

(C) “adversary adjudication” means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise. . . .;

(D) “adjudicative officer” means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner or otherwise, who presided at the adversary adjudication;

(E) “position of the agency” means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based[.]

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E), (c)(1) (1994 & Supp. III 1997).

**THE ADVERSARY ADJUDICATION THAT IS THE  
BASIS FOR APPLICANTS’ EAJA APPLICATION**

On October 20, 1998, the FSA issued a decision that the Applicants’ real property had appreciated in the amount of \$182,000 and that, under terms of the

SAA, \$84,049.62 was due March 24, 1999.

On November 11, 1998, Applicants appealed the adverse decision to NAD. Specifically, Applicants challenged the accuracy of the appraisal of the property. On February 3, 1999, the Hearing Officer conducted a hearing, and on March 4, 1999, the Hearing Officer issued an Appeal Determination that Respondent's adverse decision was erroneous. *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215. A Director's review of the Hearing Officer's Appeal Determination was requested. On July 8, 1999, the Director upheld the Hearing Officer's determination, noting that FSA acknowledged error in its failure to comply with regulatory requirements for determining payment due. *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215.

#### ARGUMENTS

Applicants contend that: (1) they were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215; (2) the Adjudicating Officer's decision as to their request for the award of appraisal fees and expenses of \$1,210 should be affirmed; and (3) the Adjudicating Officer's decision as to their request for fees for other assistance should be reversed and reasonable fees be awarded.

Respondent contends that: (1) Applicants were not prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215; (2) Respondent's decision in the adverse decision appealed from in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, was substantially justified; (3) Applicants' EAJA application does not comply with the requirements in EAJA or EAJA Rules of Practice; (4) Applicants' request for relief is not available under EAJA; and (5) Applicants' request for fees for legal and other representational services is not supported by documentation.

#### PREVAILING PARTY ANALYSIS

The Adjudicating Officer found that Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215 (Initial Decision Order at 7) and Applicants agree (EAJA Application; Applicants' Reply to Answer at 2). Respondent disagrees and asserts that a "prevailing party" must receive something of "real world value". Respondent cites *Environmental Defense Fund Inc. v. Reilly*, 1 F.3d 1254 (D.C. Cir. 1993), which held that a party who has obtained a remand for further administrative proceedings is not, at that point, a

“prevailing party” for purposes of collecting fees.<sup>2</sup> Attorney fees can be awarded only if the party ultimately succeeds on the merits of its underlying claim. *Environmental Defense Fund Inc.* at 1257. Respondent argues that, because the Hearing Officer substituted one appraisal for another and the Agency did not correct its appraisal, the amount due under the SAA is yet to be determined. Therefore, Respondent argues, Applicants have yet to receive something of “real world value” and are not prevailing parties as defined by EAJA.

Under the circumstances of this case and pursuant to the statutory basis for determinations within the jurisdiction of the NAD, a party prevails when it is finally determined that the adverse decision was erroneous. See 7 U.S.C. § 6991-7000 (1994 suppl. 4). Therefore, the Applicants were prevailing parties.

#### SUBSTANTIAL JUSTIFICATION ANALYSIS

EAJA provides an agency that conducts an adversary adjudication shall award to the prevailing party, fees and other expenses incurred by that party in connection with the proceeding, unless the Adjudicative Officer determines that the position of the agency was substantially justified (5 U.S.C. § 504(a)(1)) (1994 suppl. 3). A decision regarding whether an agency’s position is substantially justified must be based on the administrative record for which fees and other expenses are sought (5 U.S.C. § 504(a)(1)) (1994 suppl. 3). Moreover, the legislative history of EAJA establishes a presumption that the Government’s position was not substantially justified if it loses the case.<sup>3</sup>

The adversary adjudication for which the Applicants seek fees and other expenses, *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, concerned payment under the terms of an SAA. Applicants were notified that they owed \$84,049.62, the write-down amount giving rise to the SAA. At the inception of the SAA, the market value of the property was \$144,000; the appraised value of Applicants’ property at SAA maturity was determined to be \$326,000, an appreciation of \$182,000. As fifty percent (50%) of this amount exceeded the amount of the write-down, the terms of the SAA required that Applicants remit the amount of the write-down. Applicants contested the accuracy of the Agency’s October 13, 1998, appraisal in their NAD appeal.

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<sup>2</sup>See also *Sullivan v. Hudson*, 490 U.S. 877, 886, 109 S.Ct. 2248, 2254, 104 L.Ed.2d 941 (1989); *Hanrahan v. Hampton*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980); *Waterman*, 901 F.2d at 1122; *National Coalition Against Misuse of Pesticides v. Thomas*, 828 F.2d 42, 44 (D.C. Cir. 1987).

<sup>3</sup>H.R. Rep. No. 96-1418, at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4990. See also *Cornella v. Schweiker*, 728 F.2d 978, 982 (8<sup>th</sup> Cir. 1984).

The Hearing Officer concluded that Respondent had properly serviced the SAA, and that FSA was correct in demanding that Applicants remit \$84,049.62. (Appeal Determination at 6). However, the Hearing Officer found Respondent's appraisal of October 13, 1998, contained mathematical and descriptive errors and did not comply with Standard Rule 1-1 and Rule 1-2 of the Uniform Standards of Professional Appraisal Practice (USPAP) (Appeal Determination at 7). Therefore, the Hearing Officer determined that the adverse decision was erroneous. The Director upheld the Hearing Officer based on the errors admitted by FSA on review.

Applicants argue that Respondent was not substantially justified when it did not verify the accuracy of the contract appraiser's figures prior to computing the amount of the shared appreciation. Moreover, Applicants assert that Respondent failed to ensure that the contract appraiser complied with USPAP Rule 1-1(b) that states that an appraiser must not commit a substantial error of omission or commission that significantly affects the appraisal; USPAP Rule 1-1 (c) states that an appraiser must not render appraisal services in a careless or negligent manner, such as a series of errors that, considered individually, may not significantly affect the results of an appraisal, but which, when considered in the aggregate, would be misleading; and USPAP Rule 1-2 provides for a personal inspection of the property wherever possible.

Respondent argues that the test of whether or not a Government action is substantially justified is essentially one of reasonableness. Respondent admitted that the contract appraisal contained errors; however, Respondent argues that those errors did not make the determination regarding the SAA unjustified. Respondent asserts that even if the contract appraisal were flawed, the question is whether a reasonable person, looking at the evidence, would reach the same determination as the Hearing Officer when he found that "the Agency has properly serviced the Appellants' March 24, 1989 Shared Appreciation Agreement" (Appeal Determination at 6).<sup>4</sup>

Respondent contends it is not excusing the mistakes made by the contract appraiser but that regulations were otherwise followed in servicing Applicants' SAA. Moreover, it is urged that the administrative record will show Respondent correctly calculated the amount of shared appreciation due, based upon a value determined by a State Certified general appraiser, as set forth in 7 C.F.R. § 1951.914(c) (1999).

In effect, the Respondent argues "no harm, no foul". However, the Respondent

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<sup>4</sup>See *Pierce v. Underwood*, 487 U.S. 552 (1988) at 587, n. 2 (stating that "a person can be justified even though it is not correct, and we believe it can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, . . .").

did not comply with its own regulatory requirements, and was not substantially justified in failing to comply with those requirements regardless of any ultimate payment due. The Respondent's failure to follow its own rules in determining the payment due under the SAA cannot be considered as reasonable Government action. A NAD Hearing Officer simply decides the factual matter of whether an agency complied with its regulations in rendering an adverse decision. See 60 Fed. Reg. 67298, 67302 (1995). Thus, the *sine qua non* of substantial justification in this NAD determination is in compliance with law and regulations.

### FEES AND EXPENSES

Fees and expenses that may be awarded under EAJA include the reasonable expenses of expert witnesses; the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case; and reasonable attorney or agent fees (5 U.S.C. § 504(b)(1)(A)) (1994 suppl. 3).

Applicants request that the award of \$1,210 for real estate appraisal fees and expenses be affirmed. Applicants further request the award of fees for other organizations' assistance to Applicants during the administrative appeal. Applicants assert that these organizations contributed a total of 106 hours of professional services to the Applicants.

Affidavits establish that Western Minnesota Legal Services billed Applicants for 64.78 hours of legal service at a rate of \$50 to \$70 an hour for the paralegal and \$140 to \$170 an hour for the attorney. An affidavit prepared by an attorney from the Farmers' Legal Action Group, Inc. (FLAG) establishes that FLAG billed the Applicants for 10.37 hours of legal services. Supporting documentation shows a rate of \$110 to \$120 an hour for the attorney's services. The affidavit from a farm advocate employed by the Neighbor's United Resource Center of Granite Falls establishes that the advocate billed the Applicants for 32.04 hours for services. Documentation shows the advocate billed at a rate at \$50 to \$70 an hour.

Applicants cite *Cornella* for the proposition that a claimant represented by a pro bono organization may be awarded fees under EAJA.. Although the government agencies in *Cornella* were the Social Security Administration and the Department of Health and Human Services, Applicants argue that the same consideration applies to their case. In its Response in Opposition to Appeal Petition of the Applicants, the Respondent refers in a footnote to the *Cornella* case that fees are not available in instances when the position of the Government is not represented by counsel. However, the law of the Circuit providing the jurisdictional authority for NAD adjudication of EAJA fees, *Lane v. U. S. Department of Agriculture*, 120 F.3d

106 (8<sup>th</sup> Cir. 1997), is predicated on a NAD proceeding in which the Government was not represented by counsel. As noted in the Applicants' Reply Memorandum in Support of Appeal Petition, this is a matter of *stare decisis*.

Respondent argues that the only issue involved in the adverse decision was the appraisal used to calculate shared appreciation due. Respondent further argues that Applicants' request for payment for more than 100 hours of work by two attorneys, a paralegal and a farm advocate is overbilling the government and is regarded as a serious transgression, damaging to the public fisc and violative of a trust. *Environmental Defense Fund* at 1260.

The Adjudicating Officer determined that the fees and expenses associated with the independent appraisal were reasonable and justified. He rejected, based on 7 C.F.R. 1.186(a) (2000), Applicants' request for other fees; however, the regulations specifically provides for award of fees based on customary rates even if the services were made available without charge or at reduced rate to the applicant. He reasoned that, because the organizations involved were nonprofit and do not charge for their services or the fees are nominal, an award would be unreasonable.

EAJA is intended to ameliorate the cost of taking up arms against unreasonable Government action. In this case, the Applicants obtained legal and other assistance in their quest to prove that the Respondent's demand for payment under the SAA was erroneous. They prevailed, as the Respondent was found to have erred in not complying with its own rules.

The Adjudicating Officer's rationale in denying any award for such assistance is not without logic, as the purpose of EAJA is not furthered if, in fact, there was no actual cost involved in securing assistance. In addition, legal assistance may appear gratuitous in bringing an appeal to NAD. NAD hearings are conducted by hearing officers, not administrative law judges. Also, NAD proceedings are intended to be "farmer-friendly" so farmers would not be required to hire attorneys to use the NAD appeal process. See 60 Fed. Reg. 67298, 67302 (1995). Thus, the Federal Rules of Evidence, 28 U.S.C. App. (1994 suppl. 4), do not apply to NAD proceedings. 7 C.F.R. § 11.4b (2000).

Notwithstanding the above, there are other considerations to be weighed with respect to the Applicants' request for fees. The award of reasonable fees for organizations providing legal and other assistance represents more than an eleemosynary gesture; the failure to award fees for services of such organizations would discourage their involvement in cases of deserving appellants with meritorious but complex claims of error. Indeed, if the end result is improvement in the quality of the Department's administrative decisions, then the Department benefits, as do participants in its programs. It should be noted that although the

NAD appeals process is intended to be “farmer-friendly,” its rules require that any determination be “consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations”. 7 C.F.R. § 11.10b (2000). Further, Congress appears to have had some measure of legal oversight in mind for NAD as the statute requires that the NAD Director be appointed “from among persons who have substantial experience in practicing administrative law”. 7 U.S.C. 6992b(a) (1994 suppl. 4). Finally, NAD determinations are subject to judicial review and enforcement by a federal district court. 7 U.S.C. 6999 (1994 suppl. 4). Certainly a party might desire legal or other assistance to develop the administrative record.

The Respondent does not argue that the award of necessary and reasonable fees is prohibited. Rather, the Respondent objects to award of the fees, citing their unreasonableness and lack of documentation. However, the record documents with specificity the fees sought, and the Hearing Officer recognized a total of 106 hours claimed for services of several attorneys and other representatives. He also clearly questioned whether any of the hours claimed are reasonable, especially as the issues revolved around the appraisal and argument concerning such was presented almost entirely by the Applicants’ appraiser at the hearing. Indeed, it is difficult to discern the reasonableness and necessity as to fees for all the individuals identified as having provided some assistance in this case. Therefore, giving consideration to the documented participation of those making a necessary and reasonable contribution in this matter, a limited award of fees based on a rate of \$125 an hour for attorney fees pursuant to Section 504, *supra*, and \$50 an hour for paralegal fees, is appropriate. Based on the record, these fees are determined necessary and reasonable:

**Brian L. Boysen, Attorney, Western Minnesota Legal Services**

Date	Hours Billed	Activity
04/06/99	01 hr. 50 mins.	Work on appeal response
04/07/99	01 hr. 25 mins.	Work on appeal and telephone calls with Paul Mahoney and Karen Krub
04/08/99	07 hrs. 50 mins.	Work on appeal letter, travel to meet with clients, service
08/04/99	02 hrs.	Work on EAJA documents and research
08/05-06/99	05 hrs.	Meet clients, work on EAJA application and affidavits, complete EAJA documents

Total Hours: 17 hours and 25 minutes (17-1/2 hours) x \$125 = \$2,188

**Paul D. Mahoney, Paralegal, Western Minnesota Legal Services**

<u>Date</u>	<u>Hours Billed</u>	<u>Activity</u>
01/05/99	00 hrs. 20 mins.	NAD prehearing teleconference concerning appraisal appeal
01/15-26/99	16 hrs.	Preparing all appeal documents for submission to NAD and FSA credit director
02/03/99	06 hrs.	Travel time and NAD appeal
04/01-08/99	05 hrs. 30 mins.	Evaluated Director Review request received with supervising attorney, client, farm advocate then worked on response to Director Review
08/05-06/99	02 hrs.	Worked on EAJA documents
Total Hours: 27 hours and 50 minutes (28 hours) x \$50 = \$1,250		

**Karen R. Krub, Attorney, Farmers' Legal Action Group, Inc.**

<u>Date</u>	<u>Hours Billed</u>	<u>Activity</u>
03/09/00	01 hr. 10 mins.	Read Appeal Determination, review FSA appraisal regulations and internal directives
04/06/99	02 hrs. 21 mins	Work on response to Director Review: read draft; review USPAP Standards 1 & 2, FSA appraisal regulations and internal directives
04/07/99	02 hrs. 28 mins.	Work on response to Director Review: review USPAP Standards 1 & 2, FSA appraisal regulations and internal directives, USPAP court decisions; edit draft
Total Hours: 5 hours and 59 minutes (6 hours) x \$125 = \$750		

**Total: \$4,188**

**FINDINGS OF FACT AND CONCLUSION OF LAW**

The Adjudicating Officer's determinations as to prevailing party, substantial justification, and appraisal fees are affirmed. The Adjudicating Officer's denial of fees for the expenses of the legal services organizations and paralegal fees is reversed. The Applicants are entitled to an award of those fees in the amount of \$5,398, of which \$1,210 is for real estate appraisal fees and expenses.

**Order**

Applicants' request, under the EAJA, for the award of real estate appraisal fees and expenses in the amount of \$1,210 is affirmed. Applicants' request for the award of fees and expenses for legal services and other representation is approved in the amount of \$4,188. A total of \$5,398 is awarded the Applicants.

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**In re: SANFORD SKARSTEN AND CAROL SKARSTEN.**

**EAJA-FSA Docket No. 1999EEA0215.**

**Order Denying Respondent's Petition for Reconsideration and Order Granting Applicants' Petition for Reconsideration and Correction filed July 6, 2000.**

**Petition for reconsideration – Mistake of law and legislative history – Correct Computation and Mathematical for Fees and expenses – Noncompliance with Regulations.**

The Director, National Appeals Division (NAD)[Secretary of Agriculture delegated Equal Access to Justice Act (EAJA) authority to Director by memorandum dated June 14, 1999], denied Respondent's Petition for Reconsideration. The NAD Director held that the legislative history had no determinative effect as the May 10, 2000 Decision and Order reflect that the Applicants were the prevailing parties and the government did not show substantial justification. Further, the the Agency admitted error in not complying with published regulations, as stated in 7 C.F.R. 1922.201 (1999), requiring compliance with the Uniform Standards of Professional Appraisal Practice.

The Director granted Applicants' request to correct the computation and mathematical errors in awarding fees which changed the total amount awarded Applicants from \$5,398, as stated in the May 10, 2000, Decision and Order, to \$5,616.

Alice A. Peterson, for Respondent.

Brian L. Boysen, Appleton, Minnesota, for Applicant.

Karen R. Kkrub, Appleton, Minnesota, for Applicant.

Initial decision issued by Michael W. Shea, Adjudicating Officer.

*Decision and Order issued by Norman G. Cooper, Director, National Appeals Division.*

Sanford Skarsten and Carol Skarsten [hereinafter Applicants] instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504 (1994 suppl. 3)) [hereinafter EAJA] and the Procedures Relating to Awards under the Equal Access to Justice Act in Proceedings Before the Department ( 7 C.F.R. §§ 1.180-.203 (2000)) [hereinafter the EAJA Rules of Practice] by filing an Equal Access to Justice Act Application [hereinafter EAJA Application] with the United States Department of Agriculture [hereinafter USDA], National Appeals Division,

[hereinafter NAD], on August 7, 1999.

Applicants allege in their EAJA Application that: (1) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, in which Applicants appealed the decision by the Farm Service Agency [hereinafter FSA], USDA [also hereinafter Respondent], as to payment under a Shared Appreciation Agreement; (2) Applicants request the award of appraisal fees and expenses of \$1,210 be affirmed; and (3) Applicants request that the denial of fees as to the organizations providing certain assistance be reversed and that fees be awarded.

On September 9, 1999, Respondent filed an Answer to Application for Fees and Expenses [hereinafter Answer] in which Respondent: (1) denies Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215; (2) states Respondent's position in the adverse decision appealed from in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215, was substantially justified; (3) states Applicants' EAJA Application does not comply with the requirements of EAJA or the EAJA Rules of Practice; (4) states Applicants request relief that is not available under EAJA; and (5) states Applicants' request for fees is not supported by documentation.

Applicants filed their response to Respondent's Answer on September 23, 1999.

On November 5, 1999, Michael W. Shea, Hearing Officer, NAD, USDA, serving as EAJA Adjudicating Officer, issued an EAJA Determination [hereinafter Initial Decision and Order] in which he determined that: (1) Applicants filed a complete and timely EAJA Application (Initial Decision and Order at 6); (2) Applicants were the prevailing parties in *In re Sanford Skarsten and Carol Skarsten*, NAD Case No. 1999E000215 (Initial Decision and Order at 7); (3) Respondent's actions and decisions were not substantially justified (Initial Decision and Order at 7); (4) the fees and expenses associated with the independent appraisal were reasonable (Initial Decision and Order at 7); and (5) the fees requested for services provided to Applicants by two legal service attorneys, one legal service paralegal and one farm advocate were denied (Initial Decision and Order at 6).

On December 7, 1999, Applicants appealed to the Director, NAD;<sup>1</sup> on December 27, 1999, Respondent filed a Response in Opposition to Appeal Petition of the Applicants, and on January 10, 2000, Applicants submitted a Reply Memorandum in Support of Appeal Petition.

On May 10, 2000, a Decision and Order [hereinafter Decision and Order] was issued affirming the Adjudicating Officer's determination as to prevailing party,

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<sup>1</sup>The Secretary of Agriculture delegated EAJA authority to the Director, NAD by memorandum dated June 14, 1999.

substantial justification and appraisal fees; reversing the Adjudicating Officer's denial of fees for expenses of the legal service organizations and paralegal service; and awarding fees in the amount of \$5,398 of which \$1,210 was for real estate appraisal fees and expenses.

Section 1.146(a)(3) of the Rules of Practice Governing Form Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides:

§ 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 matter claimed to have been erroneously decided and alleged errors must be briefly stated.

On May 19, 2000, Applicants filed a letter and Petition for Reconsideration and Correction [hereinafter Petition for Reconsideration and Correction]; on May 22, 2000, Respondent filed Government's Petition for Reconsideration of the NAD Director's Decision and Order [hereinafter Government's Petition for Reconsideration]; on May 26, 2000, Applicants filed a Response to Government's Petition for Reconsideration; and on the same day, the Respondent filed a letter in response to the Applicants' Response to the Government's Petition for Reconsideration.

Applicants' Petition for Reconsideration and Correction seeks to modify fees computed for Brian L. Boysen and correct a mathematical error in the total hours for Paul Mahoney. Applicants point out that the affidavit submitted by Brian L. Boysen for legal services was in decimal format. For example, on April 6, 1999, the hours should be 1.5 hours instead of 1 hour and 50 minutes. Correcting the entries on page 14 of the Decision and Order into the decimal format results in a total of 17.25 hours instead of 17 hours and 25 minutes. Therefore, multiplying 17.25 hours times \$125 results in \$2,156.25, instead of the \$2,188 stated in the Decision and Order.

For the award of fees for Paul Mahoney, Applicants point out that on page 14 of the Decision and Order, the total hours are 27 hours and 50 minutes. The total hours approved are 29 hours and 50 minutes, rounded to 30 hours. Multiplying 30 hours times \$50 per hour results in a total of \$1,500 instead of the \$1,250 stated in the decision.

Applicants request that with the correction of the computation and mathematical errors, the total awarded would be \$5,616, rounded to the nearest dollar, of which \$4,406 is for the fees and expenses for legal service and other representation and \$1,210 is for the award of real estate appraisal fees.

Applicants' request to correct the computation and mathematical errors in awarding fees for Brian L. Boysen and Paul Mahoney is consistent with the intent of the Decision and Order. Therefore, Applicants' Petition for Reconsideration and Correction is granted.

Respondent raises the issues that (1) the substantial justification analysis of the decision misstates the law and its legislative history and (2) that the Decision and Order concludes that the Agency did not comply with its regulatory requirements, without stating which regulations the Agency did not follow.

Respondent notes that the Decision and Order, at pages 7 and 8, *Cornella v. Schweiker*, 728 F. 2d 978 (8<sup>th</sup> Cir. 1984) states that "the legislative history of EAJA establishes a presumption that the government's position was not substantially justified if it loses the case". Respondent points out that EAJA legislative history establishes just the opposite. Respondent adds that the legislative history of EAJA provides that it is intended to award fees where the government has coerced compliance with its position. H.R. Rep. No. 96-1418 (1980) as reprinted at 1980 WL 12964 at page 5. However, the legislative history of EAJA had no determinative effect, as the Decision and Order correctly reflects, based on the administrative record, that the Applicants were the prevailing parties and the government did not show substantial justification. Indeed, the Decision and Order fully addresses the reasonableness test, which the Respondent agrees is the proper test of whether or not a government action is substantially justified.

Respondent's position, as to the issue that the Agency did not comply with regulatory requirements, is that the administrative record will show that the Agency did in fact comply with its regulatory requirements. Specifically, Respondent references *Government's Response in Opposition to Appeal Petition* at pages 2 and 3 that states:

In order to determine the amount of appreciation due, if any, under the SAA, the Agency contracted with a state-certified appraiser to complete an appraisal, as required 7 C.F.R. § 1951.914. FmHA Instruction Part 1922

sets forth the requirements that the Agency must comply with relative to appraisals. FmHA Instruction § 1922.10(b) provides that appraisal reviews will be completed as described in the appropriate program review instructions. The instructions for servicing SAAs do not require an appraisal review, however, it is the policy of FSA to complete an administrative review of contract appraisals prior to payment the contract appraiser.

Based on the administrative record and admission that the FSA contract appraiser erred in not complying with published regulations, specifically provisions of 7 C.F.R. § 1922.201 (1999), requiring compliance with the Uniform Standards of Professional Appraisal Practice, a reasonable person would conclude that the government failed to prove that its action was substantially justified. Respondent's argument that the Agency essentially complied with it rules echoes its earlier "no harm, no foul" claim. The failure of an Agency to follow its own regulations in determining the payment under the SAA is not reasonable government action.

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

#### **Order**

Applicants' Petition for Reconsideration and Correction is granted and Respondent's Petition for Reconsideration is denied.

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**In re: DWIGHT L. LANE AND DARVIN R. LANE.**  
**EAJA-FSA Docket No. 98-0002.**  
**Decision and Order filed May 17, 2000.**

**Equal Access to Justice Act – Timely answer – Adequate answer – Commencement of adversary adjudication – Conclusion of adversary adjudication – Hourly rate for attorney fees – Sufficiency of application – Agent fees – Expert witness fees – Discharge of official duties.**

The Judicial Officer reduced Hearing Officer Harry Iszler's awards to Equal Access to Justice Act (EAJA) Applicants from \$213,997.77 to \$55,396.60. The Judicial Officer found Respondent's answer was timely filed and met the requirements for an answer in 7 C.F.R. § 1.195(c). The Judicial Officer also held that, under the EAJA, an applicant may be awarded fees and other expenses incurred in connection with an adversary adjudication. However, the administrative process that precedes the agency decision, which is the basis for the adversary adjudication, is not part of the adversary adjudication. The Judicial Officer rejected Applicants' contention that the current \$125-per-hour rate cap for attorney fees in the EAJA could be awarded to Applicants. Instead, the Judicial Officer found that the \$75-per-hour rate cap in the EAJA (5 U.S.C. § 504(b)(1)(A)(ii) (1994)), at the commencement of the adversary adjudications for which Applicants sought EAJA awards, was the applicable maximum

rate at which attorney fees could be awarded to Applicants. The Judicial Officer also rejected Applicants' contention that the \$75-per-hour rate cap must be increased to reflect the change in the cost of living that has occurred since enactment of the EAJA in 1980. The Judicial Officer found 5 U.S.C. § 504(b)(1)(A)(ii) (1994) explicitly provides that attorney fees may not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living justifies a higher fee, and the USDA has not issued a regulation increasing the cap on the rate at which attorney fees may be awarded. Based on the legislative history applicable to the EAJA (H.R. Rep. No. 96-1418), the Judicial Officer held that no award can be made for agent fees because the record did not establish that Applicants' agent was a non-attorney representative in the adversary adjudications for which Applicants sought EAJA awards. However, the Judicial Officer did award Applicants' for fees incurred for their agent's services as an expert witness at the rate provided in 28 U.S.C. § 1821(b).

Duane G. Elness and William A. Robbins, Cavalier, ND, for Applicants.  
Margit Halvorson Williams, St. Paul, MN, for Respondent.  
Initial Decision and Order by Harry Iszler, Hearing Officer.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## **I. Introduction**

Dwight Lane and Darvin Lane [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing Equal Access to Justice Act Applications [hereinafter EAJA Applications] with the National Appeals Division, United States Department of Agriculture. Applicants seek fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

On September 25, 1995, and October 27, 1995, the National Appeals Division, citing proposed National Appeals Division Rules of Procedure (60 Fed. Reg. 27,044-49 (1995)), informed Applicants that their EAJA Applications could not be considered because the Equal Access to Justice Act is not applicable to National Appeals Division proceedings.

On December 29, 1995, the United States Department of Agriculture [hereinafter USDA] adopted the proposed National Appeals Division Rules of Procedure cited in the National Appeals Division's September 25, 1995, and October 27, 1995, letters to Applicants (60 Fed. Reg. 67,298-313 (1995)). Specifically, section 11.4 of the National Appeals Division Rules of Procedure states that the Equal Access to Justice Act does not apply to proceedings before the National Appeals Division, as follows:

**§ 11.4 Inapplicability of other laws and regulations.**

The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) are not applicable to proceedings under this part. The Equal Access to Justice Act, as amended, 5 U.S.C. 504, does not apply to these proceedings. The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to these proceedings.

## 7 C.F.R. § 11.4.

Applicants sought judicial review of 7 C.F.R. § 11.4 and the National Appeals Division's refusal to consider their EAJA Applications. The United States District Court for the District of North Dakota: (1) held the Equal Access to Justice Act applies to National Appeals Division proceedings; (2) held the provision in 7 C.F.R. § 11.4, which states the Equal Access to Justice Act is not applicable to National Appeals Division proceedings, is contrary to law; (3) held Applicants are entitled to fees under 5 U.S.C. § 504; and (4) remanded the matter to the National Appeals Division to determine the amount to award to Applicants. *Lane v. United States Dep't of Agric.*, 929 F. Supp. 1290 (D.N.D. 1996). USDA appealed and the United States Court of Appeals for the Eighth Circuit held the Equal Access to Justice Act is applicable to National Appeals Division proceedings. *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8<sup>th</sup> Cir. 1997). On September 29, 1997, pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of North Dakota remanded the case to the National Appeals Division to consider the merits of Applicants' EAJA Applications. *Lane v. United States Dep't of Agric.*, A2-95-166 (D.N.D. Sept. 29, 1997) (Order); *Lane v. United States Dep't of Agric.*, A2-95-148 (D.N.D. Sept. 29, 1997) (Order).

On December 2, 1997, National Appeals Division Hearing Officer Harry Iszler [hereinafter the Hearing Officer] conducted a hearing regarding Applicants' EAJA Applications in Grand Forks, North Dakota. William A. Robbins and Duane G. Elness represented Applicants. Margit Halvorson<sup>1</sup> and Lynn E. Crooks represented the Farm Service Agency [hereinafter Respondent<sup>2</sup>], USDA. (Unofficial Transcript

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<sup>1</sup>Subsequent to the December 2, 1997, hearing, Margit Halvorson changed her name to Margit Halvorson Williams.

<sup>2</sup>Applicants instituted the adversary adjudications, for which Applicants now seek Equal Access to Justice Act awards, against the Farmers Home Administration. Pursuant to section 226 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6932), (continued...)

at 2-3.)

On February 20, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination as to Dwight Lane, in which the Hearing Officer: (1) found Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; (2) found Respondent's position in *In re Dwight Lane*, NAD Log No. 94001064W, was not substantially justified; and (3) awarded Dwight Lane \$95,933.51 for fees and other expenses incurred in connection with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W. On February 20, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination as to Darvin Lane, in which the Hearing Officer: (1) found Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W; (2) found Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W, were not substantially justified; and (3) awarded Darvin Lane \$118,064.26 for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

On March 24, 1998, Respondent appealed to the Judicial Officer. Applicants sought judicial review of USDA's authority to implement regulations providing for an administrative appeal of an Equal Access to Justice Act award. The United States District Court for the District of North Dakota found the Hearing Officer's February 20, 1998, Equal Access to Justice Act Application Determinations do not constitute final agency action ripe for judicial review. Applicants each filed a Request for Reconsideration, both of which the United States district court denied. *Lane v. United States Dep't of Agric.*, A2-95-166 (D.N.D. June 2, 1998) (Order); *Lane v. United States Dep't of Agric.*, A2-95-148 (D.N.D. June 2, 1998) (Order). Applicants appealed and the United States Court of Appeals for the Eighth Circuit affirmed the United States District Court for the District of North Dakota. *Lane v. United States Dep't of Agric.*, 187 F.3d 793 (8<sup>th</sup> Cir. 1999).

On November 18, 1999, Applicants filed Memorandum in Support of Hearing Officer Decision. On December 16, 1999, Respondent filed Motion for Leave to

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<sup>2</sup>(...continued)

the functions of the Farmers Home Administration relevant to this proceeding were transferred to the Consolidated Farm Service Agency. Effective November 8, 1995, the Secretary of Agriculture renamed the Consolidated Farm Service Agency the Farm Service Agency (60 Fed. Reg. 56,392-465 (1995)). The term "Respondent" in this Decision and Order refers not only to the Farm Service Agency, but also to its predecessor agencies, the Farmers Home Administration and the Consolidated Farm Service Agency, where appropriate.

File a Reply to Lanes' Memorandum in Support of Hearing Officer Decision; on January 4, 2000, Applicants filed Objection to Government's Motion for Leave to File a Reply to Lanes' Memorandum in Support of Hearing Officer Decision; and on January 6, 2000, I granted Respondent's request to file a reply to Applicants' Memorandum in Support of Hearing Officer Decision.

On January 27, 2000, Respondent filed Reply to Lanes' Memorandum in Support of Hearing Officer Decision. On February 17, 2000, Applicants requested an opportunity to file a response to Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, which I granted on February 22, 2000.

On March 9, 2000, Applicants filed Lanes' Response to the Government's Reply requesting, *inter alia*, that I strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision. On May 8, 2000, the National Appeals Division transmitted the record of this proceeding to the Judicial Officer for decision and a ruling on Applicants' request that the Judicial Officer strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision.

## **II. Applicable Statutory Provision**

5 U.S.C.:

### **TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES**

....

#### **CHAPTER 5—ADMINISTRATIVE PROCEDURE**

##### **SUBCHAPTER I—GENERAL PROVISIONS**

....

#### **§ 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.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section—

(A) “fees and other expenses” includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party’s case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability

of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) “party” means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) “adversary adjudication” means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) “adjudicative officer” means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) “position of the agency” means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. . . .

. . . .

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E), (c)(1) (1994).

### **III. Applicants’ Motion to Strike Respondent’s Reply to Lanes’ Memorandum in Support of Hearing Officer Decision**

Applicants request I strike Respondent’s Reply to Lanes’ Memorandum in Support of Hearing Officer Decision stating, as follows:

The Supreme Court has admonished that the filing of a fee application under the EAJA should not occasion a second round of major litigation. It appears that the Government has chosen to ignore that caveat. The Reply

that the Government has submitted is nothing more than a tardy pleading, serving mainly to delay an already lengthy proceeding, and should therefore be ordered stricken from the record.

Lanes' Response to the Government's Reply at 1 (emphasis in original).

I disagree with Applicants' contention that Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision serves mainly to delay this proceeding. Respondent states for the first time in this proceeding that "in the interests of bringing this long-standing case to a speedy resolution, [Respondent] will no longer challenge the findings that it was not substantially justified" (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 2). Respondent's concession greatly simplifies the issues in this proceeding and should expedite this proceeding.

Applicants correctly note that until Respondent's January 27, 2000, filing, Respondent consistently asserted that its positions in *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were substantially justified, and that abandonment of this defense could have been accomplished other than by filing Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision (Lanes' Response to the Government's Reply at 4-5). I do not find Respondent's consistent assertion of a defense until January 27, 2000, or the method by which Respondent abandons that defense, a basis for striking Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision.

Therefore, Applicants' motion to strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, is denied.

#### **IV. Issues on Appeal**

The Hearing Officer found: (1) *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications; (2) Darwin Lane was the prevailing party in *In re Darwin Lane*, NAD Log No. 94000376W, and *In re Darwin Lane*, NAD Log No. 94000842W, and Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; (3) Respondent's positions in *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified; (4) Applicants meet all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act; (5) Applicants did

not engage in conduct which unduly and unreasonably protracted *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W; and (6) there are no special circumstances that would make an Equal Access to Justice Act award for fees and other expenses incurred by Darwin Lane and Dwight Lane unjust (Equal Access to Justice Act Application Determination as to Darwin Lane at 8-9; Equal Access to Justice Act Application Determination as to Dwight Lane at 7).

Applicants request that I adopt the Hearing Officer's Equal Access to Justice Act Application Determination as to Darwin Lane and Equal Access to Justice Act Application Determination as to Dwight Lane and that I find the Government's Response to Application for Relief Under the Equal Access to Justice Act [hereinafter Answer] was not timely filed and did not contain specific objections to Applicants' EAJA Applications (Memorandum in Support of Hearing Officer Decision at 1, 48-49).

Respondent concedes *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications. Moreover, Respondent does not challenge the Hearing Officer's finding that Darwin Lane was the prevailing party in *In re Darwin Lane*, NAD Log No. 94000376W, and *In re Darwin Lane*, NAD Log No. 94000842W, and Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; or the Hearing Officer's finding that Respondent's positions in *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified. Respondent states "[t]herefore, the only question remaining before the Judicial Officer is 'what are the reasonable fees that should be awarded to the Lanes?'" (Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 2.)

In light of Applicants' Memorandum in Support of Hearing Officer Decision and Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, I find that the only issues remaining on appeal are: (1) the timeliness and adequacy of Respondent's Answer; and (2) the amount to award Applicants for fees and other expenses incurred by them in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

I find Respondent's Answer was timely filed and adequate. Moreover, I find the amounts the Hearing Officer awarded to Applicants for fees and other expenses incurred by them in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, error.

## V. Timeliness of Respondent's Answer

Applicants contend that Respondent's Answer was not timely filed (Memorandum in Support of Hearing Officer Decision at 7-9). Section 1.195(a) of the EAJA Rules of Practice provides that within 30 days after service of an Equal Access to Justice Act application, agency counsel may file an answer, as follows:

### § 1.195 Answer to application.

(a) Within 30 days after service of an application, agency counsel may file an answer. If agency counsel fails to timely answer or settle the application, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses.

7 C.F.R. § 1.195(a).

Darvin Lane's EAJA Application for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, is dated February 16, 1995; Darvin Lane's EAJA Application for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000842W, is dated January 16, 1995; and Dwight Lane's EAJA Application for fees and other expenses incurred in connection with *In re Dwight Lane*, NAD Log No. 94001064W, is dated February 10, 1995. Applicants contend that Respondent was required to file its Answer no later than 30 days after the United States Court of Appeals for the Eighth Circuit held that the Equal Access to Justice Act applies to National Appeals Division proceedings. The Eighth Circuit decided *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8<sup>th</sup> Cir. 1997), on July 14, 1997, and based on Applicants' methodology for determining timeliness, Respondent was required to file its Answer no later than August 13, 1997.

Respondent contends it filed a timely Answer on November 14, 1997 (Reply to Lanes' Memorandum of Hearing Officer Decision at 9). In support of its contention, Respondent notes the United States Court of Appeals for the Eighth Circuit did not, as a consequence of its July 14, 1997, decision, remand the Equal Access to Justice Act proceeding to the National Appeals Division, but rather remanded the proceeding to the United States District Court for the District of North Dakota, the court from which the case had been appealed to the Eighth Circuit. The United States District Court for the District of North Dakota then remanded the case to the National Appeals Division, and on October 24, 1997, the Hearing Officer issued notices advising Applicants and Respondent that briefs,

written arguments, additional documents, and a list of witnesses must be exchanged by November 17, 1997 (Notice of Hearing on Application for Fees and Expenses as to Dwight Lane; Notice of Hearing on Application for Fees and Expenses as to Darwin R. Lane). Pursuant to the Hearing Officer's October 24, 1997, notices, Respondent served Applicants' counsel with Respondent's Answer and filed its Answer with the United States District Court for the District of North Dakota on November 14, 1997. On November 19, 1997, Respondent filed its Answer with the Hearing Officer and again served its Answer on Applicants' counsel. (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 9.)

Applicants and Respondent agree that the time for filing Respondent's Answer did not begin to run from the date Respondent was served with the EAJA Applications, as provided in section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)). Generally, I would disagree with Applicants and Respondent and find that Respondent's Answer was due 30 days after Applicants' EAJA Applications were served on Respondent. However, given the history of this proceeding, I adopt the view shared by Applicants and Respondent that *Lane v. United States Dep't of Agric.*, 929 F. Supp. 1290 (D.N.D. 1996), and *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8<sup>th</sup> Cir. 1997), tolled the time for filing Respondent's Answer. However, I disagree with Applicants' contention that the time for filing Respondent's Answer runs from July 14, 1997, the date the United States Court of Appeals for the Eighth Circuit decided *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8<sup>th</sup> Cir. 1997).

As an initial matter, I conclude July 14, 1997, cannot be the operative date to determine the timeliness of Respondent's Answer because the United States District Court for the District of North Dakota did not remand the Equal Access to Justice Act proceeding to the National Appeals Division until September 29, 1997.<sup>3</sup> Moreover, the record reveals that, after the United States District Court for the District of North Dakota remanded the proceeding to the National Appeals Division, the Hearing Officer issued notices indicating Respondent's Answer was due November 17, 1997 (Notice of Hearing on Application for Fees and Expenses as to Dwight Lane; Notice of Hearing on Application for Fees and Expenses as to Darwin R. Lane). Respondent filed its Answer with the United States District Court for the District of North Dakota and served Applicants with its Answer on November 14, 1997. Respondent did not file its Answer with the Hearing Officer until November 19, 1997, 2 days after the date the Hearing Officer ordered

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<sup>3</sup>See *Lane v. United States Dep't of Agric.*, A2-95-148 (Order) (Sept. 29, 1997) and *Lane v. United States Dep't of Agric.*, A2-95-166 (Order) (Sept. 29, 1997) (remanding the proceeding to the National Appeals Division for consideration on the merits of the Applicants' EAJA Applications).

Respondent to file its Answer. Nevertheless, the Hearing Officer appears to have accepted Respondent's Answer as having been timely filed (Equal Access to Justice Act Application Determination as to Dwight Lane at 2; Equal Access to Justice Act Application Determination as to Darwin Lane at 2-3). Therefore, I do not find that Respondent failed to file a timely Answer.

Moreover, even if I found Respondent's Answer was late-filed, my finding would have no effect on this proceeding. The EAJA Rules of Practice do not require a respondent to file an answer and do not provide any consequence for a late-filed answer. Instead, section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)) provides agency counsel *may* file an answer and if agency counsel fails to file a timely answer, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses. The EAJA Rules of Practice do not prohibit a party that has failed to file a timely answer to an Equal Access to Justice Act application from appealing an adjudicative officer's initial decision to the Judicial Officer.

#### **VI. Adequacy of Respondent's Answer**

Applicants contend that Respondent's Answer does not explain in detail objections to the awards requested in Applicants' EAJA Applications, as required by section 1.195(c) of the EAJA Rules of Practice (7 C.F.R. § 1.195(c)) and does not specifically identify the information sought in a further proceeding in accordance with section 1.199(b) of the EAJA Rules of Practice (7 C.F.R. § 1.199(b)) (Memorandum in Support of Hearing Officer Decision at 7-9, 48-49).

Section 1.195(c) of the EAJA Rules of Practice provides, as follows:

#### **§ 1.195 Answer to application.**

....

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceeding under § 1.199 of this part.

7 C.F.R. § 1.195(c).

Respondent's Answer explains Respondent's objections to the awards requested by Applicants, as follows:

### III. ATTORNEYS' FEES

FSA will present at the hearing specific objections to the statements presented by Lanes' attorneys and their ag credit counselor. However, its general objections to the statements can be grouped into several broad categories. First, there is no attempt to differentiate on the statements between work done for Darwin and Mavis Lane and work done for Dwight Lane, nor is there a sufficient description of the work done within the time noted to enable FSA to determine for what purpose the work was done. Second, if attorneys fees were allowed, they would only be allowed for work done in connection with the appeal itself, not for general work done in connection with other matters long prior to the appeal or not directly related to it. Third, there are some items which do not appear to have any legitimate connection with compensable services rendered in these cases. Fourth, although the attorneys may bill at an hourly rate of \$95.00, they would only be able to recover at the hourly rate of \$75 per hour under the Equal Access to Justice Act. Fifth, the attorneys must be able to show that their billings are "reasonable" and they have not done so. Sixth, there is "double billing" in some instances. The Appellants have the burden of proof on the attorneys' fees issue, and it will be difficult for them to meet in these cases, based on the statements themselves.

Answer at 16-17.

I find that Respondent's Answer complies with 7 C.F.R. § 1.195(c).

Section 1.199(a) and (b) of the EAJA Rules of Practice provides award determinations are ordinarily made on the basis of the written record, but further proceedings may be conducted, as follows:

#### **§ 1.199 Further proceedings.**

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and

expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department 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.

(b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

7 C.F.R. § 1.199(a)-(b).

The record reveals Respondent did not request further proceedings under 7 C.F.R. § 1.199. Instead, the Hearing Officer, on his own initiative, ordered further proceedings (Notice of Hearings on Application for Fees and Expenses as to Dwight Lane; Notice of Hearings on Application for Fees and Expenses as to Darwin R. Lane). Respondent is not required by section 1.195(c) of the EAJA Rules of Practice (7 C.F.R. § 1.195(c)) to request further proceedings, and since Respondent did not request further proceedings, Respondent is not required by section 1.199(b) of the EAJA Rules of Practice (7 C.F.R. § 1.199(b)) to identify the information sought or the disputed issues or to explain why the additional proceedings are necessary to resolve the issues.

Therefore, I reject Applicants' contention that Respondent's Answer does not comply with 7 C.F.R. §§ 1.195(c) and 1.199(b).

Moreover, even if I found Respondent's Answer does not comply with 7 C.F.R. §§ 1.195(c) and 1.199(b), my finding would have no effect on this proceeding. The EAJA Rules of Practice do not require a respondent to file an answer and do not provide any consequence for a respondent's filing an answer that does not explain in detail objections to an Equal Access to Justice Act application or that does not specifically identify the information sought in a further proceeding. Instead, section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)) provides agency counsel *may* file an answer and, if agency counsel fails to file a timely answer, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses. The EAJA Rules of Practice do not prohibit a party that has failed to file a sufficient answer to an Equal Access to Justice Act application from appealing an adjudicative officer's initial decision to the Judicial Officer.

## VII. Fees to Which Applicants Are Entitled Under the Equal Access to Justice Act

### A. Commencement and Conclusion of the Adversary Adjudications

Respondent contends it denied loan servicing to Dwight Lane on November 22, 1993, and the Hearing Officer's award for fees and other expenses incurred by Dwight Lane prior to November 22, 1993, is error (Pet. for Review by Judicial Officer as to Dwight Lane at 11-12). Moreover, Respondent contends it denied a release of funds to Darwin Lane on November 14, 1993, and the Hearing Officer's award for fees and other expenses incurred by Darwin Lane prior to November 14, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000376W, is error. Finally, Respondent contends it denied loan servicing to Darwin Lane on November 18, 1993, and the Hearing Officer's award for fees and other expenses incurred by Darwin Lane prior to November 18, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000842W, is error. (Pet. for Review by Judicial Officer as to Darwin Lane at 15.)<sup>4</sup>

The Hearing Officer found Respondent notified Applicants of the denial of their application for loan servicing on November 22, 1993 (Equal Access to Justice Act Application Determination as to Darwin Lane at 4; Equal Access to Justice Act Application Determination as to Dwight Lane at 3). Nevertheless, the Hearing Officer's awards includes fees Applicants incurred for an agent beginning July 1, 1992, and fees Applicants incurred for attorneys beginning June 9, 1993 (Equal Access to Justice Act Application Determination as to Darwin Lane at 6-7; Equal Access to Justice Act Application Determination as to Dwight Lane at 5-6).

The Hearing Officer based Applicants' awards for agent fees beginning on July 1, 1992, on the following findings: (1) Respondent notified Applicants in 1992 that they had an opportunity to apply for loan servicing, that the application was very complex, and that Applicants may need assistance with the application; (2)

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<sup>4</sup>Respondent takes contradictory positions in Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, stating on the one hand November 14, 1993, "is the earliest date for which Darwin Lane may claim EAJA fees" and on the other hand "the earliest date for which Darwin Lane may receive EAJA fees is January 21, 1994" (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 5-6). Respondent does not explain the basis for its contradictory positions with respect to the earliest date for which Darwin Lane "may claim EAJA fees." In any event, as discussed in this Decision and Order, *infra*, I find that only fees and expenses incurred by Applicants on and after November 14, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000376W, and on and after November 18, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000842W, may be awarded to Applicants.

Applicants secured the services of Mark Kreklau, an agricultural financial consultant, who assisted Applicants with the completion of their loan servicing applications; and (3) Applicants submitted their respective loan servicing applications to Respondent on July 7, 1992 (Equal Access to Justice Act Application Determination as to Darwin Lane at 4, 6; Equal Access to Justice Act Application Determination as to Dwight Lane at 3, 5). The Hearing Officer based Applicants' awards for attorney fees beginning on June 9, 1993, on the following findings: (1) Respondent notified Applicants on June 9, 1993, that their loan servicing applications would be reviewed by the Office of the General Counsel, USDA, because of past problems and discrepancies; and (2) it was reasonable for Applicants to obtain legal counsel once Respondent informed Applicants the Office of the General Counsel, USDA, would review their loan servicing applications (Equal Access to Justice Act Application Determination as to Darwin Lane at 4-5, 7; Equal Access to Justice Act Application Determination as to Dwight Lane at 3, 5-6).

I disagree with the Hearing Officer's determination that Applicants are entitled to fees for an agent from the approximate date the agent began assisting Applicants with the completion of their respective loan servicing applications. Moreover, I disagree with the Hearing Officer's determination that Applicants are entitled to attorney fees incurred from the date Respondent informed Applicants that the Office of the General Counsel, USDA, would be reviewing their loan servicing applications.

Under the Equal Access to Justice Act, an applicant may be awarded fees and other expenses incurred in connection with an adversary adjudication. However, the administrative process that precedes the agency decision, which is the basis for the adversary adjudication, is not part of the adversary adjudication.<sup>5</sup> The fees and expenses Applicants incurred in connection with the completion of their loan servicing applications are not fees or other expenses incurred in connection with the adversary adjudications that are the subject of this Equal Access to Justice Act proceeding. Respondent's act of notifying Applicants that the Office of the General Counsel, USDA, would review Applicants' loan servicing applications does not constitute the commencement of an adversary adjudication under the Equal Access to Justice Act.

I conclude the adversary adjudication captioned *In re Dwight Lane*, NAD Log

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<sup>5</sup>See generally *Levernier Construction, Inc. v. United States*, 947 F.2d 497, 500-01 (Fed. Cir. 1991); *Weaver-Bailey Contractors, Inc. v. United States*, 24 Cl. Ct. 576, 581 (Cl. Ct. 1991); *Cox Construction Co. v. United States*, 17 Cl. Ct. 29, 33-34 (Cl. Ct. 1989); *United Construction Co. v. United States*, 11 Cl. Ct. 597, 599 (Cl. Ct. 1987).

No. 94001064W, began no earlier than November 22, 1993, the date Respondent denied Dwight Lane's loan servicing application, and only fees and expenses incurred by Applicants on and after November 22, 1993, in connection with *In re Dwight Lane*, NAD Log No. 94001064W, may be awarded to Applicants.<sup>6</sup>

Moreover, I conclude the adversary adjudication captioned *In re Darwin Lane*, NAD Log No. 94000376W, began no earlier than November 14, 1993, the date Respondent denied a release of funds to Darwin Lane, and the adversary adjudication captioned *In re Darwin Lane*, NAD Log No. 94000842W, began no earlier than November 18, 1993, the date Respondent denied loan servicing to Darwin Lane. Therefore, only fees and expenses incurred by Applicants on and after November 14, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000376W, and on and after November 18, 1993, in connection with *In re Darwin Lane*, NAD Log No. 94000842W, may be awarded to Applicants.<sup>7</sup>

Respondent also contends the adversary adjudications for which Applicants seek fees and other expenses ended on December 2, 1994, when the National Appeals Division issued "final agency orders only reviewable by a United States District Court." Hence, Respondent concludes that the award to Applicants may not include an award for fees and other expenses incurred after December 2, 1994, except for fees for the preparation of Applicants' EAJA Applications. (Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 6.)

I agree with Respondent's contention that the conclusions of the adversary adjudications in question are marked by the issuance of final agency decisions. Moreover, I agree with Respondent that the Hearing Officer issued the final agency decision in *In re Darwin Lane*, NAD Log No. 94000842W, on December 2, 1994. However, I disagree with Respondent's contention that the other adversary adjudications in question were concluded on December 2, 1994. The Acting Director, National Appeals Division, issued a final agency decision in *In re Darwin Lane*, NAD Log No. 94000376W, on January 27, 1995 (Review Decision in *In re Darwin Lane*, NAD Log No. 94000376W, at last unnumbered page). Moreover, the date of the Hearing Officer's final agency decision in *In re Dwight Lane*, NAD Log No. 94001064W, is January 3, 1995.

Therefore, I conclude the Equal Access to Justice Act award to Applicants may only include fees and other expenses: (1) incurred by Applicants in connection with

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<sup>6</sup>See *In re Ronald L. Wiczorek*, 57 Agric. Dec. 1149, 1157 (1998) (holding attorney fees incurred by the applicants from the date the respondent issued an adverse decision regarding the applicants' application were fees incurred in connection with the adversary adjudication).

<sup>7</sup>See note 6.

*In re Darvin Lane*, NAD Log No. 94000376W, from November 14, 1993, through January 27, 1995; (2) incurred by Applicants in connection with *In re Darvin Lane*, NAD Log No. 94000842W, from November 18, 1993, through December 2, 1994; and (3) incurred by Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W, from November 22, 1993, through January 3, 1995.

#### **B. Maximum Hourly Rate for Attorney Fees**

The Hearing Officer awarded Applicants attorney fees at the rate of \$95 per hour based on his findings that Applicants' attorneys normally charge \$95 per hour for legal services and \$95 per hour is the prevailing rate in the community in which Applicants' attorneys ordinarily perform their services (Equal Access to Justice Act Application Determination as to Darvin Lane at 7-8; Equal Access to Justice Act Application Determination as to Dwight Lane at 6).

Respondent contends that "[t]he award of attorney's fees at the hourly rate of \$95.00 per hour is improper" and that the hourly rate that may be awarded under the Equal Access to Justice Act is limited to \$75 per hour (Pet. for Review by Judicial Officer as to Darvin Lane at 11-12; Pet. for Review by Judicial Officer as to Dwight Lane at 8).

Applicants contend that the hourly rate at which attorney fees should be awarded is the maximum rate provided under the Equal Access to Justice Act at the time of the award, not the maximum rate provided under the Equal Access to Justice Act at the time the attorney provided legal services, and request that I award Applicants attorney fees at a rate of \$125 per hour (Memorandum in Support of Hearing Officer Decision at 25, 49).

I agree with Respondent that the award to Applicants for attorney fees incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, is limited to \$75 per hour. The adversary adjudications for which Applicants seek fees and other expenses commenced in November 1993 and concluded no later than January 27, 1995. During that time, the Equal Access to Justice Act provided a \$75-per-hour rate cap on the award for attorney fees, as follows:

#### **§ 504. Costs and fees of parties**

....

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes . . . reasonable attorney

or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[.]

5 U.S.C. § 504(b)(1)(A) (1994).

Section 231(b)(1) of the Contract with America Advancement Act of 1996 amended 5 U.S.C. § 504(b)(1)(A)(ii) (1994) by increasing the rate cap on the award for fees of an attorney to \$125 per hour (Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 231(b)(1), 110 Stat. 847, 863 (1996)). Section 233 of the Contract with America Advancement Act of 1996 limits the effect of section “331” of the Contract with America Advancement Act of 1996 to adversary adjudications commenced on or after March 29, 1996, the date of enactment of the Contract with America Advancement Act of 1996, as follows:

**SEC. 233. EFFECTIVE DATE.**

The amendments made by sections 331 and 332 shall apply to civil actions and adversary adjudications commenced on or after the date of enactment of this subtitle.

Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 233, 110 Stat. 847, 864 (1996).

Section “331” of the Contract with America Advancement Act of 1996 does not exist. The Law Revision Counsel of the House of Representatives, which supervises the preparation and publication of the United States Code, found the reference to “sections 331 and 332” error and stated that Congress probably intended to refer to “sections 231 and 232”, as follows:

EFFECTIVE DATE OF 1996 AMENDMENT

Section 233 of Pub. L. 104-121, provided that: “The amendments made by sections 331 and 332 [probably means sections 231 and 232, amending this section and section 2412 of Title 28, Judiciary and Judicial Procedure] shall apply to civil actions and adversary adjudications commenced on or after the date of the enactment of this subtitle [Mar. 29, 1996].”

5 U.S.C. § 504 note (Supp. IV 1998) (brackets in original).

I conclude the reference to section “331” in section 233 of the Contract with America Advancement Act of 1996 is error, and I infer, based on the context in which the reference to section “331” is found, that Congress intended to refer to section “231” in section 233 of the Contract with America Advancement Act of 1996. Therefore, the rate cap on the award for attorney fees applicable to this Equal Access to Justice Act proceeding is the \$75-per-hour maximum in 5 U.S.C. § 504(b)(1)(A)(ii) (1994).

Moreover, section 1.186(b) of the EAJA Rules of Practice provides that no award for the fee of an attorney may exceed \$75 per hour, as follows:

**§ 1.186 Allowable fees and expenses.**

....

(b) No award for the fee of an attorney or agent under these rules may exceed \$75.00 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).

Section 1.187 of the EAJA Rules of Practice provides USDA may adopt regulations providing for the award of attorney fees at a rate higher than \$75 per hour if warranted by an increase in the cost of living or by special circumstances, as follows:

**§ 1.187 Rulemaking on maximum rates for attorney fees.**

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this Department may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with this Department a petition for rulemaking to increase the maximum rate for attorney fees in accordance with § 1.28 of

this part. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It also should explain fully the reasons why the higher rate is warranted. The Department will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

7 C.F.R. § 1.187.

USDA has not adopted a regulation providing for the award for the fees of an attorney in excess of \$75 per hour. Therefore, under the Equal Access to Justice Act and the EAJA Rules of Practice, Applicants' award for the fees of their attorneys incurred in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, may not exceed \$75 per hour, even if Applicants paid their attorneys more than \$75 per hour for legal services.

Applicants contend that the \$75-per-hour rate cap must be adjusted for the increase in the cost of living that has occurred since the enactment of the Equal Access to Justice Act in 1980 (Lanes' Response to the Government's Reply at 5). Relying on *Pierce v. Underwood*, 487 U.S. 552 (1988), Applicants contend that "the Supreme Court considers the cost of living increase to be a part of the rate cap itself, and, therefore, automatically operative factor that must be applied in every case" (Memorandum in Support of Hearing Officer Decision at 25).

I disagree with Applicants. As an initial matter, *Pierce v. Underwood*, 487 U.S. 552 (1988), does not explicitly state a cost-of-living factor is to be applied automatically in every case. Moreover, the statutory provision which was at issue in *Pierce v. Underwood* was section 204(a) of the Equal Access to Justice Act,<sup>8</sup> which applies to the award for fees and other expenses incurred in certain judicial proceedings. The statutory provision which is applicable in this proceeding is section 203(a)(1) of the Equal Access to Justice Act,<sup>9</sup> which applies to the award for fees and other expenses incurred in agency adversary adjudications. Section 204(a) of the Equal Access to Justice Act provides "attorney fees shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living . . . justifies a higher fee." (28 U.S.C. § 2412(d)(2)(A)(ii) (1994).)

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<sup>8</sup>Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 204(a), 94 Stat. 2325, 2327-29 (28 U.S.C. § 2412).

<sup>9</sup>Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 203(a)(1), 94 Stat. 2325, 2325-27 (5 U.S.C. § 504).

Section 203(a)(1) of the Equal Access to Justice Act provides “attorney . . . fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living . . . justifies a higher fee.” (5 U.S.C. § 504(b)(1)(A)(ii) (1994).) Therefore, I find *Pierce v. Underwood* inapposite. Moreover, I do not find that the rate cap on the award for attorney fees in 5 U.S.C. § 504(b)(1)(A)(ii) (1994) is automatically adjusted in each case to reflect an increase in the cost of living, as Applicants contend. Instead, 5 U.S.C. § 504(b)(1)(A)(ii) (1994) explicitly provides that attorney fees may not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living justifies a higher fee. USDA has not issued a regulation increasing the cap on the rate at which an Equal Access to Justice Act award may be made for attorney fees. Therefore, I find that Applicants’ award for attorney fees incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, cannot exceed \$75 per hour.

### C. Travel and Telephone Calls

Respondent contends that the Hearing Officer’s award erroneously includes attorney fees which Applicants did not incur in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W (Pet. for Review by Judicial Officer as to Darvin Lane at 16-17; Pet. for Review by Judicial Officer as to Dwight Lane at 12-13). Specifically, Respondent asserts the William A. Robbins Law Offices does not routinely bill clients for travel time and telephone calls.

The attorney billing statements attached to Applicants’ EAJA Applications contain numerous entries marked “no charge” and generally these “no charge” entries are related to travel and telephone calls.

William A. Robbins testified that the entries marked “no charge” indicate that the William A. Robbins Law Offices billed Applicants at one-half the usual rate of \$95 per hour, as follows:

Halvorson: I direct your attention on that same billing statement to August 25<sup>th</sup> of 94 and you have indicated travel to Devils Lake from Cavalier. You have in parentheses no charge and then you put 4.0 hours.

Robbins: That’s right.

Halvorson: So you intend to bill the government if you’re able to for work

that you would not ordinarily bill a client?

Robbins: I put a no charge down on that but travel time is half-time. I adjust that when my statement comes up.

Halvorson: So no charge means half-time?

Robbins: (Undistinguishable). . . our computer as you plug in, as you plug it in, it isn't set up for half rates. It's set up for full rates. And when it sees an hour it multiplies it by the full rate. The only way to keep it from multiplying by the full rate is to put no charge and to enter it separately manually as you get to the end of the statement because travel time is half rate and that's the way it's supposed to be billed. So if I were to put it in as four hours back and forth it would have billed it a[t] \$95.00 an hour. Well that's not the proper way.

Halvorson: Is there any reason why you just didn't put half rate then instead of no charge?

Robbins: Well I don't know. Our computer can't handle half rate. So the secretary runs the time slips. They come back to me and I look at 'em, and if I see a no charge I look at it and then if it's travel time it's it's [sic] put in at half rate.

. . . .

Halvorson: In an attempt to clarify the explanation of why the no charge entries are showing. If you'll look at the statement from um, November 29<sup>th</sup> of 94.

Robbins: Yes, ma'am.

Halvorson: As I understand your testimony, it was that your computer system didn't allow you to enter half entries so you put no charge, then you added it manual [sic] back in at the end. Is that correct?

Robbins: That's I'm not I I [sic] put the time records down. I submit it at the end of each day. And then they do the time records. To my belief, that's how it's done because they come back to me and say how much time is spent

on travel.

Halvorson: Well, if you'll look on the last entry on that invoice for November 29<sup>th</sup> of 94, it has total fees 175.90 hours and a total. So travel times are not added in there. They're not added in on any of your monthly invoices. You charge milage, but no travel time.

Robbins: OK.

Halvorson: So wouldn't that in fact indicate that you're trying to charge the government for something that you don't customarily bill your clients for?

Robbins: I don't think so.

Unofficial Transcript at 37-38, 40.

I do not find that the Hearing Officer erred when he awarded Applicants for fees incurred for the time Applicants' attorneys made telephone calls and traveled in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Despite the notations "no charge" on the billing statements, the record contains substantial evidence that the William A. Robbins Law Offices ordinarily billed its clients, and actually billed Applicants, at a rate of \$47.50 per hour for some telephone calls and travel time. Therefore, I award Applicants \$47.50 for each hour on the attorney billing statement entries marked "no charge" which apply to *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

#### **D. Insufficient Itemized Statements**

Respondent contends that the Hearing Officer erroneously "awarded fees based upon itemized statements which were insufficient to apprise the Hearing Officer of what work was actually done, whether it was done on behalf of Darwin Lane or Dwight Lane, and how that work related to the specific adversary adjudication" (Pet. for Review by Judicial Officer as to Darwin Lane at 17; Pet. for Review by Judicial Officer as to Dwight Lane at 14).

Respondent does not specifically identify which itemized statements are not sufficient to apprise the Hearing Officer of the work actually done, whether the work was done for Darwin Lane or Dwight Lane, and how the work reflected on the itemized statements relates to the specific adversary adjudication. I infer that

Respondent contends that no award for fees and other expenses incurred in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, may be made to Applicants because the itemized statements are insufficient to support any Equal Access to Justice Act award.

I have carefully reviewed Applicants' Applications for Fees and Other Expenses and the accompanying billing statements and affidavits issued by Mark Kreklau, Dennis Biliske, Glenn Gilleshammer, and William A. Robbins and Duane G. Elness and find that they are generally sufficient to apprise the adjudicative officer of the service performed, the individual or individuals for whom the services were performed, and the relationship between the services performed and *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, while I find that Applicants are not entitled to the entire Equal Access to Justice Act award which they request and I disagree with the Hearing Officer's award to Applicants, I reject Respondent's contention that the Hearing Officer "awarded fees based upon itemized statements which were insufficient to apprise the Hearing Officer of what work was actually done, whether it was done on behalf of Darwin Lane or Dwight Lane, and how that work related to the specific adversary adjudication."

#### **E. Award of Attorney Fees and Agent Fees**

Respondent contends that the Hearing Officer's award for both attorney fees and agent fees incurred in connection with the adversary adjudications in question is error, as follows:

5 U.S.C. § 504 permits an award of attorney's fees **or** agent's fees in connection with an adversary adjudication, but not both. The intent of the Act is to enable the Appellant to be reimbursed for the services of an agent who represents him for purposes of an adversary adjudication, but the government is not compelled to pay the fees of both an attorney and an agent, or in this case, two attorneys and an agent. The fees of the agricultural consultant, if paid at all, should only have been paid for his services in testifying as an expert witness at the proceedings, and then only at the expert witness rate, not his customary hourly rate.

Pet. for Review by Judicial Officer as to Darwin Lane at 17-18; Pet. for Review by Judicial Officer as to Dwight Lane at 14. (Emphasis in originals.)

Applicants contend that the Equal Access to Justice Act allows the award for

fees paid to an agent and an attorney, as follows:

It is true and no doubt well known to the Hearing Officer, that Mr. Kreklau was not merely an expert witness, though he could certainly meet the criteria for being deemed an expert. Mr. Kreklau is, in fact, an agricultural credit counsellor with very broad and deep familiarity with farming, finance, and FmHA's rules and procedures, who formerly was employed by the State of North Dakota as an ag credit counsellor specialist. He had appeared before Mr. Iszler at many NAS and NAD hearings. He was not serving the Lanes as an expert witness, but as an agent with expertise in agricultural credit in their dealings with FmHA.

Clearly, § 504 allows the adjudicative officer to compensate a prevailing party for the fees of an agent who is not an attorney and not an expert witness if he finds that those expenses were reasonable [sic] required to be incurred. . . .

. . . .

Clearly, § 504 provides authority for compensation of an agent such as Mr. Kreklau, and Hearing Officer Iszler duly determined that certain of Mr. Kreklau's services were "reasonable expenses" incurred by Lanes in connection with the proceedings that FmHA's unreasonable actions had made necessary.

Memorandum in Support of Hearing Officer Decision at 20-21.

The Equal Access to Justice Act is a partial waiver of sovereign immunity and such a waiver must be strictly construed in favor of the United States.<sup>10</sup> The Equal Access to Justice Act provides that the fees and other expenses that may be awarded

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<sup>10</sup>See *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (stating the Equal Access to Justice Act renders the United States liable for attorney fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity; any such waiver must be strictly construed); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887 (8<sup>th</sup> Cir. 1995) (stating the Equal Access to Justice Act amounts to a partial waiver of the government's sovereign immunity and, as such, must be strictly construed in the government's favor); *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1134 (8<sup>th</sup> Cir. 1994) (stating the Equal Access to Justice Act operates as a limited waiver of the United States' sovereign immunity; waivers of sovereign immunity must be strictly construed in the government's favor); *Premachandra v. Mitts*, 753 F.2d 635, 641 (8<sup>th</sup> Cir. 1985) (stating the Equal Access to Justice Act is a waiver of sovereign immunity and it must be strictly construed in the government's favor).

includes reasonable attorney or agent fees (5 U.S.C. § 504(b)(1)(A)).

The House Judiciary Committee Report on S. 265, from which the Equal Access to Justice Act was derived, makes clear that Congress understood *agent fees* to be fees for representation by a person who is not generally authorized to practice law, but who is permitted by the agency to represent persons who come before the agency, as follows:

Section 504(b) defines terms used in the section. The “fees and other expenses” which may be recovered under this section include the reasonable fees of attorneys, agents and expert witnesses as well as the reasonable cost of any report, study or test which is necessary to the party’s case. An “agent fee” may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it.

H.R. Rep. No. 96-1418, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993.<sup>11</sup>

While Mr. Kreklau assisted Applicants with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, I do not award Applicants for fees incurred for Mr. Kreklau’s services, except Mr. Kreklau’s services as an expert witness, for two reasons. First, the record does not indicate that Mr. Kreklau provided services as Applicants’ non-attorney representative in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Second, even if I found that Mr. Kreklau provided services as Applicants’ non-attorney representative, I would not award Applicants for fees incurred for Mr. Kreklau’s services because the fees are not reasonable and necessary. The record establishes that Applicants were represented in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, by two able attorneys who specialize in agricultural law. I do not find agent fees for an agricultural financial consultant, in addition to the fees for two attorneys, are necessary and reasonable.

However, I find the award to Applicants may include fees incurred for Mr. Kreklau’s services as an expert witness. The Equal Access to Justice Act provides that an award may include reasonable expenses of expert witnesses, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved (5 U.S.C. §

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<sup>11</sup>*Accord Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 721 (Fed. Cir. 1998); *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995).

504(b)(1)(A)). Section 1.186(b) of the EAJA Rules of Practice provides for an award for fees incurred for expert witnesses, as follows:

**§ 1.186 Allowable fees and expenses.**

. . . .

(b) . . . No award to compensate as 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).

Section 1.150 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that witnesses may be compensated, as follows:

**§ 1.150 Fees of witnesses.**

Witnesses summoned under these rules of practice shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instances the witness appears or the deposition is taken.

7 C.F.R. § 1.150.

Attendance fees paid to witnesses in courts of the United States are limited by statute to \$40 per day for each day's attendance, as follows:

**§ 1821. Per diem and milage generally; subsistence**

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States"

includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of \$40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C. § 1821(a)-(b).

This statutory limitation on witness fees applies to expert witnesses, as well as fact witnesses.<sup>12</sup> Therefore, I award Applicants \$40 per day for each day that Mr. Kreklau attended the hearings conducted in connection with the adversary adjudications in question and the Equal Access to Justice Act hearing.

#### **F. Mr. Kreklau's Itemized Statements**

Respondent contends that the Hearing Officer erred by awarding fees incurred by Applicants based on billing statements that were not adequate to inform the Hearing Officer of the nature of the work performed by Mr. Kreklau and whether Mr. Kreklau's services were performed in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W (Pet. for Review by Judicial Officer as to Darwin Lane at 18-19; Pet. for Review by Judicial Officer as to Dwight Lane at 14-16).

As fully explicated in this Decision and Order, *supra*, my award to Applicants does not include fees incurred for Mr. Kreklau's services, except Mr. Kreklau's services as an expert witness. Therefore, the issue of the adequacy of Mr. Kreklau's billing statements to support an award, except an award for Mr. Kreklau's services

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<sup>12</sup>See *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 86 (1991) (stating that 28 U.S.C. §§ 1821(b) and 1920(3) define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further; when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821(b), absent contract or explicit statutory authority to the contrary); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987) (holding when a prevailing party seeks reimbursement for fees paid to its expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821(b), absent contract or explicit statutory authority to the contrary); *Pinkham v. Camex, Inc.*, 84 F.3d 292, 295 (8<sup>th</sup> Cir. 1996) (per curiam) (holding expert witness fees in excess of the 28 U.S.C. § 1821(b) \$40 limit are not recoverable, unless otherwise provided by law).

as an expert witness, is moot. I find that the record is adequate to apprise me of Mr. Kreklau's services as an expert witness performed in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

### **G. Hearing Officer's Review of the Record**

Respondent contends that the Hearing Officer failed to adequately review the William A. Robbins Law Offices' and agricultural financial consultant's billing statements and awarded fees requested by Applicants without eliminating unnecessary, double billed, and not customarily billed items (Pet. for Review by Judicial Officer as to Darvin Lane at 19-20; Pet. for Review by Judicial Officer as to Dwight Lane at 16-17).

An adjudicative officer has the duty to determine whether an applicant is entitled to an Equal Access to Justice Act award and the amount, if any, to which the applicant is entitled. Moreover, a respondent's failure to file an answer or request further proceedings does not relieve the adjudicative officer of this duty. (See 7 C.F.R. §§ 1.195(a), .199.)

While I find the Hearing Officer's awards to Applicants are error, I find no basis for Respondent's contention that the Hearing Officer failed to adequately review the record. The Hearing Officer states that his determinations are based on a review of the "Case Record, all applicable law and regulations and oral arguments" (Equal Access to Justice Act Application Determination as to Darvin Lane at 2; Equal Access to Justice Act Application Determination as to Dwight Lane at 2). The Hearing Officer's official duties with regard to Applicants' EAJA Applications include a careful review of those EAJA Applications to determine whether Applicants are eligible for the requested awards. There is a presumption of regularity with respect to official acts of public officers and in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.<sup>13</sup>

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<sup>13</sup>See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350 (1918) (continued...)

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<sup>13</sup>(...continued)

(stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5<sup>th</sup> Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6<sup>th</sup> Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6<sup>th</sup> Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9<sup>th</sup> Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5<sup>th</sup> Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5<sup>th</sup> Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9<sup>th</sup> Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming USDA attorneys and investigators warped the viewpoint of USDA veterinary medical officers, the court should have presumed that training of USDA veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of USDA employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some USDA employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, USDA), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9<sup>th</sup> Cir. 1984) (unpublished) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that USDA shell egg graders switched cases of eggs to discredit

(continued...)

An adjudicative officer who adequately reviews a record in a proceeding may nonetheless commit error. There is no evidence on the record which indicates that the Hearing Officer failed to adequately review the record. I do not infer that the Hearing Officer's erroneous awards to Applicants resulted from his failure to properly discharge his official duties.

#### **H. Computation of Awards to Applicants**

##### **1. *In re Dwight Lane*, NAD Log No. 94001064W**

*In re Dwight Lane*, NAD Log No. 94001064W, commenced November 22, 1993, and concluded January 3, 1995. The Affidavit of Appraiser Dennis Biliske and the attached January 28, 1994, receipt establishes Dennis Biliske billed Dwight Lane \$150 for a chattel appraisal in connection with *In re Dwight Lane*, NAD Log No. 94001064W. The Affidavit of Attorneys which relates to *In re Dwight Lane*, NAD Log No. 94001064W, establishes that the William A. Robbins Law Offices billed Dwight Lane one-half of their total motel expenses, \$74.54, related to *In re Dwight Lane*, NAD Log No. 94001064W (Affidavit of Attorneys ¶ 6). The Affidavit of Appraiser Glenn Gilleshammer and the attached billing statement establishes Mr. Gilleshammer billed Dwight Lane \$1,000 for appraisal services, a court appearance, and research. Mr. Gilleshammer's billing statement indicates that only \$650 of these fees were incurred after the commencement of *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I find that Dwight Lane incurred expenses of \$874.54 in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

The record establishes that Mr. Kreklau attended the hearings conducted in connection with *In re Dwight Lane*, NAD Log No. 94001064W, on May 11, 1994, November 2, 1994, and November 8, 1994 (Appeal Decision in *In re Dwight Lane*, NAD Log No. 94001064W, at 1). On May 11, 1994, Mr. Kreklau also attended a hearing regarding *In re Darwin Lane*, NAD Log No. 94000842W. Therefore, I award only one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Dwight Lane for services provided by Mr. Kreklau as an expert witness on May 11, 1994. The record also establishes that Mr. Kreklau attended the December 2, 1997, Equal Access to Justice Act hearing conducted in connection

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<sup>13</sup>(...continued)  
respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3<sup>d</sup> Cir. 1980).

with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darwin Lane*, NAD Log No. 94000376W, and *In re Darwin Lane*, NAD Log No. 94000842W (Unofficial Transcript). Therefore, I award one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Dwight Lane for services provided by Mr. Kreklau as an expert witness on December 2, 1997. Thus, I award Dwight Lane a total of \$120 for Mr. Kreklau's services as an expert witness in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

The Affidavit of Attorneys which relates to *In re Dwight Lane*, NAD Log No. 94001064W, establishes the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees (Affidavit of Attorneys ¶ 5).

The December 21, 1993, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 45.6 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Six of the entries on the December 21, 1993, billing statement totaling 4.2 hours are identified as "no charge" for which I award Applicants \$47.50 per hour. Four of the entries totaling 19 hours are identified as services regarding transcription of hearing tapes for which the William A. Robbins Law Offices billed Applicants at \$20 per hour and for which I award Applicants \$20 per hour. I award Applicants \$75 per hour for the remaining 22.4 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the December 21, 1993, billing statement, I award Applicants \$2,259.50.

The January 26, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 13 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the January 26, 1994, billing statement totaling 4.4 hours are identified as "no charge" for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 8.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the January 26, 1994, billing statement, I award Applicants \$854.

The February 16, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 23.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. I award Applicants \$75 per hour for the 23.1 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the February 16, 1994, billing statement, I award Applicants \$1,732.50.

The March 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 34.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the March 23, 1994, billing statement totaling 4.5 hours are identified as "no charge"

for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 29.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the March 23, 1994, billing statement, I award Applicants \$2,433.75.

The April 24, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 23.6 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. One of the entries on the April 24, 1994, billing statement totaling 4.0 hours is identified as “no charge” for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 19.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the April 24, 1994, billing statement, I award Applicants \$1,660.

The May 25, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 94.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the May 25, 1994, billing statement totaling 4.6 hours are identified as “no charge” for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 89.5 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the May 25, 1994, billing statement, I award Applicants \$6,931.

The June 22, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 57.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. I award Applicants \$75 per hour for the 57.1 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the June 22, 1994, billing statement, I award Applicants \$4,282.50.

The July 27, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 82.8 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends that two of the entries on the July 27, 1994, billing statement do not relate to services performed by the William A. Robbins Law Offices in connection with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darwin Lane*, NAD Log No. 94000376W, or *In re Darwin Lane*, NAD Log No. 94000842W (Pet. for Review by Judicial Officer as to Darwin Lane at 15-16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). Respondent contends that the June 21, 1994, entry that shows “items to be completed regarding Dakota Growers and Drayton stock” and one of the July 7, 1994, entries “showing a conference ‘regarding FmHA refusal to give over June 14, 1994 letter to borrower’”

do not relate to the adversary adjudications in question (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12).

The June 21, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for .8 of an hour and that the legal services for which Applicants were billed include “phone conferences with Dwight regarding items to be completed regarding Dakota Growers and Drayton stock.” This item on the June 21, 1994, entry does not appear to relate to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. However, the June 21, 1994, entry includes three other items which appear to relate to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, since the item that is not related to the adversary adjudications in question represents one-fourth of the items in the June 21, 1994, entry, I do not award Applicants fees for .2 of the .8 of an hour billed for the items on the June 21, 1994, entry.<sup>14</sup>

One of the July 7, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for .6 of an hour and that the service for which Applicants were billed was a “[c]onference with Dwight regarding FmHA refusal to give over June 14, 1994, letter to borrower.” The July 7, 1994, entry does not appear to relate to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, I do not award Applicants fees for .6 of an hour billed in this July 7, 1994, entry.

Five of the entries on the July 27, 1994, billing statement totaling 11.1 hours are identified as “no charge” for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 70.9 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the July 27, 1994, billing statement, I award Applicants \$5,844.75.

The August 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 45.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

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<sup>14</sup>The record does not establish that each of the four items included in the June 21, 1994, entry constitutes one-fourth of the .8 of an hour billed by the William A. Robbins Law Offices. Nevertheless, based on the record before me, I find no other means by which to determine the time billed by the William A. Robbins Law Offices for each of the items on the June 21, 1994, entry, than to assign equal time to each item. In those instances in which the William A. Robbins Law Offices’ billing statements contain more than one item in an entry and the record does not reveal the time expended on each item in that entry, I assign equal time to each item.

Respondent contends that the August 23, 1994, billing statement contains entries that relate to meetings with United States Senator Kent Conrad and his administrative staff (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). The August 23, 1994, billing statement contains 10 entries that relate to conferences with Lynn Clancy of United States Senator Kent Conrad's office. However, only two of these 10 entries indicate that the William A. Robbins Law Offices billed Applicants for conferences with Lynn Clancy. One of the July 22, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for .4 of an hour and that the legal services for which Applicants were billed include a phone conference with Lynn Clancy. However, the July 22, 1994, entry in question includes one other item. Therefore, since the item relating to a conference with Lynn Clancy represents one-half of the items in the July 22, 1994, entry, I do not award Applicants the fees for .2 of the .4 of an hour billed in the July 22, 1994, entry.<sup>15</sup> The August 9, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for phone conferences with Lynn Clancy. However, the August 9, 1994, entry in question includes three other items. Therefore, since the item relating to phone conferences with Lynn Clancy represents one-fourth of the items in the August 9, 1994, entry, I do not award Applicants the fees for 1.5 of the 5.9 hours billed in the August 9, 1994, entry.<sup>16</sup>

Eight of the entries on the August 23, 1994, billing statement totaling 7.9 hours are identified as "no charge" for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 36.3 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the August 23, 1994, billing statement, I award Applicants \$3,097.75.

The September 22, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 61.3 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends the September 22, 1994, billing statement contains entries that relate to meetings with United States Senator Kent Conrad and his administrative staff (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). The September 22, 1994, billing statement contains three entries that relate to meetings or conferences with Lynn Clancy of United States Senator Kent Conrad's office. One of the

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<sup>15</sup>See note 14.

<sup>16</sup>See note 14.

August 25, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for 2.5 hours and that the legal services for which Applicants were billed include preparation for a meeting with Lynn Clancy. However, the August 25, 1994, entry in question includes one other item. Therefore, since the item relating to preparation for a meeting with Lynn Clancy represents one-half of the items in the August 25, 1994, entry, I do not award Applicants the fees for 1.3 hours of the 2.5 hours billed on the August 25, 1994, entry.<sup>17</sup> One of the September 1, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for a meeting with Lynn Clancy at United States Senator Kent Conrad's office. However, the September 1, 1994, entry in question includes one other item. Therefore, since the item relating to a meeting with Lynn Clancy represents one-half of the items billed on the September 1, 1994, entry, I do not award Applicants the fees for 1.5 of the 3.0 hours billed on the September 1, 1994, entry in question.<sup>18</sup> Similarly, another September 1, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for a meeting with Lynn Clancy. However, the September 1, 1994, entry in question includes one other item. Therefore, since the item relating to a meeting with Lynn Clancy represents one-half of the items on the September 1, 1994, entry, I do not award Applicants the fees for 1.5 of the 2.9 hours billed on the September 1, 1994, entry in question.<sup>19</sup>

Respondent also contends the August 30, 1994, entry on the September 22, 1994, billing statement indicates that two attorneys representing Applicants conducted an office conference to draft a letter to Larry Jordan regarding the replacement of the Hearing Officer and it was not reasonable or necessary to have two attorneys attend this law office conference (Pet. for Review by Judicial Officer as to Darvin Lane at 17; Pet. for Review by Judicial Officer as to Dwight Lane at 13).

I agree with Respondent that the fee for two attorneys attending this office conference is not reasonable. Therefore, my award to Applicants only includes attorney fees incurred for 2.3 hours of legal services, rather than the 4.6 hours, which the William A. Robbins Law Offices billed Applicants for this office conference.

Nine of the entries on the September 22, 1994, billing statement totaling 17.7 hours are identified as "no charge" for which I award Applicants \$47.50 per hour.

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<sup>17</sup>See note 14.

<sup>18</sup>See note 14.

<sup>19</sup>See note 14.

I award Applicants \$75 per hour for the remaining 37 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the September 22, 1994, billing statement, I award Applicants \$3,615.75.

The November 29, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 175.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends that the November 29, 1994, billing statement contains entries dated October 12, 13, 17, 19, 25, 26, 28, 30, and 31, 1994, which "all seem to relate to settlement conferences unrelated to the adversary adjudication" (Pet. for Review by Judicial Officer as to Darwin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). Except with respect to the entry dated October 30, 1994, I agree with Respondent that the entries cited by Respondent relate to settlement conferences unrelated to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darwin Lane*, NAD Log No. 94000376W, or *In re Darwin Lane*, NAD Log No. 94000842W. Therefore, my award to Applicants does not include attorney fees for 19.4 hours billed in the October 12, 13, 17, 19, 25, 26, 28, and 31, 1994, entries on the November 29, 1994, billing statement.

Seventeen of the entries on the November 29, 1994, billing statement totaling 40.7 hours are identified as "no charge" for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 115.8 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the November 29, 1994, billing statement, I award Applicants \$10,618.25.

The December 27, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 17.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Two of the entries on the December 27, 1994, billing statement totaling 1 hour are identified as "no charge" for which I award Applicants \$47.50 per hour. I award Applicants \$75 per hour for the remaining 16.9 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the December 27, 1994, billing statement, I award Applicants \$1,315.

The Affidavit of Attorneys which relates to the Equal Access to Justice Act proceeding in connection with *In re Dwight Lane*, NAD Log No. 94001064W, and the attached December 3, 1997, billing statement states that the William A. Robbins Law Offices billed Dwight Lane \$5,151.76 for 56.95 hours of legal services. Respondent contends the time the William A. Robbins Law Offices "spent researching and briefing the issue of cost-of-living adjustments to the hourly rate"

was neither reasonable nor necessary (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 3).

I agree with Respondent. One of the November 5, 1997, entries indicates that the William A. Robbins Law Offices billed Dwight Lane for 1.05 hours of legal services and that the legal services for which Dwight Lane was billed included research regarding the cost-of-living issue. However, this November 5, 1997, entry appears to include five other items. Therefore, since the item relating to the cost-of-living issue represents one-sixth of the items billed on the November 5, 1997, entry, I do not award Dwight Lane .18 of the 1.05 hours billed on the November 5, 1997, entry in question.<sup>20</sup> One of the November 7, 1997, entries indicates that the William A. Robbins Law Offices billed Dwight Lane for .45 hours for work on a preliminary brief regarding, *inter alia*, the cost-of-living issue. However, this November 7, 1997, entry indicates that the preliminary brief includes two other issues. Therefore, since the portion of the preliminary brief relating to the cost-of-living issue represents one-third of the issues addressed in the brief, I do not award Dwight Lane .15 of the .45 hours billed on the November 7, 1997, entry in question.<sup>21</sup> The November 11, 1997, entry indicates that the William A. Robbins Law Offices billed Dwight Lane for .35 hours for a telephone conference in which, *inter alia*, the cost-of-living issue was discussed. However, the November 11, 1997, entry indicates that the telephone conference concerned four other issues. Therefore, since the portion of the telephone conference relating to the cost-of-living issue represents one-fifth of the issues discussed, I do not award Dwight Lane .07 of the .35 hours billed on the November 11, 1997, entry.<sup>22</sup>

Respondent states the December 3, 1997, billing statement contains numerous entries indicating “consultation with Mark Kreklau regarding preparation of the briefs.” Respondent contends that no award should be made for these consultations because Applicants’ “briefs did not contain statements of facts, but only legal arguments, about which Mr. Kreklau has no expertise, since he is not an attorney.” (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 5.)

I agree with Respondent. The November 3, 1997, entry, one of the November 5, 1997, entries, one of the November 7, 1997, entries, one of the November 10, 1997, entries, one of the November 12, 1997, entries, two of the November 24, 1997,

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<sup>20</sup>See note 14.

<sup>21</sup>See note 14.

<sup>22</sup>See note 14.

entries, one of the November 25, 1997, entries, and one of the November 26, 1997, entries, indicate that the William A. Robbins Law Offices billed Dwight Lane for 5.75 hours of legal services and that the legal services for which Applicants were billed include consultation with Mr. Kreklau regarding the preparation of briefs. However, these entries appear to include 24 items, only 12 of which appear to be related to Mr. Kreklau's assistance with the preparation of the briefs. Therefore, since the items relating to Mr. Kreklau's assistance represent one-half of the items on the entries in question, I do not award Dwight Lane 2.88 of the 5.75 hours billed on these entries.<sup>23</sup>

I award Dwight Lane for the remaining 53.67 hours of legal services provided to him in connection with the Equal Access to Justice Act proceeding. Four of the entries on the December 3, 1997, billing statement totaling 4.55 hours are identified as "no charge" "travel," or "one-half rate" for which I award Dwight Lane \$47.50 per hour. I award Dwight Lane \$75 per hour for the remaining 49.12 hours of legal services provided to Dwight Lane in connection with the Equal Access to Justice Act proceeding. Therefore, based on the December 3, 1997, billing statement, I award Dwight Lane \$3,900.13 for attorney fees incurred in connection with the Equal Access to Justice Act proceeding related to *In re Dwight Lane*, NAD Log No. 94001064W.

## **2. *In re Darvin Lane*, NAD Log No. 94000376W**

*In re Darvin Lane*, NAD Log No. 94000376W, commenced November 14, 1993, and concluded January 27, 1995. The Affidavit of Attorneys which relates to *In re Darvin Lane*, NAD Log No. 94000376W, establishes that the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees (Affidavit of Attorneys ¶ 5). The only billing statement issued by the William A. Robbins Law Offices to Applicants that contains fees for legal services during the period November 14, 1993, through January 27, 1995, is a March 23, 1994, billing statement.

The March 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 9.3 hours of legal services. However, the March 9, 1994, entry for which Applicants request an award for .5 of an hour does not appear to relate to *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants the fees for .5 of an hour billed in the March 9, 1994, entry. Moreover, the March 14, 1994, entry for which

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<sup>23</sup>See note 14.

Applicants seek an award for .4 of an hour for legal services includes three items for which Applicants were billed. One of these three items, the review of a letter regarding beet stock sale, does not appear to relate to *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants the fees for .1 of an hour of the .4 of an hour billed in this March 14, 1994, entry. I award Applicants \$75 per hour for the 8.7 hours of legal services provided to Applicants in connection with *In re Darvin Lane*, NAD Log No. 94000376W. Therefore, based on the March 23, 1994, billing statement, I award Applicants \$652.50.

The record also establishes that Mr. Kreklau attended the December 2, 1997, Equal Access to Justice Act hearing conducted in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W (Unofficial Transcript). Therefore, I award one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Darvin Lane for services provided by Mr. Kreklau on December 2, 1997. Since I award Darvin Lane for Mr. Kreklau's services as an expert witness in connection with *In re Darvin Lane*, NAD Log No. 94000376W, I do not also award Darvin Lane for Mr. Kreklau's identical services provided simultaneously on December 2, 1997, in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

### **3. *In re Darvin Lane*, NAD Log No. 94000842W**

*In re Darvin Lane*, NAD Log No. 94000842W, commenced November 18, 1993, and concluded December 2, 1994. The Affidavit of Appraiser Glenn Gilleshammer establishes Mr. Gilleshammer billed Darvin Lane \$1,000 for appraisal services, a court appearance, and research in connection with *In re Darvin Lane*, NAD Log No. 94000842W. Mr. Gilleshammer's affidavit indicates that Darvin Lane and Dwight Lane were each responsible for paying one-half of the appraisal, court appearance, and research expenses. Therefore, I award Darvin Lane and Dwight Lane \$500 each for the expenses incurred for Mr. Gilleshammer's services in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

Also included in Darvin Lane's EAJA Application relative to *In re Darvin Lane*, NAD Log No. 94000842W, is a receipt dated February 15, 1994, indicating that Darvin Lane paid Dennis Biliske \$150 for a chattel appraisal completed on November 22, 1993. Therefore, I award Darvin Lane \$150 for expenses incurred for Mr. Biliske's services in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to *In re Darvin Lane*, NAD Log No.

94000842W, establishes that the William A. Robbins Law Offices billed Darwin Lane one-half of the total motel expenses, \$74.54, related to *In re Darwin Lane*, NAD Log No. 94000842W (Affidavit of Attorneys ¶ 6).

Therefore, I find that Darwin Lane incurred expenses of \$724.54 in connection with *In re Darwin Lane*, NAD Log No. 94000842W, and Dwight Lane incurred expenses of \$500 in connection with *In re Darwin Lane*, NAD Log No. 94000842W.

The record establishes that Mr. Kreklau attended the hearings conducted in connection with *In re Darwin Lane*, NAD Log No. 94000842W, on February 24, 1994, and May 11, 1994 (Appeal Decision in *In re Darwin Lane*, NAD Log No. 94000842W, at 1). On May 11, 1994, Mr. Kreklau also attended a hearing regarding *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I award only one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Darwin Lane for services provided by Mr. Kreklau as an expert witness on May 11, 1994. Thus, I award Darwin Lane a total of \$60 for Mr. Kreklau's services as an expert witness in connection with *In re Darwin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to *In re Darwin Lane*, NAD Log No. 94000842W, establishes that the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees. However, the December 21, 1993, through December 27, 1994, billing statements related to *In re Darwin Lane*, NAD Log No. 94000842W, are identical to the December 21, 1993, through December 27, 1994, billing statements related to *In re Dwight Lane*, NAD Log No. 94001064W. As discussed in this Decision and Order, *supra*, I award Applicants attorney fees based on the billing statements in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants for fees reflected on these same billing statements in connection with *In re Darwin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to the Equal Access to Justice Act proceeding in connection with *In re Darwin Lane*, NAD Log No. 94000842W, and the attached December 3, 1997, billing statement states that the William A. Robbins Law Offices billed Darwin Lane \$5,151.76 for 56.95 hours of legal services. Respondent contends the time the William A. Robbins Law Offices "spent researching and briefing the issue of cost-of-living adjustments to the hourly rate" was neither reasonable nor necessary (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 3).

I agree with Respondent. One of the November 5, 1997, entries indicates that the William A. Robbins Law Offices billed Darwin Lane for 1.05 hours of legal services and that the legal services for which Darwin Lane was billed included research regarding the cost-of-living issue. However, this November 5, 1997, entry

appears to include five other items. Therefore, since the item relating to the cost-of-living issue represents one-sixth of the items billed on the November 5, 1997, entry, I do not award Darvin Lane .18 of the 1.05 hours billed on the November 5, 1997, entry in question.<sup>24</sup> One of the November 7, 1997, entries indicates that the William A. Robbins Law Offices billed Darvin Lane for .45 hours for work on a preliminary brief regarding, *inter alia*, the cost-of-living issue. However, this November 7, 1997, entry indicates that the preliminary brief includes two other issues. Therefore, since the portion of the preliminary brief relating to the cost-of-living issue represents one-third of the issues addressed in the brief, I do not award Darvin Lane .15 of the .45 hours billed on the November 7, 1997, entry in question.<sup>25</sup> The November 11, 1997, entry indicates that the William A. Robbins Law Offices billed Darvin Lane for .35 hours for a telephone conference in which, *inter alia*, the cost-of-living issue was discussed. However, the November 11, 1997, entry indicates that the telephone conference concerned four other issues. Therefore, since the portion of the telephone conference relating to the cost-of-living issue represents one-fifth of the issues discussed, I do not award Darvin Lane .07 of the .35 hours billed on the November 11, 1997, entry.<sup>26</sup>

Respondent states the December 3, 1997, billing statement contains numerous entries indicating “consultation with Mark Kreklau regarding preparation of the briefs.” Respondent contends that no award should be made for these consultations because Applicants’ “briefs did not contain statements of facts, but only legal arguments, about which Mr. Kreklau has no expertise, since he is not an attorney.” (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 5.)

I agree with Respondent. The November 3, 1997, entry, one of the November 5, 1997, entries, one of the November 7, 1997, entries, one of the November 10, 1997, entries, one of the November 12, 1997, entries, two of the November 24, 1997, entries, one of the November 25, 1997, entries, and one of the November 26, 1997, entries, indicate that the William A. Robbins Law Offices billed Darvin Lane for 5.75 hours of legal services and that the legal services for which Darvin Lane was billed include consultation with Mr. Kreklau regarding the preparation of briefs. However, these entries appear to include 24 items, only 12 of which appear to be related to Mr. Kreklau’s assistance with the preparation of the briefs. Therefore,

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<sup>24</sup>See note 14.

<sup>25</sup>See note 14.

<sup>26</sup>See note 14.

since the items relating to Mr. Kreklau's assistance represent one-half of the items on the entries in question, I do not award Darvin Lane 2.88 of the 5.75 hours billed on these entries.<sup>27</sup>

I award Darvin Lane for the remaining 53.67 hours of legal services provided to him in connection with the Equal Access to Justice Act proceeding in connection with *In re Darvin Lane*, NAD Log No. 94000842W. Four of the entries on the December 3, 1997, billing statement totaling 4.55 hours are identified as "no charge" "travel," or "one-half rate" for which I award Darvin Lane \$47.50 per hour. I award Darvin Lane \$75 per hour for the remaining 49.12 hours of legal services provided to Darvin Lane in connection with the Equal Access to Justice Act proceeding. Therefore, based on the December 3, 1997, billing statement, I award Darvin Lane \$3,900.13 for attorney fees incurred in connection with the Equal Access to Justice Act proceeding related to *In re Darvin Lane*, NAD Log No. 94000842W.

#### **VIII. Findings of Fact and Conclusions of Law**

1. Darvin Lane is a resident of North Dakota. At all times material to this proceeding, Darvin Lane had net worth of less than \$2,000,000.

2. Dwight Lane is a resident of North Dakota. At all times material to this proceeding, Dwight Lane had a net worth of less than \$2,000,000.

3. *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications.

4. Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W.

5. Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W.

6. Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified.

7. Darvin Lane and Dwight Lane meet all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act (5 U.S.C. § 504).

8. Darvin Lane and Dwight Lane have not unduly or unreasonably delayed or protracted *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W.

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<sup>27</sup>See note 14.

9. There are no special circumstances that would make the award of fees to Darwin Lane or Dwight Lane unjust.

10. Darwin Lane incurred fees and other expenses in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, to which he is entitled to an award under the Equal Access to Justice Act totaling \$27,353.30.

11. Dwight Lane incurred fees and other expenses in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, to which he is entitled to an award under the Equal Access to Justice Act totaling \$28,043.30.

#### **IX. Order**

1. Pursuant to the Equal Access to Justice Act, Darwin Lane is awarded \$27,353.30 for fees and expenses incurred in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Darwin Lane shall seek payment of this Equal Access to Justice Act award and Respondent shall pay this Equal Access to Justice Act award in accordance with section 1.203 of the EAJA Rules of Practice (7 C.F.R. § 1.203).<sup>28</sup>

2. Pursuant to the Equal Access to Justice Act, Dwight Lane is awarded \$28,043.30 for fees and expenses incurred in connection with *In re Darwin Lane*, NAD Log No. 94000376W, *In re Darwin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Dwight Lane shall seek payment of

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<sup>28</sup>Section 1.203 of the EAJA Rules of Practice provides for payment of an Equal Access to Justice Act award, as follows:

##### **§ 1.203 Payment of award.**

An applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

this Equal Access to Justice Act award and Respondent shall pay this Equal Access to Justice Act award in accordance with section 1.203 of the EAJA Rules of Practice (7 C.F.R. § 1.203).<sup>29</sup>

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<sup>29</sup>See note 28.

**FEDERAL MEAT INSPECTION ACT AND  
POULTRY PRODUCTS INSPECTION ACT**

**DEPARTMENTAL DECISION**

**In re: GREENVILLE PACKING COMPANY, INC.**

**FMIA Docket No. 98-0005.**

**PPIA Docket No. 98-0003.**

**Decision and Order filed June 1, 2000.**

**Meat inspection – Poultry inspection – Felony conviction – Bribery – Withdrawal of inspection services – Mitigating circumstances – Collateral effects – Presumption of regularity – Sanction policy – Sanction testimony.**

The Judicial Officer affirmed the Decision by Judge Baker (ALJ) indefinitely withdrawing inspection services under title I of the Federal Meat Inspection Act (FMIA) and under the Poultry Products Inspection Act (PPIA) from Respondent, based upon Respondent's conviction of the felony of bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A). The Judicial Officer found that Respondent's bribery of a Food Safety and Inspection Service (FSIS) inspector to avoid required ante mortem and post mortem inspections at Respondent's establishment strikes at the heart of the FMIA and the PPIA. The Judicial Officer considered the mitigating circumstances offered by Respondent, but found that they were insufficient to overcome Respondent's unfitness to receive inspection services under the FMIA and under the PPIA, as demonstrated by Respondent's felony conviction. The Judicial Officer held that once Respondent introduced factors in mitigation of its bribery conviction, Complainant could introduce evidence of aggravating circumstances. The Judicial Officer rejected Respondent's contention that FSIS inspectors issued process deficiency records (PDRs) in order to build a record of aggravating circumstances. The Judicial Officer stated that there is a presumption of regularity with respect to official acts of public officers and in the absence of clear evidence that FSIS inspectors improperly issued PDRs, the FSIS inspectors are presumed to have properly discharged their official duties. The Judicial Officer rejected Respondent's contention that FSIS' Federal Register notice (44 Fed. Reg. 37,322-24 (1979)) setting forth the sanction FSIS will seek in administrative proceedings is a "per se" policy that has been rejected by the federal courts. The Judicial Officer held that, under the Department's sanction policy, sanction recommendations of administrative officials, while not controlling, are relevant and that the ALJ properly allowed an administrative official charged with the responsibility for achieving the congressional purposes of the FMIA and the PPIA to testify regarding his sanction recommendation.

Howard D. Levine and Rick D. Herndon, for Complainant.

John Breeze and Michael Rhodes-Devey, Slingerlands, NY, for Respondent.

Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Food Safety and Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695)

[hereinafter the FMIA], the Poultry Products Inspection Act, as amended (21 U.S.C. §§ 451-471) [hereinafter the PPIA], 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] by filing a Complaint on July 27, 1998.

The Complaint alleges Greenville Packing Co., Inc. [hereinafter Respondent], was convicted in the United States District Court for the Northern District of New York of the felony of bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A), and by reason of Respondent's felony bribery conviction, Respondent is unfit to engage in any business requiring inspection services under title I of the FMIA and under the PPIA (Compl. ¶¶ II, III). Complainant seeks an order indefinitely withdrawing inspection services under title I of the FMIA and under the PPIA from Respondent (Compl. at 4).

Respondent filed an Answer on September 4, 1998, which admits the jurisdictional allegations in the Complaint, including the conviction of the felony of bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A), but denies Respondent is unfit to engage in any business requiring inspection service under title I of the FMIA or under the PPIA (Answer ¶¶ 1-3).

Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a hearing on September 29, 1999, in Albany, New York. Howard D. Levine and Rick D. Herndon, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Michael Rhodes-Devey and John Breeze, Breeze & Rhodes-Devey, Slingerlands, New York, represented Respondent.

On November 24, 1999, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, and Proposed Order; on January 10, 2000, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law [hereinafter Respondent's Brief]; and on February 4, 2000, Complainant filed Complainant's Reply Brief.

On March 13, 2000, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) found that on or about December 9, 1997, in the United States District Court for the Northern District of New York, Respondent, after a plea of guilty, was convicted of the felony of bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A); (2) found that Respondent is unfit to receive inspection services under title I of the FMIA and under the PPIA; and (3) indefinitely withdrew inspection services under title I of the FMIA and under the PPIA from Respondent, its successors, affiliates, and assigns (Initial Decision and Order at 3, 13, 31).

On April 18, 2000, Respondent appealed to, and requested oral argument before, the Judicial Officer; on May 19, 2000, Complainant filed Complainant's

Reply to Respondent's Appeal; and on May 19, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's request for oral argument and decision.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Complainant and Respondent have thoroughly addressed the issues in this proceeding. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions and discussion, as restated.

Complainant's exhibits are designated by "CX" and transcript references are designated by "Tr." Respondent introduced no exhibits.

**ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Findings of Fact**

1. Respondent is now and, at all times material to this proceeding, was a corporation which operates a meat and poultry slaughtering and processing establishment located at Route 32, P.O. Box 244, Greenville, New York 12083 (Ans. ¶ 1; CX 1-CX 2).

2. Respondent is now and, at all times material to this proceeding, was operating its meat and poultry slaughtering and processing establishment pursuant to a grant of inspection issued by the United States Department of Agriculture, Food Safety and Inspection Service [hereinafter FSIS] (CX 1-CX 2, CX 12A at 3; Tr. 31-33).

3. Respondent is now and, at all times material to this proceeding, was a recipient of meat inspection service under title I of the FMIA at its place of business in Greenville, New York (Establishment 9956) (Ans. ¶ 1; CX 1-CX 2).

4. Respondent is now and, at all times material to this proceeding, was a recipient of poultry inspection service under the PPIA at its place of business in Greenville, New York (Establishment P-9956) (Ans. ¶ 1; CX 1-CX 2).

5. At all times relevant to this proceeding, Mr. Robert Mattick was the sole shareholder and president of Respondent (CX 1 at 2).

6. Starting in August 1993, Randall Barber was the FSIS inspector permanently assigned to Respondent (CX 12A at 3).

7. On or about December 9, 1997, in the United States District Court for the Northern District of New York, Respondent, after a plea of guilty, was convicted of the felony of bribery of a public official in violation of 18 U.S.C. § 201(c)(1)(A) (Ans. ¶ 1; CX 4-CX 6, CX 9-CX 10).

8. Specifically, Respondent was convicted of the following count:

That commencing in or about January, 1995 and continuing until in or about January, 1997, in the State and Northern District of New York, GREENVILLE PACKING CO., INC., the defendant herein, did directly and indirectly corruptly give, offer and promise something of value, that is, cash payments, to RANDALL BARBER, a public official, for and because of an official act performed and to be performed by RANDALL BARBER in RANDALL BARBER'S capacity as a food inspector at the GREENVILLE PACKING CO., INC.

CX 4.

9. An inspection brand is a metal brand which contains an establishment's number and the letters "U.S. INSP'D & P'S'D" (Tr. 34; 9 C.F.R. pt. 312). The brand is used to distinguish product which has been inspected and which has passed all of the inspection requirements, from product which has not been inspected and has not been passed. Product which has been inspected and passed is eligible for other processing and sale in interstate commerce. Conversely, product which has not been inspected and has not been passed is not eligible to be branded or further processed or sold in interstate commerce. (Tr. 35.)

10. To ensure that inspection brands are only applied to product processed under a grant of inspection while an inspector is present, FSIS maintains tight controls over inspection brands (Tr. 34-36). First, the owner of an establishment must get authorization from the FSIS inspector-in-charge at his or her establishment to have inspection brands manufactured (Tr. 34; 9 C.F.R. §§ 316.1-.2, 317.3). Second, the inspection brand manufacturer must then deliver the inspection brands to an FSIS inspector at the establishment, not to the establishment itself (Tr. 36). Third, at the establishment, the FSIS personnel maintain custody of the inspection brands. Finally, the inspection brands may only be used under the supervision of an FSIS inspector at the establishment and are locked up when an FSIS inspector is not present. (Tr. 36; 9 C.F.R. § 316.4.)

11. FSIS inspector Randall Barber instructed Respondent's employees in his absence to slaughter animals and mark product as inspected and passed, and he gave the inspection brands to Respondent's employees, all of which was in violation of the law (CX 12A).

12. Animals at a federally-inspected slaughtering establishment are required to have ante mortem and post mortem inspections. Ante mortem and post mortem inspections are performed to determine whether products from these animals are fit for human consumption. This determination must be made because some animal diseases can be transmitted from animals and animal tissues to humans. (Tr. 119-20.) Products from an animal which has not received ante mortem inspection is not suitable for consumption by humans because information has not been obtained regarding the animal's health status (Tr. 126). An uninspected animal might have diseases, chemical residues, or repugnancies which render products from the animal unfit for human consumption (Tr. 119-42).

13. Ante mortem inspection is a visual examination of an animal in motion and at rest. During ante mortem inspection, an animal is observed on its left and right sides while in motion and at rest. The inspector examining the animal looks for any abnormalities. Neurological diseases can be detected only during ante mortem inspection. If an inspector detects an abnormality during ante mortem inspection, the inspector must affix a tag to the ear of the animal which reads "U.S. Suspect" and withhold the animal from slaughter until it can be examined by an FSIS veterinary medical officer. (Tr. 119, 121-22.)

14. Post mortem inspection is examination of a carcass. Post mortem inspection includes examination of the lymph nodes, the heart, the lungs, and the liver. The purpose of the post mortem examination is to obtain additional gross pathological findings that impact on the decision regarding disposition of a carcass. (Tr. 119, 126.)

15. A downer animal is an animal that cannot rise or walk; it is essentially severely disabled. Because a downer animal is much more likely to be diseased than an ambulatory animal, ante mortem inspection of a downer animal is much more extensive than ante mortem inspection of an ambulatory animal and post mortem inspection of the carcass of a downer animal is much more extensive than post mortem inspection of the carcass of an ambulatory animal. Every downer animal must be tagged and identified as "U.S. Suspect" for inspection by an FSIS veterinary medical officer. (Tr. 117-18, 121-24.)

16. An inspector who is not a veterinarian is not qualified to inspect a downer animal. A veterinary medical officer is needed to perform the ante mortem inspection necessary to detect abnormalities in downer animals and to perform the post mortem inspection necessary to detect abnormalities in the carcass of a downer animal. The ante mortem inspection for a downer animal includes a full nose-to-tail examination of the animal, starting at the nose. (Tr. 123-24.)

17. Dr. Craig White is an epidemiologist employed by FSIS. Formerly, Dr. White was an FSIS supervisory veterinary medical officer. As a supervisory

veterinary medical officer, Dr. White's responsibilities included Respondent's establishment. (Tr. 109-10, 113-16.)

Dr. White testified as to the performance of an ante mortem inspection of a downer animal, as follows:

You start by looking at the nose for evidence of hemorrhage or lesions on the nose like blisters or bruises . . . . [I]f you see some of that, you are going to want to look in the oral cavity and determine the extent of it.

You look at the rest of the head for signs of injury or swelling or lymph nodes that may be inflamed. You look at the neck. You examine the neck for distension of the carotid artery which may be an indication of disease. You look at the eyes for any of the abnormalities there. And you just work your way back, examine the entire animal until you get to the rear end. And, of course, then you take his temperature.

Tr. 124.

18. After an FSIS veterinary medical officer examines a downer animal, depending upon the results of the veterinarian's examination, the veterinarian will condemn (declare unfit for human consumption) the animal or allow the animal to be slaughtered. An animal would be condemned, for example, if it had a fever over 105 degrees or showed symptoms of neurological disease. If a veterinarian allows a downer animal to be slaughtered, the veterinarian will obtain additional information during post mortem inspection to determine the ultimate disposition of the carcass of the downer animal. (Tr. 125-26.)

19. If an FSIS veterinary medical officer suspects that an animal has a neurological disease, the veterinarian must condemn the animal. For every animal a veterinarian condemns for suspected neurological disease, the veterinarian must submit tissue from that animal to a laboratory for diagnosis. Tissue is sent to a laboratory so that FSIS can determine whether the condemned animal was infected with a disease that can be transmitted to humans or other animals. (Tr. 126-28.)

During the times relevant to this proceeding, FSIS inspector Randall Barber inspected and passed downer animals without the required inspections by a veterinary medical officer. Mr. Barber also did not conduct required ante mortem and post mortem inspections at Respondent's establishment. (CX 12A.)

20. Bovine spongiform encephalopathy is a fatal neurological disease for which an FSIS veterinary medical officer checks during ante mortem inspection. Bovine spongiform encephalopathy, called nCJD in humans, is transmissible to humans through the consumption of meat that contains infected nerve tissue.

Although Bovine spongiform encephalopathy is not present in the United States, FSIS is concerned about possible introduction into the United States and therefore conducts a surveillance program designed to detect entry into the United States. (Tr. 128-29.) Dr. White testified as to the risk of not inspecting a downer animal as part of the nCJD surveillance program, as follows:

Well, the risk is horrible in my opinion to comprehend because if we miss it, then we have lost an opportunity to isolate that animal and keep it out of the food chain and to do a trace-back to find out where that animal came from because we would very likely depopulate that herd.

Tr. 130.

Dr. White also explained that nCJD has an incubation period of 5 to 10 years in humans and by the time nCJD would be detected in humans, the opportunity to control the disease would have long passed (Tr. 130).

21. There are approximately 100 diseases of concern during a veterinary inspection of a downer animal. Rabies, a viral infection caused by the rhabdovirus, is one such disease. Rabies attacks the cranial nerves and the central nervous system. Rabies is more likely to be present in downer animals than in ambulatory animals. Anthrax is another disease that may infect cattle. (Tr. 131, 133, 136-37, 139.)

Listeriosis, a bacterial disease caused by the agent *Listeria monocytogenes*, is a neurological condition detectable only during ante mortem inspection. One recent outbreak of listeriosis resulted in 21 fatalities and 100 illnesses. Human infection with listeriosis results in an 80-percent rate of hospitalization and a 25-percent fatality rate among those hospitalized. As with other diseases, downer animals are more likely to have listeriosis than ambulatory animals. (Tr. 134-36.)

22. In addition to diseases which may cause an animal to become a downer, a downer animal can develop gangrene and gangrene-like diseases which pose a risk to consumers of meat and meat food products from these animals. As Dr. White explained:

The nature of a downer animal and the syndrome that we call downer cow syndrome, the animal is down and unable to move about. And the weight of the animal presses against the muscles on the bottom side of the animal like the large muscles of the hind leg, the muscles of the brisket, the muscles of the abdomen, and causes what we call pressure ischemia where the blood essentially flows out of the tissue and circulation is impaired.

This situation sets up the very high likelihood that because there is a lower oxygen supply because the blood is gone or reduced of several forms of gangrene and gangrenelike diseases, diseases caused by Clostridium.

Tr. 137-38.

Gangrene in downer animals can cause a type A toxicity called Clostridium perfringens in consumers of meat from those animals (Tr. 138). Clostridium perfringens in humans “causes a very, very serious gastrointestinal intoxication of a very short incubation and a very, very badly upset gastrointestinal tract” (Tr. 139).

23. Antibiotics present in an animal after treatment are referred to as chemical residues. There is a threshold limit for the permissible chemical residue from every antibiotic that is administered to livestock. Any chemical residue over this threshold is not permitted in meat and meat food products intended for human consumption. The presence of chemical residues in meat poses a risk to consumers who are allergic to them. Because of this health risk, all downer animals must be screened for chemical residues. The test for chemical residues is performed by the FSIS inspector-in-charge and interpreted by an FSIS supervisory veterinary medical officer. If the results are positive, a sample of muscle, kidney, and liver from the animal is sent to a laboratory for analysis. While the test results are pending, the animal carcass is held and is not processed for human consumption. (Tr. 140-42.)

An audit by Dr. White revealed that from August 1996 to January 1997, tests for chemical residues in downer animals were not conducted at Respondent’s establishment (Tr. 207). An inference can be made that any time FSIS inspector Randall Barber was not inspecting downer animals, he was not testing for chemical residues in them (Tr. 216-17).

24. Animals also might be condemned during inspection for extensive bruising, for gelatinous deterioration of muscle or fat, or for cancerous tumors because many consumers consider these conditions repugnant (Tr. 142). If any of these repugnancies are not trimmed away, they “become[] incorporated into the product and the consumer has no ability to recognize that it is abnormal and, therefore, trim it off or cut it off or do whatever they would normally do if it was repugnant to them” (Tr. 217).

25. Dr. White was FSIS inspector Randall Barber’s supervisor from March 1996 to February 1997. During this period, Dr. White conducted audits of Mr. Barber’s work, but found nothing out of order. (Tr. 203.)

26. Dr. White first became aware of a possible problem at Respondent’s establishment when FSIS processing inspectors at other establishments in the greater Albany, New York, area told Dr. White that product their establishments

had received from Respondent did not look like it had been inspected. In particular, the FSIS inspectors stated that the product contained foreign material, such as dirt, scruff, dandruff, hide, and fecal material. (Tr. 144-46.)

During the weekend following Thanksgiving of 1996, Dr. White had a chance encounter with an employee of Respondent at a K-Mart store. The employee informed Dr. White that Respondent was operating without an inspector present. An FSIS inspector must be present for a slaughtering establishment to operate, and operation of a slaughtering establishment without an inspector present is illegal. Dr. White did not, at that time, take enforcement action. On or about January 2, 1997, Dr. White received more specific information regarding wrongdoing at Respondent's establishment. On January 3, 1997, Dr. White made an unscheduled visit to Respondent's establishment and observed the establishment slaughtering animals and applying the official mark of inspection without an inspector present. (CX 12A at 3; Tr. 147-50.)

27. Mr. Mattick, Respondent's president and sole shareholder, was present at the establishment when Dr. White arrived on January 3, 1997 (CX 12A at 11). Mr. Mattick attempted to explain the absence of FSIS inspector Randall Barber by telling Dr. White that Mr. Barber had gone to the post office and would be returning shortly. (CX 12A at 11, 20-21; Tr. 149.) Mr. Mattick then directed an employee to call Mr. Barber at home and tell him to return to Respondent's establishment. After the employee was unable to reach Mr. Barber, Mr. Mattick called Mr. Barber's home and left a message with Mr. Barber's wife, instructing Mr. Barber to return to the establishment. (CX 12A at 20-21.) Mr. Mattick also called Richard Dedie, the owner of Rich's Custom Meat Shop, and requested Mr. Dedie to tell anyone who inquired that Mr. Barber had been conducting a review at Rich's Custom Meat Shop on that day (CX 12A at 15). On February 12, 1997, during a telephone call initiated by Mr. Dedie, Mr. Mattick urged Mr. Dedie to "tell the truth" and state that Mr. Barber was not at Rich's Custom Meat Shop on January 3, 1997 (CX 12A at 16). Mr. Mattick did not mention bribery to Dr. White (Tr. 151-52).

28. During his January 3, 1997, visit to Respondent's establishment, Dr. White discovered the inspection brands in a room adjoining the slaughter department. Because there was no FSIS inspector present, the brands should have been locked in the inspector's office. An hour after Dr. White arrived, FSIS inspector Randall Barber returned. (Tr. 150-51.)

29. After Dr. White left Respondent's establishment, he immediately wrote a report of his findings. The next workday, Dr. White reported his findings to his two superiors. Subsequently, Dr. White notified the Office of Inspector General, United States Department of Agriculture, which began an investigation. (CX 12A;

Tr. 52, 151-52.)

30. For a 2-year period from approximately January 1995 until January 1997, Mr. Mattick paid bribes to FSIS inspector Randall Barber (Ans. ¶ 1; CX 4-CX 6, CX 9-CX 10).

31. Sometime in 1995, Respondent was experiencing difficulty getting an FSIS veterinary medical officer to be present to inspect downer animals. At about the same time, FSIS inspector Randall Barber approached Mr. Mattick and suggested that he (Mr. Barber) would inspect the downer animals rather than wait for the veterinarian, which would allow Respondent to proceed with business. In exchange, Mr. Barber suggested that he be paid \$25 for each downer animal that he passed. (CX 12A at 4; Tr. 66-67, 248-49.) Mr. Mattick felt compelled to accept Mr. Barber's proposal because he believed that Mr. Barber "would waste a half a day. For days he would have us tied down and we wouldn't be able to do nothing" (Tr. 260). Gradually, Mr. Barber stopped inspecting the downer animals and refused to come out of his office to inspect downer animals, except when an FSIS veterinary medical officer or an FSIS compliance officer was at Respondent's establishment (CX 12A at 4, 27-28, 32). Mr. Barber instructed Respondent's employees to slaughter downer animals without inspection (CX 12 at 5, 27).

32. In 1996, FSIS inspector Randall Barber began leaving Respondent's establishment while slaughtering was taking place. When Mr. Barber left Respondent's establishment during slaughtering operations, he gave Respondent's employees the inspection brands and instructed Respondent's employees to apply the brand after slaughtering. He further instructed the employees to replace the brands in his safe when they were done and to lock the safe and the door when they left. (CX 12A at 19-20, 28, 30.)

33. Mr. Mattick never asked FSIS inspector Randall Barber to leave Respondent's establishment (Tr. 218).

34. FSIS inspector Randall Barber kept demanding more and more money from Mr. Mattick (CX 12A at 19; Tr. 98-99). Later, Mr. Barber wanted to be paid a flat fee of \$50 a day plus \$25 per downer animal. Mr. Mattick's payments to Mr. Barber went up to approximately \$500 a week. Mr. Mattick eventually told Mr. Barber he could not afford to pay him \$500 a week and the payments went down to \$300 a week. (CX 12A at 19; Tr. 72.)

35. When Mr. Mattick initially paid FSIS inspector Randall Barber \$25 for each downer animal that was allowed to be slaughtered without examination by an FSIS veterinary medical officer, the payment was for the purpose of not having to wait for the veterinarian to arrive at Respondent's establishment to perform the required inspection. Eventually, Mr. Barber stopped inspecting the downer animals himself. Thus, downer animals were slaughtered by Respondent without any federal

inspection at all. (CX 12A at 18-19; Tr. 67-68.)

36. On average, Respondent slaughtered about 4 to 10 downer animals each week, later rising to about 10 downer animals per week, that required inspection by an FSIS veterinary medical officer, but which instead either were inspected by FSIS inspector Randall Barber or received no FSIS inspection. Mr. Mattick acknowledged that some of the animals that were slaughtered at Respondent's establishment would have been condemned if inspected by an FSIS veterinarian. (CX 12A at 18-19; Tr. 102, 104.)

37. During 1997 and 1998, FSIS inspectors documented 101 deficiencies in the conditions at, and operation of, Respondent's establishment (CX 15-CX 90, CX 92-CX 116).

38. Respondent is unfit to receive inspection service under title I of the FMIA. Respondent is unfit to receive inspection service under the PPIA.

#### **Conclusions and Discussion**

The initial consequence of Respondent's bribery was that Respondent was permitted to slaughter downer animals without the required inspection. Later, the circumvention of inspection was greatly expanded. Frequently, no animals, either downer or ambulatory, were inspected. (CX 12A at 18-20, 25, 27-28, 32; Tr. 72.)

Ambulatory animals at Respondent's establishment escaped inspection in two ways. First, until settling on a flat rate, Respondent paid FSIS inspector Randall Barber \$50 per day to remain in his office and not on the slaughter floor. Mr. Barber frequently remained in his office all day. Different employees of Respondent estimated the duration of this behavior as 12 to 18 months and 1 year. Second, sometime after the initial bribery began, Mr. Barber began leaving Respondent's establishment early approximately three times per week. After Mr. Barber would leave the establishment, Respondent continued to perform slaughter operations. As many as four to five cows and 20 to 25 calves would be slaughtered while no inspector was present. Even though animals and carcasses were not inspected at these times, Respondent continued to apply the official mark of inspection to indicate to purchasers of Respondent's meat and meat food products that the meat and meat food products had been inspected and passed by the United States Department of Agriculture. (CX 12A at 19-20, 25, 27-28, 32; Tr. 72.)

Richard Van Blargan, Deputy Assistant Deputy Administrator, District Enforcement Operations, FSIS, and a 34-year veteran of FSIS' inspection programs, described FSIS' long-standing campaign to eliminate bribery by providing the meat and poultry slaughtering and processing industries with ample notice and

opportunity to inform FSIS of attempted bribery:

[S]tarting in 1981, the Food Safety and Quality Service and Food Safety [and] Inspection Service after that . . . started a campaign in which we have notified industry consistently, not only have we notified our own employees that if they get offered a bribe, that they have to report it; we have also notified . . . nationwide industry, any inspected plant, if you get approached by any federal inspector, any federal employee looking for any type of money or if they believe that there is an extortion possibility there, is that they had an OIG hot line number that they could call the OIG.

They could do it in the middle of the night and nobody would even know that they were reporting it. We had posters that were posted in plants that says if you've got a problem with inspection personnel, here is the number to call and here is who to contact.

You had either to contact FSIS. You could contact OIG, which was an independent agency within the United States Department of Agriculture, or you could contact the supervisor or the management chain all the way up to the district office.

Tr. 250.

Respondent has had compliance difficulties in the past, but they were of less magnitude than the situation presented in this proceeding. A process deficiency record [hereinafter PDR] is a report used to document an establishment's deficiencies detected by an inspector. PDRs include information such as a narrative description of the deficiency, the nature of the deficiency, the extent and degree of the deficiency, the time in which the deficiency occurred, and the person responsible for correcting the deficiency. The purpose of a PDR is to monitor the corrective actions and preventive measures taken by an establishment to prevent recurring deficiencies. (Tr. 157.) The Performance-Based Inspection System, a computer system, directs the inspector as to which aspects of establishment operations to monitor on a particular day (Tr. 164-65).

During 1997 and 1998, Respondent received a large number of PDRs, covering a wide range of deficiencies at the establishment (CX 15-CX 90, CX 92-CX 116). Respondent received 18 PDRs during this time period that document conditions at the establishment while product was being produced which could render the product adulterated, such as condensation dripping directly on animal product (CX 15-CX 32; Tr. 167).

Respondent received 46 PDRs for pre-operational sanitation deficiencies (CX 33-CX 78; Tr. 169-70). Pre-operational sanitation refers to the sanitation necessary for an establishment to begin slaughter and processing operations. Respondent received these 46 PDRs even though Dr. White instructed the FSIS inspectors he supervised not to begin checking for pre-operational sanitation deficiencies until informed by Respondent that the establishment was ready to begin operations. Improper pre-operational sanitation could lead to product becoming adulterated with residue from a previous day's operations. Any deficiency that relates to product residues from previous operations creates a risk because bacteria and viruses are common in the environment, and the fat and bone of meat products provide an ideal environment for growth of bacteria and viruses. (Tr. 170, 173.)

During 1997 and 1998, Respondent received 12 PDRs documenting operational deficiencies (CX 79-CX 90; Tr. 174). Operational deficiencies are similar to pre-operational deficiencies, but they occur during operations and thus present a greater risk of the production of adulterated product than pre-operational deficiencies (Tr. 174-75). Respondent also received 12 PDRs during this time period related to deficiencies associated with mishandling of products after production (CX 92-CX 103; Tr. 179). Respondent's improper handling of products, as documented in the 12 PDRs, created a risk of adulteration of those products by foreign matter and filth (Tr. 180).

During 1997 and 1998, Respondent received nine PDRs related to deficiencies regarding product identity, such as the improper labeling and marking of products and the use of ingredients in products that are not allowed in those products (CX 104-CX 112; Tr. 181-82). For example, beef was found in a product not allowed to contain beef (CX 106; Tr. 182). This use of beef in product not allowed to contain beef posed the danger that consumers, not knowing that the product contained beef, might not adequately cook the product (Tr. 182-83).

Also during 1997 and 1998, Respondent received four PDRs documenting other deficiencies, such as the inhumane handling of an animal (CX 113-CX 116). The inhumane treatment presented a safety risk to the FSIS inspector and Respondent's employees (CX 116; Tr. 184).

Mr. Van Blargan testified concerning his experience and expectations regarding an establishment that finds itself under legal scrutiny, such as Respondent:

Under normal circumstances, it has been my experience . . . that once an establishment has either been approached or knows that it is the target of either criminal investigation or an administrative action, . . . they go out of their way to be very compliant during that period of time pending the outcome of either a complaint or an indictment being issued in a criminal

case or complaint to an administrative action being issued. So I would expect that anyone who is under scrutiny for illegal activities would, in fact, basically, you know, show compliance.

Tr. 231.

Similarly, Dr. White testified that in his experience establishments that are under investigation or have been convicted of criminal violations “are very scrupulous about rigorously conforming to the standards” of the FMIA and the PPIA (Tr. 185). Despite an on-going criminal investigation and Respondent’s December 9, 1997, conviction for bribery, Respondent had twice as many PDRs during 1997 and 1998 as Dr. White would expect for an operation of its size, type, production, and age (Tr. 187-88). From January 1999 through September 1999, Respondent received only one PDR.

When Congress passed the FMIA, it made specific findings regarding the public interest of assuring that meat and meat food products are wholesome, not adulterated, and properly marked, labeled, and packaged:

**§ 602. Congressional statement of findings**

Meat and meat food products are an important source of the Nation’s total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally.

21 U.S.C. § 602. Congress made similar findings regarding poultry and poultry products in the PPIA. *See* 21 U.S.C. § 451.

Section 401 of the FMIA authorizes the Secretary of Agriculture to withdraw

inspection service from an establishment if the Secretary determines that the establishment is unfit to engage in any business requiring inspection under title I of the FMIA, based upon a felony conviction:

**§ 671. Inspection services; refusal or withdrawal; hearing; business unfitness based upon certain convictions; other provisions for withdrawal of services unaffected; responsible connection with business; finality of Secretary's actions; judicial review; record**

The Secretary may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this chapter) refuse to provide, or withdraw, inspection service under subchapter I of this chapter with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under subchapter I because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any Federal or State court, of (1) any felony[.]

21 U.S.C. § 671. Section 18(a) of the PPIA contains a similar provision authorizing the Secretary of Agriculture to withdraw inspection service from an establishment if the Secretary determines that the establishment is unfit to engage in any business requiring inspection under the PPIA, based upon a felony conviction. *See* 21 U.S.C. § 467(a).

Bribery goes to the heart of the FMIA and the PPIA. The United States Court of Appeals for the Sixth Circuit has recognized that “[b]ribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated.” *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6<sup>th</sup> Cir. 1986). In addition, Mr. Van Blargan testified as to the significance of bribery in regard to the inspection system:

[B]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. They have to take independent action with regard to the effect of their actions as it relates to the industry.

If they accept bribes, . . . it compromises their integrity, their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection.

.....

There is no way that we can afford to have the number of resources to be in every nook and cranny of that establishment checking every little piece of meat. We have to rely on the integrity of the plants and the integrity of the operators of those plants to have some accountability, and the integrity to comply with the federal regulatory requirements and the law.

Tr. 225-26. *See also In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 (1978) (stating bribery of a grader strikes at the heart of the meat grading program).

There are other circumstances which also favor withdrawal. "The more closely the conduct strikes to the policies of the Federal Meat Inspection Act, the more likely it alone will support a determination of unfitness regardless of the mitigating facts present." *Utica Packing Co. v. Block, supra*, 781 F.2d at 78. Nevertheless, in its Answer, Respondent alleges that "facts exist in mitigation of the Respondent's plea of guilty." (Ans. ¶ 4.)

If mitigating circumstances are to be considered relevant, aggravating circumstances should be considered as well. *In re William Stewart*, 50 Agric. Dec. 511, 519 (1991), *aff'd*, 947 F.2d 937 (3<sup>d</sup> Cir. 1991) (Table). "Although only the felony conviction affords a jurisdictional basis for withdrawing inspection services from respondent, once the jurisdictional basis is met consideration can be given to any other relevant circumstances, favorable and unfavorable." *Id.* (Quoting *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2<sup>d</sup> Cir. Jan. 22, 1982)). The facts underlying Respondent's bribery conviction are rife with aggravating circumstances which simply enhance the presumption of unfitness resulting from Respondent's conviction of the felony of bribery of an FSIS inspector.

Ante mortem and post mortem inspections are the heart of the federal inspection system. They are the primary means by which unwholesome products are kept out of the food supply. Because of the importance of ante mortem and post mortem inspections, every animal slaughtered under the FMIA must receive both types of inspection.

Beginning in January 1995, and continuing for 2 years, Respondent made daily or weekly cash payments to the FSIS inspector assigned to Respondent's establishment. At first, Respondent paid the FSIS inspector \$25 for each downer animal Respondent was permitted to slaughter without the required veterinary inspection. Later, after this sum reached \$500 per week, an amount Respondent could not pay, Respondent and the FSIS inspector agreed upon a flat rate of \$300

per week.

In return for its cash payments to the FSIS inspector, Respondent was able, without inspection, to slaughter downer animals and to introduce meat and meat food products from these downer animals into the food supply. Downer animals are more likely to be diseased than ambulatory animals so they are the animals for which proper inspection is most important. By making payments to the FSIS inspector, Respondent was able to avoid what it regarded as the inconvenience of inspection and also the risk of condemnation. Animals which have not received inspection are not fit for human consumption. In the case of downer animals, the situation is even more dire. By their very nature, downer animals are not well; if they were, they would be ambulatory. Mr. Mattick conceded that some of the animals Respondent slaughtered and introduced into the food supply likely would have been condemned if they had been properly inspected.

Furthermore, Respondent's circumvention of inspection extended beyond downer animals. In exchange for \$50 per day, the FSIS inspector stayed in his office and did not inspect any animals. In addition, the bribed FSIS inspector often left the establishment early, and Respondent continued to slaughter animals after his departure. Whether the FSIS inspector was in his office for the day or was absent from the establishment, no animals received inspection in either case. Nevertheless, Respondent continued to operate, slaughtering and processing animals, and even marking product as inspected and passed with the inspection brand. While the inspector was absent, no inspection tasks of any type were performed so other aspects of inspection, such as sampling downer animals for chemical residues, were not occurring.

Respondent's bribery of an FSIS inspector in exchange for permission to slaughter uninspected animals and to introduce meat and meat food products from uninspected animals into the food supply presented a threat to consumer health and welfare. Respondent attempts to minimize the dangers to consumers posed by Respondent's circumvention of the inspection system. Specifically, Respondent states "[t]here is no evidence that any meat which was unfit for human consumption entered into the stream of commerce." (Respondent's Brief ¶ 29.) In addition, Respondent, citing the Office of Inspector General's Report (CX 12), repeats Mr. Mattick's assertion that he never "intentionally slaughtered any animals that were clearly unfit for human consumption." (Respondent's Brief ¶ 29.)

The requirement of ante mortem inspection of all animals and post mortem inspection of all carcasses is the heart of the FMIA. Without examination by a trained inspector, an animal's health status is unknown, and thus the meat and meat food products from that animal are not suitable for human consumption. (Tr. 126.) In particular, an uninspected animal might suffer from diseases communicable to

humans, contain dangerous levels of chemical residues, or have conditions repugnant to many consumers (Tr. 119-42). Meat and meat food products from animals with diseases communicable to humans and meat and meat food products containing chemical residues may endanger the health of consumers. Because of these risks to consumer health and the possible existence of repugnancies, the FMIA requires that, before meat or meat food products may enter commerce, inspectors must make an affirmative determination, after ante mortem inspection, that meat and meat food products derived from the animal would not be adulterated. 21 U.S.C. § 603. Moreover, the FMIA requires that inspectors make an affirmative determination, after post mortem inspection, that the carcass of the slaughtered animal is capable of use as human food. Only after such ante mortem inspection, post mortem inspection, and affirmative determinations can meat and meat food products from an animal be marked as “inspected and passed.” 21 U.S.C. § 604. These affirmative determinations are significant. There is no assumption that an uninspected animal or an uninspected carcass is suitable for use as human food.

Respondent regularly slaughtered downer animals (CX 12A at 18; Tr. 264). As Mr. Mattick described his operation, “it’s a slaughterhouse where you can bring crippled cows and downers.” (Tr. 264.) Inspection is especially critical for downer animals, which are the most likely to be diseased (Tr. 117-24). The special health risk to consumers from downer animals is recognized in the FMIA’s ante mortem inspection requirement, which mandates the separation for closer inspection of all animals exhibiting signs of disease “[f]or the purpose of preventing the use in commerce of meat and meat food products which are adulterated” (21 U.S.C. § 603(a)).

Inspection is the means by which information about an animal’s health status and suitability of meat and meat food products for human consumption are obtained. Respondent evaded inspection for 2 years and the health status of the animals Respondent slaughtered is unknown. During this period, FSIS inspectors from other establishments observed foreign material, such as dirt, scruff, dandruff, hide, and fecal material on products received from Respondent (Tr. 146). Meat and meat food products from animals with one or more of the over 100 diseases FSIS veterinary medical officers are trained to identify may have been introduced into the food supply. Meat and meat food products from animals infected with Bovine spongiform encephalopathy may have entered the food supply undetected, only to be identified in another 5 to 10 years when an infected person exhibits symptoms. Meat and meat food products from animals with other diseases, such as rabies, anthrax, or listeriosis, may have been consumed. Meat and meat food products from animals with impermissibly high chemical residues or with repugnancies, such as cancerous tumors, may have entered the food supply.

Respondent correctly notes that Dr. White did not condemn carcasses when he performed post mortem inspections during his surprise visit on January 3, 1997 (Respondent's Brief ¶ 30). There is no indication that Dr. White was aware that the animals from which the carcasses were derived had not received ante mortem inspection and thus may have had neurological diseases not detectable during post mortem inspection. Moreover, those carcasses remaining at the end of the shift on January 3, 1997, would have been derived from a tiny portion of the animals slaughtered at Respondent's establishment without inspection from January 1995 to January 1997.

At the very least, as a consequence of Respondent's actions, consumers purchased meat and meat food products which were labeled as U.S. inspected and passed, but which were not inspected, and the public consumed meat and meat food products from animals which were not suitable for human consumption.

Even after January 3, 1997, when Dr. White's surprise visit triggered the investigation, Respondent failed to comply with inspection requirements. Mr. Van Blargan and Dr. White testified that, in their experience, establishments under investigation, such as Respondent, show excellent compliance, but Respondent's compliance was anything but excellent. During 1997 and 1998, Respondent received 101 PDRs, twice as many PDRs as Dr. White would expect based on Respondent's size, type, production, and age.

By applying the official mark of inspection to meat and meat food products that were not inspected and passed, Respondent's actions threatened the integrity of the official mark. The Secretary of Agriculture has recognized the importance of preserving the integrity of the official mark of inspection:

The official mark "U.S. INSP'D & P'S'D" is a symbol accepted throughout the United States as assurance that the meat is wholesome and not adulterated or misbranded. Similarly, official Federal grade marks, such as "USDA Choice," are accepted throughout the United States as assurance that the meat is of a certain quality. Those marks will continue to be accepted as assurance of wholesomeness and quality only if government inspectors and graders continue to have competence and integrity, and packing plant operators continue to cooperate with, rather than attempt to subvert, the inspection and grading process.

*In re Great American Veal Co.*, 45 Agric. Dec. 1770, 1782-83 (1986), *aff'd*, No. 86-3998 (D.N.J. Oct. 27, 1987), *consent order*, No. 86-3998 (D.N.J. Jan. 12, 1990).

FSIS must be able to rely on the integrity of an establishment's management to be assured that the health and welfare of consumers will be protected. *In re Great*

*American Veal Co., supra*, 45 Agric. Dec. at 1782. This need to rely on an establishment's management includes the need to rely on the integrity of the establishment's management not to subvert the inspection system through the payment of bribes. Respondent has demonstrated that FSIS cannot rely upon Respondent to assure that the health and welfare of consumers will be protected.

Respondent states that Mr. Mattick "never intentionally slaughtered any animals that were clearly unfit for human consumption." (Respondent's Brief ¶ 29.) This statement wrongly suggests that any slaughter of uninspected animals and introduction into commerce of meat and meat food products from these animals was an accident. Respondent's slaughter of hundreds of downer animals and introduction of meat and meat food products from these animals into the food supply without any inspection was the consequence of a series of intentional actions by Respondent during a 2-year period: (1) failure to notify any authorities of bribery solicitation; (2) payment of bribes to FSIS inspector Randall Barber; (3) introduction of downer animals into the establishment without inspection; (4) slaughter of downer animals without inspection; and (5) marking the meat and meat food products from uninspected animals as "inspected and passed."

Moreover, Respondent presented no evidence nor claimed that it withheld even a single animal from slaughter because Respondent had determined the animal was "clearly unfit for human consumption." The record does not contain any evidence that Respondent did anything to keep meat or meat food products derived from even a single uninspected animal out of the food supply, regardless of the health risk.

FSIS veterinary medical officers, who have the necessary training and knowledge, are responsible for determining the disease status of downer animals, the suitability of downer animals for human consumption, and the proper disposition of downer animals.

Respondent's claim that it would have suffered retaliation for reporting FSIS inspector Randall Barber, although not supported by the evidence, may, nevertheless, have been a belief Respondent held.

Respondent quotes Mr. Mattick's claim that if he had alerted the United States Department of Agriculture of the bribery "it would be worse. They come down on you harder." (Tr. 260-61.) Mr. Mattick also alleged that calling up the United States Department of Agriculture would be "a joke." (Tr. 260.) See Respondent's Brief ¶ 41. Everett Millington, Respondent's part-time employee, apparently acting on his own, told Dr. White during a chance encounter at a K-Mart store in late November 1996, that Respondent was operating without an inspector present (CX 12A at 10-11; Tr. 96, 147).

In the words of Dr. White:

And he basically accosted me -- or accused me, I should say, of being incredibly stupid for not noticing that the inspector wasn't always there during operations.

Tr. 147.

Mr. Millington declined to cooperate with Dr. White or to allow his name to be used (CX 12A at 4; Tr. 147). Respondent presented no specific evidence of any incident in which FSIS had ever retaliated against Respondent. This is not to say that Mr. Mattick did not genuinely believe that FSIS would retaliate for reporting FSIS inspector Randall Barber. In fact, I find Mr. Mattick's testimony in this regard credible.

However, Respondent had alternatives to paying bribes to FSIS inspector Randall Barber. Respondent could have notified Mr. Barber's supervisor, Dr. White, or the Office of Inspector General, United States Department of Agriculture, of Mr. Barber's solicitation of bribery.

Mr. Van Blargan testified as to the numerous methods available to an establishment to report wrongdoing by an inspector, and FSIS' extensive efforts to educate establishments as to these options. Mr. Van Blargan's testimony related to the meat and poultry slaughtering and processing industries, in general, and there was no specific reference to Respondent:

[S]tarting in 1981, the Food Safety and Quality Service and Food Safety [and] Inspection Service after that . . . started a campaign in which we have notified industry consistently . . . if you get approached by any federal inspector, any federal employee looking for any type of money or if they believe that there is an extortion possibility there, is that they had an OIG hot line number that they could call the OIG.

They could do it in the middle of the night and nobody would even know that they were reporting it. We had posters that were posted in plants that says if you've got a problem with inspection personnel, here is the number to call and here is who to contact.

. . . You could contact OIG, which was an independent agency within the United States Department of Agriculture, or you could contact the supervisor or the management chain all the way up to the district office.

Tr. 250.

Respondent is unfit to receive inspection service under title I of the FMIA. Respondent is unfit to receive inspection service under the PPIA. The federal meat and poultry inspection programs require that FSIS be able to rely on the integrity of inspected establishments. Inspectors cannot be everywhere, and no matter how many resources FSIS has or how good the policies and procedures it adopts, FSIS can never completely eliminate the opportunity for a dishonest establishment to endanger the health of consumers.

From 1995 until detection in 1997, Respondent's actions endangered the health of consumers. By its actions, Respondent has demonstrated that it is not fit to receive inspection services, and thus inspection services should be withdrawn.

Having established that Respondent is unfit to receive federal meat and poultry inspection services, the length of time for the withdrawal of inspection services must now be considered. The meat and poultry slaughtering and processing industries have been on notice since June 26, 1979, as to FSIS' sanction policy. On that date, in order to inform the public of its position, the Food Safety and Quality Service (FSIS' predecessor agency) published in the Federal Register its Policy on Withdrawal or Denial of Federal Inspection or Grading and Acceptance Services Based Upon Convictions for Bribery and Related Offenses. 44 Fed. Reg. 37,322-24 (1979).

In that Federal Register notice, the Food Safety and Quality Service stated that in administrative actions brought for the withdrawal of federal inspection services based upon convictions for bribery, the Food Safety and Quality Service would seek to withdraw indefinitely inspection services:

FSQS shall institute an administrative proceeding seeking the indefinite withdrawal or denial of Federal inspection and/or grading and acceptance services from any recipient of . . . such services when the Department's action is based upon a criminal conviction or convictions for bribery or related offenses. . . .

. . . .

Proceedings of this nature will be instituted by FSQS whenever the Secretary has jurisdiction to determine whether inspection or grading and acceptance services shall be withdrawn or denied based upon convictions for bribery and related offenses.

44 Fed. Reg. at 37,323.

Also in the notice, the Food Safety and Quality Service explained the compelling need for its policy:

In addition to evidencing a lack of basic integrity, such convictions must be considered especially serious in the specific context of the meat and poultry industries. While the FMIA, PPIA, and EPIA require the mandatory inspection of the slaughtering of certain livestock and poultry and processing of products thereof, . . . it is physically impossible for Federal inspection personnel to oversee all actions taken by operators and employees of federally inspected establishments. Great reliance must, therefore, be placed upon the integrity of these individuals. . . . When such criminal convictions are based upon the giving or offering of bribes or gratuities to Federal inspection or grading personnel, such actions also pose a direct and tangible threat to the integrity of the inspection and grading systems. The Department has recognized the seriousness of such offenses in dealing with its own personnel, who have been subjected to immediate suspension without pay upon being charged with such offenses, and have been dismissed based upon conviction for such offenses.

44 Fed. Reg. at 37,323.

Respondent, in arguing for mitigating circumstances, states that since Dr. White's surprise visit on January 3, 1997, Respondent has remained in operation receiving inspection services continuously. Thus, Respondent contends it has not presented a risk to consumers since that time or further action would have been taken by the Government. Indeed, the Government acknowledged during the criminal proceeding that it was willing to allow Respondent to continue in business as long as Mr. Mattick removed himself from the management of Respondent for a period of time.

Further, Respondent contends that the issue in this proceeding is not Respondent's fitness to receive inspection services, but rather the issue is the appropriate punishment for Respondent's bribery of an FSIS inspector and that Mr. Mattick and Respondent are victims, as well as perpetrators, of the bribery. Respondent states punishment is appropriate, but argues that the destruction of a life's work is not the answer and that Complainant here seeks not only to ban Mr. Mattick from the meat and poultry slaughtering and processing business for life, but also Respondent's successors, affiliates, and assigns, directly or through any corporate device. (Respondent's Brief at 10.) Respondent contends:

The goal of the Government is to lay this business to waste so that Robert Mattick cannot convey this business to his family or otherwise sell it. This is unfair. It is the full nuclear retaliatory response school of governmental administration.

It is respectfully submitted that the punishment has already taken place in the criminal arena. An administrative fine would be the appropriate punishment for this Court to impose coupled, perhaps, with a short term withdrawal of inspection services.

Respondent's Brief at 10-11.

In formulating its indefinite withdrawal policy, FSIS was aware of the substantial impact that the policy could have upon affected individuals and establishments. However, FSIS formulated the policy because it determined that such a uniform policy is essential in order to protect the integrity of the inspection system and to deter bribery and related offenses (44 Fed. Reg. at 37,324).

Deterrence is critical because the nature of the inspection system makes it particularly vulnerable to bribery. First, many FSIS inspectors work in establishments where supervisors are not physically present. Second, FSIS inspectors are relatively low-paid employees and thus bribes can significantly augment their salaries. Third, FSIS inspectors make decisions with a large financial impact on the establishments to which they are assigned. The great economic gain to be had from bribery makes bribery attractive to establishments, except for the possible penalties resulting from detection. Finally, bribery is cancerous in nature and, unless stopped, can become routine and even spread to other establishments. *See In re Great American Veal Co., supra*, 45 Agric. Dec. at 1783-84.

Mr. Van Blargan, who participated in the formulation of the sanction policy, testified that FSIS believed "it was far more important to preserve the integrity of the inspection system . . . because bribery really cuts to the heart of the inspection system, undermines the confidence of the consumer public, as well." (Tr. 225.)

FSIS' 20-year policy and Mr. Van Blargan's testimony, based on decades of experience with bribery cases, reflect FSIS' view that indefinite withdrawal is the appropriate sanction for bribery. Although bribery always poses a serious threat to the inspection system, Mr. Van Blargan testified that the threat to the integrity of the inspection system presented by Respondent's bribery was greater than that presented in any of the more than 50 withdrawal actions with which he has been involved because of the severity of the risk to consumer health created by Respondent's actions:

I have testified and I have been involved in many withdrawal actions as it relates to adulterated product. The primary concern in those areas have [sic] been economic in where we have a substitution of meat product for, say, a plant product.

And although there is some health and safety risk associated with the possibility of someone being allergic to, say, plant food or plant protein, . . . it is generally regarded as [GRAS] or generally [recognized] as [safe] for human consumption.

The reason I look at this as being much more egregious is from the standpoint that . . . we have an establishment operator who had operated under a grant of inspection from the early '80s and through -- including 1995 and is currently still operating, that during the period of time was well aware of the inspection requirements and the regulatory requirements and the types of operations and conditions that had to exist in federally-inspected plants in order for product to be produced in a wholesome manner.

They knowingly circumvented that through the effect of offering gratuity and bribes to an inspector to compromise that inspection system. The animals he knowingly put forth from a standpoint that the livestock were downers and had a higher possibility of being either disabled or diseased, subsequently knowingly marked it as inspected and passed when he knew the marks could not be applied unless they were, in fact, inspected and passed, and then subsequently introduced it into the consumer channels with utter disregard as to what the health and safety consequences might be.

Tr. 229-31.

Respondent has demonstrated a lack of integrity necessary for the operation of an establishment inspected under the FMIA and the PPIA. Respondent deceived purchasers of its meat and meat food products by falsely labeling meat and meat food products as federally-inspected and passed when Respondent's meat and meat food products were not inspected and passed. Respondent subjected consumers to health risks by routinely slaughtering animals, including the most sick, without any inspection. FSIS cannot rely upon the integrity of the establishment's management. To protect consumer health and maintain public confidence, inspection services under the FMIA and the PPIA must be provided only to "fit" persons. *In re Apex Meat Co.*, 44 Agric. Dec. 1855, 1872 (1985), *aff'd*, No. 85-3189 (D.D.C. Sept. 19, 1986), *aff'd per curiam*, No. 86-5627 (D.C. Cir. Sept. 16, 1987).

I conclude that Respondent is unfit to engage in any business requiring inspection service under title I of the FMIA (21 U.S.C. §§ 601-624), that Respondent is unfit to engage in any business requiring inspection service under the PPIA (21 U.S.C. §§ 451-471), and that inspection services under title I of the FMIA and under the PPIA should be indefinitely withdrawn from Respondent, its successors, affiliates, and assigns.

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent raises six issues in its Appeal Petition.

First, Respondent states the ALJ's indefinite withdrawal of inspection services under title I of the FMIA and under the PPIA from Respondent, is error. Specifically, Respondent contends that the ALJ's "ultimate determination" is error because "[a]ll of the complained of activities associated with [Respondent's conviction of the felony of bribery of a public official] originated with the USDA [i]nspector (who was convicted of [a]ccepting [b]ribes)." (Appeal Pet. ¶ 1 at 3.)

The record establishes that FSIS Inspector Randall Barber initially solicited bribes from Respondent for Mr. Barber's inspection of downer animals in violation of the FMIA (CX 12A at 4; Tr. 66-67). The record also establishes that Mr. Barber initiated the other violations of the FMIA for which Respondent paid bribes. However, Mr. Barber's initial solicitation of bribery and initiation of the other violations of the FMIA, for which Respondent paid bribes, are not sufficiently mitigating to overcome Respondent's unfitness to receive inspection services under the FMIA and under the PPIA, as demonstrated by Respondent's conviction of the felony of bribery of a public official. I do not find that the ALJ erred when she indefinitely withdrew inspection services under title I of the FMIA and under the PPIA from Respondent.

Respondent had alternatives to paying bribes to FSIS inspector Randall Barber. Respondent could have notified Mr. Barber's supervisor, Dr. White, or the Office of Inspector General, United States Department of Agriculture, of Mr. Barber's solicitation of bribes (Tr. 250). Moreover, Respondent offered no evidence to support its contention that Mr. Barber or FSIS would retaliate for Respondent's reporting Mr. Barber's solicitation of bribes. Dr. White testified that if Respondent had reported Mr. Barber's solicitation of bribes, he (Dr. White) would have immediately removed Mr. Barber from assignment to Respondent's establishment (Tr. 153-54). Moreover, Mr. Van Blargan testified that Mr. Mattick would not be required to identify himself if he reported the solicitation of bribes to the Office of Inspector General, United States Department of Agriculture (Tr. 250). Thus, I find that, while Mr. Mattick may have believed that Mr. Barber or FSIS would retaliate

for reporting Mr. Barber's solicitation of bribes, Mr. Barber would have been immediately removed from assignment to Respondent's establishment and would not have been in a position to retaliate against Respondent. Moreover, the record contains no evidence that FSIS would have retaliated against Respondent. To the contrary, the record establishes that FSIS encourages inspected establishments to report the solicitation of bribes by FSIS employees and that FSIS has procedures in place to ensure that there will be no retaliation against those who report the solicitation of bribes by FSIS employees and to ensure that those who contemplate reporting the solicitation of bribes do not fear retaliation either by the FSIS employees who are reported or by FSIS.

Second, Respondent contends "[t]he ALJ improperly admitted into evidence testimony and records concerning subsequent non-compliance with regulations by [Respondent]" (Appeal Pet. ¶ 2 at 5).

Respondent alleges that facts exist in mitigation of its plea of guilty to the felony of bribery of a public official (Answer ¶ 4; Tr. 21-22), Respondent introduced evidence of alleged mitigating circumstances (Tr. 258-66), and Respondent contends mitigating circumstances should be taken into account when determining the sanction to be imposed against Respondent (Appeal Pet. ¶ 1 at 3-5, ¶ 4 at 6-7). Complainant introduced evidence of Respondent's violations of the regulations issued under the FMIA to prove aggravating circumstances warranting the indefinite withdrawal of inspection services under title I of the FMIA and under the PPIA.

It has long been held that if mitigating circumstances are to be considered, relevant aggravating circumstances should be considered as well.<sup>1</sup> Although only Respondent's felony conviction affords a jurisdictional basis for withdrawing inspection services from Respondent, once the jurisdictional basis is met, consideration can be given to relevant favorable and unfavorable circumstances. Therefore, I find that the ALJ properly admitted evidence of Respondent's violations of the regulations issued under the FMIA introduced by Complainant to prove aggravating circumstances warranting the indefinite withdrawal of inspection services under title I of the FMIA and under the PPIA.

Respondent also contends that FSIS inspectors "artificially inflated the citations" for Respondent's violations of the regulations issued under the FMIA "after the Respondent's conviction in order to build a record against the Respondent for this proceeding." (Appeal Pet. ¶ 2 at 5.)

During 1997 and 1998, FSIS inspectors issued 101 PDRs documenting

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<sup>1</sup>*In re William Stewart*, 50 Agric. Dec. 511, 519 (1991), *aff'd*, 947 F.2d 937 (3<sup>d</sup> Cir. 1991) (Table); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2<sup>d</sup> Cir. Jan. 22, 1982).

deficiencies in the conditions at, and the operation of, Respondent's establishment (CX 15-CX 90, CX 92-CX 116). FSIS inspectors have the duty to detect deficiencies in the conditions at, and the operation of, inspected establishments and properly document deficiencies on PDRs. There is a presumption of regularity with respect to official acts of public officers and in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.<sup>2</sup> The record contains no evidence that FSIS inspectors "artificially inflated"

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<sup>2</sup>See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5<sup>th</sup> Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6<sup>th</sup> Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6<sup>th</sup> Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9<sup>th</sup> Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5<sup>th</sup> Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5<sup>th</sup> Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9<sup>th</sup> Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Dwight L. Lane*, 59 Agric. Dec. \_\_\_, slip op. at 42-45 (May 17, 2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil* (continued...)

the number of PDRs which they issued after Respondent's conviction of bribing FSIS inspector Randall Barber in order to build a record against Respondent for this proceeding. Therefore, Respondent failed to overcome the presumption that FSIS inspectors properly issued the PDRs in question (CX 15-CX 90, CX 92-CX 116).

Respondent further states Complainant concedes "a negligible non-compliance history prior to January 3, 1997." (Appeal Pet. ¶ 2 at 5.) Respondent cites Tr. 214-15 as the basis for its statement that Complainant concedes a "negligible non-compliance history prior to January 3, 1997." I have carefully reviewed the cited pages of the transcript and find no such concession.

Third, Respondent contends the ALJ erroneously allowed the admission into evidence of a Federal Register notice which sets forth a United States Department of Agriculture "per se policy" that has been consistently rejected by federal courts (Appeal Pet. ¶ 3 at 6).

The ALJ did allow the admission into evidence of a Federal Register notice (44 Fed. Reg. 37,322-24 (1979); CX 11; Tr. 221). This Federal Register notice

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<sup>2</sup>(...continued)

*Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9<sup>th</sup> Cir. 1984) (unpublished) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3<sup>d</sup> Cir. 1980).

describes FSIS' policy regarding the institution of administrative proceedings against recipients of federal inspection services when the United States Department of Agriculture's action is based upon a criminal conviction or convictions for bribery or related offenses (44 Fed. Reg. at 37,323; CX 11 at 2). The Federal Register notice states that the Food Safety and Quality Service (FSIS' predecessor agency) shall seek indefinite withdrawal of federal inspection services from a recipient of federal inspection services when the United States Department of Agriculture's institution of an administrative proceeding against the recipient of federal inspection services is based upon a criminal conviction or convictions for bribery or related offenses (44 Fed. Reg. at 37,323; CX 11 at 2).

I find that the Federal Register notice (44 Fed. Reg. 37,322-24 (1979); CX 11) does not set forth a "per se policy," as Respondent contends. Instead, the Federal Register notice sets forth FSIS' policy regarding the sanction FSIS seeks in administrative proceedings that it institutes against, *inter alia*, recipients of inspection services under the FMIA and the PPIA when the proceedings are based upon a criminal conviction or convictions for bribery or related offenses. I have carefully examined the cases cited by Respondent in support of its contention that the Federal Register notice has been "rejected" by federal courts<sup>3</sup> and find that none of these cases<sup>4</sup> "reject" the Federal Register notice, as Respondent contends. The "per se" issue addressed in cases cited by Respondent<sup>5</sup> relates to the lawfulness of the Judicial Officer's conclusion that fitness determinations under 21 U.S.C. § 671 can rest solely upon convictions without regard to mitigating circumstances. The cases cited by Respondent<sup>6</sup> do not preclude the ALJ from admitting the Federal Register notice (CX 11) into evidence. Therefore, I reject Respondent's contention that the ALJ erroneously allowed the admission into evidence of the Federal Register notice (CX 11).

Respondent also contends the ALJ "felt" that she was compelled by the Federal Register notice (CX 11) to withdraw indefinitely inspection services under title I of

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<sup>3</sup>Respondent states the following cases have rejected the "per se" policy set forth in 44 Fed. Reg. 37,322-24 (1979): *Windy City Meat Co. v. United States Dep't of Agric.*, 926 F.2d 672 (7<sup>th</sup> Cir. 1991); *Chernin v. Lyng*, 874 F.2d 501 (8<sup>th</sup> Cir. 1989); *Utica Packing Co. v. Block*, 781 F.2d 71 (6<sup>th</sup> Cir. 1986); *Wyszynski Provision Co. v. Secretary of Agric.*, 538 F. Supp. 361 (E.D. Pa. 1982); and *Toscony Provision Co. v. Block*, 538 F. Supp. 318 (D.N.J. 1982) (Appeal Pet. ¶ 3 at 6).

<sup>4</sup>See note 3.

<sup>5</sup>See note 3.

<sup>6</sup>See note 3.

the FMIA and under the PPIA from Respondent (Appeal Pet. ¶ 3 at 6). I find nothing in the record that supports Respondent's contention that the ALJ "felt" her disposition of the proceeding was constrained by the Federal Register notice (CX 11). Moreover, the Federal Register notice does not purport to mandate the disposition of administrative proceedings. Instead, the Federal Register notice merely states that FSIS shall institute an administrative proceeding *seeking* indefinite withdrawal of federal inspection services from a recipient of federal inspection services when the United States Department of Agriculture's action is based upon a criminal conviction or convictions for bribery or related offenses (44 Fed. Reg. at 37,323; CX 11 at 2). The Federal Register notice makes clear that the *decisions* rendered in administrative proceedings instituted by FSIS in which FSIS *seeks* indefinite withdrawal of federal inspection services are those of administrative law judges, the Judicial Officer, and the federal courts, as follows:

Such proceedings shall be conducted in conformity with the applicable Rules of Practice, which afford the respondent the opportunity for a hearing before an Administrative Law Judge. Decisions rendered in such proceedings may then be appealed to the Judicial Officer of the Department, whose decisions may, in turn, be appealed to the Federal courts.

44 Fed. Reg. at 37,323; CX 11 at 2.

Finally, I note that the Order in this Decision and Order indefinitely withdrawing inspection services under title I of the FMIA and under the PPIA from Respondent is not compelled by the Federal Register notice (44 Fed. Reg. 37,322-24 (1979); CX 11) or by FSIS' adherence to the policy set forth in that Federal Register notice.

Fourth, Respondent contends the ALJ erroneously failed to consider evidence of mitigating circumstances introduced by Respondent (Appeal Pet. ¶ 4 at 6-7).

The ALJ did not base her determination that Respondent is unfit to receive inspection services solely upon Respondent's conviction of the felony of bribery without regard to mitigating circumstances. Instead, the Initial Decision and Order clearly establishes that the ALJ considered mitigating circumstances alleged by Respondent. Specifically, the ALJ addressed: (1) Respondent's contention that FSIS inspector Randall Barber initiated the bribery by soliciting bribes from Respondent (Initial Decision and Order at 11); (2) Respondent's contention that Respondent felt compelled to bribe Mr. Barber (Initial Decision and Order at 11); (3) Respondent's contention that Mr. Barber stopped inspecting animals at Respondent's establishment and left Respondent's establishment while slaughtering operations were taking place and that Respondent did not ask Mr. Barber to leave the establishment (Initial Decision and Order at 11-12); (4) Respondent's

contention that Mr. Barber instructed Respondent's employees to slaughter animals without inspection and to unlawfully apply the official mark of inspection to meat and meat food products that had not been inspected and passed (Initial Decision and Order at 12); (5) Respondent's contention that there is no evidence that any of its meat or meat food products which were unfit for human consumption entered commerce (Initial Decision and Order at 21); (6) Respondent's contention that Respondent never intentionally slaughtered animals that were clearly unfit for human consumption (Initial Decision and Order at 24); (7) Respondent's contention that Mr. Barber and FSIS would retaliate against Respondent if Respondent informed FSIS of the bribery (Initial Decision and Order at 25); (8) Respondent's contention that since January 3, 1997, Respondent has not presented a risk to the health of consumers (Initial Decision and Order at 28); (9) Respondent's contention that Respondent and Mr. Mattick are victims, as well as perpetrators, of the bribery (Initial Decision and Order at 28); and (10) Respondent's contention that indefinite withdrawal of inspection services under title I of the FMIA and under the PPIA would result in the destruction of a life's work (Initial Decision and Order at 28). Therefore, I reject Respondent's contention that the ALJ did not consider "any mitigating circumstances put forth by Respondent." (Appeal Pet. ¶ 4 at 6.)

Moreover, I have reviewed the circumstances which Respondent characterizes as mitigating in its Appeal Petition (Appeal Pet. ¶ 4 at 7) and find that they do not overcome Respondent's unfitness to receive inspection services under title I of the FMIA and under the PPIA, as demonstrated by Respondent's conviction of the felony of bribery of a public official.<sup>7</sup>

Fifth, Respondent contends Ellen Quackenbush "testified that she had no

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<sup>7</sup>It appears that two of the circumstances characterized by Respondent as "mitigating circumstances" are not mitigating circumstances. Specifically, Respondent contends "Respondent provides a necessary service to the farming communities of the Hudson Valley and adjoining environs, which in the absence of Greenville Packing Co., Inc., the needs of the surrounding farming communities will not be met; and Respondent provides jobs and commerce in an economically depressed area of the State of New York." (Appeal Pet. ¶ 4 at 7.) I find that, with respect to these two circumstances, Respondent is arguing that the indefinite withdrawal of inspection services under title I of the FMIA and under the PPIA from Respondent will have collateral effects on farming communities, jobs, and commerce. Collateral effects are not mitigating circumstances and should not be considered to determine whether they overcome a respondent's unfitness to receive inspection services under title I of the FMIA and under the PPIA, as demonstrated by a respondent's conviction of the felony of bribery of a public official. However, should a reviewing court agree with Respondent's characterization of these circumstances or disagree with my view that collateral effects should not be considered, I have considered the collateral effects identified in Respondent's Appeal Petition ¶ 4 at 7 and determine that they do not overcome Respondent's unfitness to receive inspection services under title I of the FMIA and under the PPIA, as demonstrated by Respondent's conviction of the felony of bribery of a public official.

evidence that any sick animals had been introduced into the stream of commerce” and that the ALJ erred by allowing Complainant to impeach Ellen Quackenbush’s testimony (Appeal Pet ¶ 5 at 7).

The record reveals that Complainant’s counsel did not attempt to impeach Ellen Quackenbush, but instead Complainant’s counsel refreshed Ellen Quackenbush’s recollection (Tr. 100-02). I do not find the ALJ erred by allowing Complainant’s counsel to refresh the recollection of a witness.

Sixth, Respondent contends the ALJ erred by allowing Mr. Van Blargan to testify regarding his opinion as to what sanction should be imposed on Respondent (Appeal Pet. ¶ 6 at 7).

The United States Department of Agriculture’s current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff’d*, 991 F.2d 803, 1993 WL 128889 (9<sup>th</sup> Cir. 1993) (not to be cited as precedent under 9<sup>th</sup> 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.

In light of this sanction policy, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the FMIA and the PPIA are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated meat and poultry slaughtering and processing industries. Mr. Van Blargan, the Deputy Assistant Deputy Administrator, District Enforcement Operations, FSIS, is an administrative official charged with the responsibility for achieving the congressional purposes of the FMIA and the PPIA. Therefore, Mr. Van Blargan’s testimony regarding any sanction to be imposed on Respondent is highly relevant, and the ALJ did not err by allowing Mr. Van Blargan to testify regarding his sanction recommendation.

Respondent further contends the sanction to be imposed on Respondent should be left to the discretion of the ALJ and is not a proper matter for testimony before the ALJ (Appeal Pet. ¶ 6 at 7). Prior to Respondent’s filing its Appeal Petition, the sanction to be imposed was completely within the discretion of the ALJ. Mr. Van Blargan’s sanction recommendation is not controlling, and the ALJ was free to

impose any sanction on Respondent warranted in law and justified in fact.<sup>8</sup>  
For the foregoing reasons, the following order should be issued.

### Order

Inspection services under title I of the Federal Meat Inspection Act, as amended, and under the Poultry Products Inspection Act, as amended, are indefinitely withdrawn from Greenville Packing Co., Inc., its successors, affiliates, and assigns, directly or through any corporate device.

This Order shall become effective 30 days after service of this Order on Respondent.

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<sup>8</sup>The recommendation of administrative officials as to the sanction to be imposed is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal docketed*, Nos. 99-2640, 99-2665 (8<sup>th</sup> Cir. June 1 and June 25, 1999); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4<sup>th</sup> Cir. June 18, 1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5<sup>th</sup> Cir.), *cert. denied*, 120 S. Ct. 530 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

**HORSE PROTECTION ACT**  
**DEPARTMENTAL DECISION**

**In re: DAVID TRACY BRADSHAW.**  
**HPA Docket No. 99-0008.**  
**Decision and Order filed June 14, 2000.**

**Horse protection – Allowing entry – Ownership – Palpation reliable – Sixth amendment – Adverse inference – Civil penalty – Disqualification.**

The Judicial Officer affirmed the decision by Chief Administrative Law Judge James W. Hunt: (1) concluding that Respondent allowed the entry of a horse in a horse show, for the purpose of showing or exhibiting the horse, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(D); (2) assessing Respondent a \$2,000 civil penalty; and (3) disqualifying Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or participating in any horse show, horse exhibition, horse sale, or horse auction. The Judicial Officer held that digital palpation alone is a reliable method by which to determine if a horse is “sore,” as that word is defined in the Horse Protection Act. The Judicial Officer found *Young v. United States Dep’t of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), inapposite and rejected Respondent’s contention that the Chief ALJ erred by failing to follow the holding in *Young*. The Judicial Officer held documents comprising past recollection recorded, prepared while the events were fresh in the authors’ minds, are reliable, probative, and substantial evidence and the Chief ALJ did not err when he allowed the admission of these documents. The Judicial Officer held the Sixth Amendment right to confront witnesses is not applicable to administrative proceedings. Moreover, the Judicial Officer found that Complainant’s counsel’s objections to questions on cross-examination did not deprive Respondent of the right to confront witnesses against him. The Judicial Officer rejected Respondent’s contention that the Chief ALJ erred by drawing an inference against Respondent based upon Respondent’s failure to call as a witness the trainer of Respondent’s horse.

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.  
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] by filing a Complaint on March 4, 1999.

The Complaint alleges that on August 28, 1998, David Tracy Bradshaw [hereinafter Respondent] allowed the entry of a horse called “Favorite’s Fargo” as

entry number 2016 in class number 25 at the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Favorite's Fargo, while Favorite's Fargo was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶¶ 2-3).

On April 1, 1999, Respondent filed an Answer denying the allegations in the Complaint. On December 8, 1999, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted a hearing in Fort Worth, Texas. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kenneth A. Wright of the Law Offices of Rogers & Wright, Dallas, Texas, represented Respondent.

On February 16, 2000, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Points and Authorities in Support Thereof [hereinafter Complainant's Brief], and Respondent filed Respondent's Brief in Support of Motion for Dismissal [hereinafter Respondent's Brief].

On April 6, 2000, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by entering or allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo; (2) assessed Respondent a \$2,000 civil penalty; and (3) disqualified Respondent for 1 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, horse sale, or horse auction (Initial Decision and Order at 9).

On May 5, 2000, Respondent appealed to the Judicial Officer<sup>1</sup>; on May 22, 2000, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on May 23, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's Conclusion of Law, as restated.

Complainant's exhibits are designated by "CX." Transcript references are

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<sup>1</sup>Respondent filed his appeal petition pro se. Mr. Wright did not file a motion to withdraw as Respondent's counsel. I infer, based upon Respondent's filing his appeal petition pro se, Mr. Wright no longer represents Respondent and Respondent is pro se.

designated by “Tr.”

**CHIEF ADMINISTRATIVE LAW JUDGE’S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

Respondent has owned and exhibited Tennessee Walking Horses for approximately 10 years. Prior to this proceeding, Respondent had never been charged with violating the Horse Protection Act and had never been “ticketed” by a Designated Qualified Person [hereinafter DQP] at a show sanctioned by the National Horse Show Commission. (Tr. 240-43.)

In July 1998, Respondent and John Feltner, Jr., a professional horse trainer, visited White Oak Stables where they observed the workout of a 2-year-old stallion called “Favorite’s Fargo.” John Feltner, Jr., was impressed with the horse and told Respondent “if you buy this horse, I’ll train him for nothing, and I think we can go to the Celebration and do real well and sell him at a profit. And then, we’ll split the profit.” (Tr. 245-46, 267.)

Respondent agreed. John Feltner, Jr., took Favorite’s Fargo to the stables belonging to his father, John Feltner, Sr., to train the horse. Respondent did not see the horse again for several weeks. Respondent said, at the time he bought Favorite’s Fargo, the horse had never been shown or exhibited and was “green broke”; that is, Favorite’s Fargo could be saddled and ridden but had not been trained to perform. Respondent said, Favorite’s Fargo would “act up” when “you would ask him to start working. And generally, his reaction to that, when you first ask him to go on, as we call it, he would want to jump up, and he’ll buck and sometimes he’ll jump up and spin.” But that “after the initial playing, he would go on and we will be able to ride him.” (Tr. 248-49.) Respondent described Favorite’s Fargo variously as “fractious and unruly,” “nutty,” and “crazy” (Tr. 251-54).

John Feltner, Sr., testified that he observed Favorite’s Fargo while the horse was being trained by his son. He said Favorite’s Fargo was talented but not broke and would react when his foot was lifted by leaning back or sitting down. He attributed the horse’s behavior to genetics, saying that Favorite’s Fargo came from a line of horses with a reputation for being unruly and not wanting “to work.” (Tr. 202-03, 208.)

On August 28, 1998, about a month after buying the horse, Respondent entered Favorite’s Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, as entry number 2016 in class number 25 (Tr. 16). John

Feltner, Sr., a spectator at the show, observed Favorite's Fargo in line waiting for a pre-show examination. He said Favorite's Fargo appeared "antsy" by rearing up and spinning around (Tr. 210-11). Respondent testified that Favorite's Fargo would not stand still and would "go around and go around" and knocked over a table and stepped on a cone in the inspection area (Tr. 251-52).

The examination, conducted behind a curtain, was not seen either by John Feltner, Sr., or by Respondent (Tr. 209, 221, 250-52). Favorite's Fargo was first examined by the show's DQP who excused Favorite's Fargo from being exhibited because the horse did not meet the rules of the National Horse Show Commission (Tr. 22-23). Favorite's Fargo was next examined by Sylvia Taylor, an Animal and Plant Health Inspection Service veterinary medical officer, who has examined approximately 400 horses for compliance with the Horse Protection Act (Tr. 139-41). After examining Favorite's Fargo, Dr. Taylor concluded that the horse was sore. Although Dr. Taylor testified that she did not remember her examination of Favorite's Fargo, she said she had prepared an affidavit on the same day as her examination, while the examination was still fresh in her memory. (Tr. 145-50.) In her affidavit, Dr. Taylor states:

I palpated both front feet and found them consistently and repeatedly painful to palpation along the entire anterior aspect of each pastern. The horse would violently withdraw it's [sic] foot, tuck it's [sic] back feet underneath it's [sic] body, and clench it's [sic] abdominal muscles when the anterior pasterns were palpated.

CX 7 at 1.

Dr. Taylor testified that these reactions to palpation were signs of pain because they were consistent and repeatable whereas, if Favorite's Fargo were silly or unruly, his reactions to palpation would be random rather than consistent and repeatable. Dr. Taylor expressed the opinion that Favorite's Fargo had been sored by means of either chemicals or action devices or both chemicals and action devices and that Favorite's Fargo would have experienced pain if he had been exhibited. (Tr. 143-44, 151-52.)

Favorite's Fargo was then examined by Scott Price, an Animal and Plant Health Inspection Service veterinary medical officer, whose license to practice veterinary medicine has expired (Tr. 48, 79). Dr. Price testified that he did not remember his examination of Favorite's Fargo but that he had prepared an affidavit on the same day as his examination, while the examination was still fresh in his memory. (Tr. 55-56, 60-61.) In his affidavit, Dr. Price states:

I was the second federal veterinarian to examine this horse. The horse walked and turned around the cone without difficulty. I palpated both front feet and found them consistently and repeatedly painful to palpation along the entire anterior aspect of each pastern. The horse would violently withdraw its [sic] foot, tuck its [sic] back feet underneath its [sic] body, and clench its [sic] abdominal muscles when the anterior pasterns were palpated.

CX 8 at 1-2.

Dr. Price said these consistent and repetitive responses to palpation were abnormal and were signs of pain rather than signs of a silly horse. A silly horse, he said, “will withdraw its foot sometimes when you’re applying pressure and sometimes when you’re not applying pressure. Also, a silly horse will not give the same response on the same area each time you palpate it.” (Tr. 54-55.) Dr. Price testified that when he examines a horse, he gives the benefit of the doubt to the horse’s owner or trainer and that, of the approximately 10,000 horses he has examined, he has found less than 5 percent of the horses to be sore. Dr. Price stated, in the case of Favorite’s Fargo, his examination showed that the horse’s pasterns were “extremely painful.” (Tr. 50, 54-55, 59, 68-70, 132-33.) Drs. Price and Taylor then completed and signed that part of APHIS FORM 7077 containing the results of their examinations (CX 3).

John Feltner, Jr., the trainer of Favorite’s Fargo, was present during Dr. Price’s examination and Dr. Taylor’s examination of Favorite’s Fargo but did not testify at the hearing. Respondent testified he had no knowledge that Favorite’s Fargo had been sore. Although Respondent was not present during Dr. Price’s examination or Dr. Taylor’s examination, he said Favorite’s Fargo’s reaction to palpation was not due to pain but due to the horse being fractious and unruly and not being calmed down for the examinations. Respondent said Favorite’s Fargo was subsequently entered and exhibited at four or five other shows and, though he continued to act “nutty,” he calmed down enough to pass examination. In the spring of 1999, Respondent had Favorite’s Fargo gelded. (Tr. 245, 252-55, 258, 261-62.) John Feltner, Sr., who did the gelding, said it was done to “hopefully give [him] a change of attitude.” (Tr. 212.)

### **Law**

Section 2(3) of the Horse Protection Act defines the term “sore,” as follows:

**§ 1821. Definitions**

As used in this chapter unless the context otherwise requires:

....

- (3) The term "sore" when used to describe a horse means that—
- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
  - (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
  - (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
  - (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

Section 5(2) of the Horse Protection Act (15 U.S.C. § 1824(2)) prohibits not only the showing or exhibiting of a sore horse, but also prohibits entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore. Section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) prohibits an owner of a horse from allowing a horse which is sore to be entered in a horse show or horse exhibition.

Section 6(d)(5) of the Horse Protection Act creates a presumption that a horse that manifests abnormal, bilateral sensitivity is a horse which is sore, as follows:

**§ 1825. Violations and penalties**

....

**(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**

....

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

**Discussion**

Complainant contends that Dr. Price's examination and Dr. Taylor's examination of Favorite's Fargo establish that the horse was sore (Complainant's Brief at 2-12). Respondent moves to dismiss the Complaint on the grounds that Favorite's Fargo was not sore; that Favorite's Fargo's reactions to the examinations were due to the horse being fractious; that Dr. Price's and Dr. Taylor's affidavits are unreliable hearsay; that Dr. Price's and Dr. Taylor's affidavits were prepared in anticipation of litigation; that Dr. Price, being unlicensed, was not qualified to conduct an examination of Favorite's Fargo to determine whether the horse was sore; that Dr. Price was biased; that, as the United States Court of Appeals for the Fifth Circuit ruled in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), palpation alone is not a reliable means of determining whether a horse is sore; that Favorite's Fargo did not manifest other signs of being sore; that there was no evidence that chemicals or action devices were used to sore Favorite's Fargo; that Respondent's witnesses were more reliable than Complainant's witnesses; and that Respondent had no knowledge that Favorite's Fargo was sore (Respondent's Brief).

Complainant, as the proponent of an order, has the burden of proof in this proceeding,<sup>2</sup> and the standard of proof by which this burden is met is the preponderance of the evidence standard.<sup>3</sup> Complainant may prove a horse is sore

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<sup>2</sup>See 5 U.S.C. § 556(d).

<sup>3</sup>See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per* (continued...)

through palpation, which alone is a reliable method by which to determine that a horse is “sore,” as that word is defined in the Horse Protection Act.<sup>4</sup> If, pursuant to section 6(d)(5) of the Horse Protection Act (15 U.S.C. § 1825(d)(5)), Complainant shows that a horse has abnormal, bilateral sensitivity in its forelimbs, the horse is presumed to be a horse which is sore. In proving a *prima facie* violation, Complainant does not have to establish the means by which the horse was sore and does not have to show that the horse’s owner knew that the horse was sore.<sup>5</sup>

Dr. Price, even though not currently licensed to practice veterinary medicine, and Dr. Taylor are experienced veterinarians and their testimony was credible concerning their findings of pain responses when they examined Favorite’s Fargo.

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<sup>3</sup>(...continued)

*curiam*, 138 F.3d 958 (Table) (11<sup>th</sup> Cir. 1998), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11<sup>th</sup> Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff’d*, 52 F.3d 1406 (6<sup>th</sup> Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8<sup>th</sup> Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff’d*, 23 F.3d 407, 1994 WL 162761 (6<sup>th</sup> Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff’d per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff’d*, 28 F.3d 279 (3<sup>d</sup> Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff’d*, 990 F.2d 140 (4<sup>th</sup> Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff’d*, 713 F.2d 179 (6<sup>th</sup> Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

<sup>4</sup>*See Crawford v. United States Dep’t of Agric.*, 50 F.3d 46, 50 (D.C. Cir. 1995) (stating the Court has no legitimate reason to reject digital palpation as a diagnostic technique, whether used alone or not), *cert. denied*, 516 U.S. 824 (1995); *In re Kim Bennett*, 55 Agric. Dec. 176, 236-37 (1996) (stating digital palpation is a highly reliable method by which to determine that a horse is sore within the meaning of the Horse Protection Act, without any other circumstances, such as gait dysfunction, swelling, heat, redness, etc.).

<sup>5</sup>*In re Eldon Stamper*, 42 Agric. Dec. 20, 44-49 (1983), *aff’d*, 722 F.2d 1483 (9<sup>th</sup> Cir. 1984); *In re Bill Gray*, 41 Agric. Dec. 253, 254-55 (1982).

Dr. Price's affidavit and Dr. Taylor's affidavit, recorded when their examinations were fresh in their minds, are probative and reliable documents. *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd in part & remanded*, 73 F.3d 312 (11<sup>th</sup> Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam*, 111 F.3d 897 (11<sup>th</sup> Cir. 1997). There is no evidence that either Dr. Price or Dr. Taylor were biased. Dr. Price said he gives a horse owner or trainer the benefit of the doubt and has found only a small percentage of the thousands of horses he has examined to be sore. Drs. Price and Taylor prepared their affidavits to document their findings as part of their duty as public servants to seek compliance with a congressionally enacted statute.

As for Respondent's contention that Favorite's Fargo was fractious and unruly, rather than sore, Drs. Price and Taylor testified credibly that in their experience they can distinguish the reaction of a silly or unruly horse from the reaction of a sore horse and that Favorite's Fargo's repeated and consistent responses to palpation were signs of pain. Finally, Respondent argues that its witnesses were more reliable than Drs. Price and Taylor. However, as lay persons, the testimony of Respondent and John Feltner, Sr., has less probative value than that of veterinarians Price and Taylor. Moreover, neither Respondent nor John Feltner, Sr., were present during Dr. Price's examination and Dr. Taylor's examination of Favorite's Fargo. The trainer, John Feltner, Jr., was present for the examinations but he was not called as a witness by Respondent which raises the inference that, had John Feltner, Jr., testified, his testimony would not have favored Respondent. *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979).

Complainant has proven by a preponderance of the evidence that Favorite's Fargo was sore when entered in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998. Even though Respondent may not have known the horse was sore, an owner is held strictly liable for allowing the entry of a horse which is sore in a horse show or horse exhibition. If the horse is entered when sore, the owner has violated the Horse Protection Act. *In re Eldon Stamper*, 42 Agric. Dec. at 44-49. Accordingly, Respondent violated the Horse Protection Act by allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore. Respondent's motion to dismiss the Complaint is therefore denied.

Complainant's proposed sanction of a \$2,000 civil penalty and a 1-year disqualification is the routine penalty for a first violation of the Horse Protection

Act.<sup>6</sup>

### Findings of Fact

1. Respondent, David Tracy Bradshaw, is an individual whose mailing address is 1293 Russell Bend Road, Weatherford, Texas 76088.

2. On August 28, 1998, and at all times material to this proceeding, Respondent was the owner of a horse called "Favorite's Fargo." On August 28, 1998, Respondent allowed the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, as entry number 2016 in class number 25.

3. On August 28, 1998, Animal and Plant Health Inspection Service veterinary medical officers Dr. Sylvia Taylor and Dr. Scott Price independently examined Favorite's Fargo. Favorite's Fargo manifested bilateral pain when the veterinary medical officers palpated Favorite's Fargo's front pasterns.

### Conclusion of Law

Respondent, David Tracy Bradshaw, violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of Favorite's Fargo in the 60<sup>th</sup> Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on August 28, 1998, while Favorite's Fargo was sore, for the purpose of showing or exhibiting Favorite's Fargo.

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises 10 issues in his May 3, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition].

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<sup>6</sup>*In re Jack Stepp*, 57 Agric. Dec. 297, 312 (1998), *aff'd* 188 F.3d 508 (Table), 1999 WL 646138 (6<sup>th</sup> Cir. 1999) (not to be cited as precedent under 6<sup>th</sup> Circuit Rule 206); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 890 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re Tracy Renee Hampton* (Decision as to Dennis Harold Jones), 53 Agric. Dec. 1357, 1390-91 (1994); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1240-41 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 317-18 (1993), *aff'd*, 28 F.3d 279 (3<sup>d</sup> Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 283 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 248-50 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24).

First, Respondent contends the Chief ALJ erroneously ignored the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), that digital palpation alone is not a reliable means of determining whether a horse is sore (Appeal Pet. ¶ 1).

The Court in *Young* held that digital palpation alone is not a reliable method by which to determine if a horse is sore. However, the holding in *Young* is based upon a number of factors that are not present in this proceeding. In *Young*, several “highly qualified expert witnesses” testified for the respondents that “soring could not be diagnosed through palpation alone.” *Id.* at 731. Respondent, in this proceeding, did not introduce expert witness testimony to rebut Dr. Price’s and Dr. Taylor’s testimony that digital palpation is a reliable method by which to determine that a horse is sore.

The respondents in *Young* “offered a written protocol signed by a group of prominent veterinarians coming to the . . . conclusion” that “soring could not be diagnosed through palpation alone.” *Id.* at 731. Respondent, in this proceeding, did not offer any such written protocol.

In *Young*, two private veterinarians and one off-duty DQP testified they examined the horse in question immediately after United States Department of Agriculture veterinary medical officers found the horse was sore. These private veterinarians and the off-duty DQP testified they did not find the horse to be sore. *Id.* at 731-32. The record in this proceeding does not contain any testimony regarding an examination of Favorite’s Fargo immediately after Drs. Price and Taylor concluded their examinations.

In *Young*, the administrative law judge found the respondents’ witnesses to be more credible than the complainant’s witnesses. *Id.* at 732. In the instant proceeding, the Chief ALJ found Drs. Price and Taylor credible, found Respondent’s and John Feltner, Sr.’s testimony to be of less probative value than Dr. Price’s and Dr. Taylor’s testimony, and inferred that, had John Feltner, Jr., testified, his testimony would not have favored Respondent.

Finally, in *Young*, the administrative law judge dismissed the complaint and the Judicial Officer reversed the administrative law judge. *Id.* at 732. In the instant proceeding, the Chief ALJ and the Judicial Officer agree that the record supports the conclusion that Respondent violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

Therefore, I find *Young* inapposite, and I find the Chief ALJ did not err when he failed to follow the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), that digital palpation alone is not a reliable means of determining whether a horse is sore.

Second, Respondent contends the Chief ALJ erroneously allowed evidence that

Favorite's Fargo was sore based upon digital palpation without any evidence that digital palpation is a reliable means by which to determine that a horse is sore (Appeal Pet. ¶ 1).

I disagree with Respondent's contention that the record contains no evidence that digital palpation is a reliable means by which to determine that a horse is sore. The record supports a finding that digital palpation is a reliable means by which to determine whether a horse is "sore," as that word is defined in the Horse Protection Act. Drs. Price and Taylor testified about the procedures they use to detect a sore horse. Both Dr. Price and Dr. Taylor testified that they were able to detect evidence of soring using digital palpation. (Tr. 50-55, 141-44.)

Further, the United States Department of Agriculture has long held that palpation is a highly reliable method of determining whether a horse is "sore," as that word is defined in the Horse Protection Act.<sup>7</sup> The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their effort to enforce the Horse Protection Act.

Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act, as follows:

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<sup>7</sup>See, e.g., *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11<sup>th</sup> Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6<sup>th</sup> Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8<sup>th</sup> Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6<sup>th</sup> Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6<sup>th</sup> Cir. 1994) (citation limited under 6<sup>th</sup> Circuit Rule 24).

**§ 11.1 Definitions.**

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected by definition in a standard dictionary, such as “Webster’s.”

....

*Inspection* means the examination of any horse and any records pertaining to any horse by use of whatever means are deemed appropriate and necessary for the purpose of determining compliance with the [Horse Protection] Act and regulations. Such inspection may include, but is not limited to, visual examination of a horse and records, actual physical examination of a horse including touching, rubbing, *palpating* and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

9 C.F.R. § 11.1 (emphasis added).

Respondent also contends “the genesis of this procedure [digital palpation] is something that is simply taught by the USDA, and not derived from any textbook or veterinary school.” (Appeal Pet. ¶ 1.)

I disagree with Respondent. The record establishes that digital palpation is a medically accepted diagnostic technique used to detect pain. Specifically, Dr. Taylor testified that digital palpation is a universal means to detect pain in animals, as follows:

BY MR. WRIGHT:

Q. Do you know of the existence of any publication concerning digital palpation in your capacity as a licensed practitioner of veterinary medicine?

....

THE WITNESS: Okay. I know that there are publications, including many of the textbooks that I used while in veterinary school, which definitely speak to the use of digital palpation as a means of determining pain in any kind of animal.

That is universal for all the species that veterinarians usually work with, at the very least.

BY MR. WRIGHT:

Q. And just so I understand your testimony, because we have had some confusion, is that concerning lameness or soreness?

A. It could be either one. Digital palpation is used, again, universally among species to determine pain, whether it results or is connected with lameness or whether it is any kind of, quote, soreness or not.

Your question appeared to be more general as to the entire field.

Tr. 183-84.

Therefore, I find the Chief ALJ did not err by allowing evidence that Favorite's Fargo was sore based upon Favorite's Fargo's reactions to digital palpation.

Third, Respondent, citing Tr. 88-89, contends "Dr. Price admitted that the USDA sanctions the soreing of horses for the purpose of training . . . thus putting USDA in violation of the Horse Protection Act" (Appeal Pet. ¶ 1).

I disagree with Respondent's contentions that Dr. Price admitted the United States Department of Agriculture sanctions soring horses and that the United States Department of Agriculture violated the Horse Protection Act.

Dr. Price testified that in 1988 he attended a 3-day DQP training session in Lexington, Kentucky, at which horses were purposely sored (Tr. 88-90). Dr. Price testified that this training was not sponsored by the United States Department of Agriculture (Tr. 89). Dr. Price's attendance at a training session where sore horses were present does not establish that the United States Department of Agriculture sanctions soring horses or that the United States Department of Agriculture violated the Horse Protection Act. Moreover, Respondent's contentions that the United States Department of Agriculture sanctions soring horses and that the United States Department of Agriculture violated the Horse Protection Act are not relevant to this proceeding.

Fourth, Respondent contends the Chief ALJ erroneously admitted Dr. Price's

affidavit (CX 8), Dr. Taylor's affidavit (CX 7), and APHIS FORM 7077 (CX 3) into evidence. Respondent contends that Drs. Price and Taylor had no recollection of their examinations of Favorite's Fargo and relied upon documents prepared in anticipation of litigation, which is unreliable hearsay.

Drs. Price and Taylor testified that, at the time of the hearing, they had no independent recollection of their examinations of Favorite's Fargo (Tr. 55-57, 144-47). Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX 8) are Dr. Price's and Dr. Taylor's past recorded recollections of their examinations of Favorite's Fargo. Dr. Price and Dr. Taylor testified that the documents comprising their recorded recollections were prepared while the events were fresh in their minds (Tr. 60-61, 148). The United States Department of Agriculture has long held that past recollection recorded is reliable, probative, and substantial evidence and fulfills the requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witness' mind.<sup>8</sup> Affidavits and APHIS 7077 Forms, such as those prepared by Drs. Price and Taylor, are regularly made as to all of the horses, which are found to be sore and are kept in the ordinary course of the United States Department of Agriculture's business. There is no exclusionary rule applicable to proceedings conducted in accordance with the Rules of Practice which prevents their receipt as evidence, and they have been regularly received in Horse Protection Act cases. Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX 8) were properly received as evidence. In fact, I would attach more weight to these affidavits and the APHIS FORM 7077, prepared on the day of the event, than to the testimony given 15 months after the event.

Respondent cites *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5<sup>th</sup> Cir. 1995), as authority for the proposition that documents prepared in anticipation of litigation are unreliable hearsay (Appeal Pet. ¶ 2). The Court in *Young* states:

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<sup>8</sup>*In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 869 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4<sup>th</sup> Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8<sup>th</sup> Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 313 (1993), *aff'd*, 28 F.3d 279 (3<sup>d</sup> Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 289 (1993); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6<sup>th</sup> Cir. 1983).

The VMO's testimony in this case revealed that as a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated. *See Palmer v. Hoffman*, 318 U.S. 800, 63 S.Ct. 757, 87 L.Ed. 1163 (1943) (holding that an accident report prepared by a railroad did not carry the indicia of reliability of a routine business record because it was prepared at least partially in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5<sup>th</sup> Cir. 1979) (holding that an affidavit prepared by an official of the United States Treasury Department was unreliable because it was prepared in anticipation of litigation).

53 F.3d at 730-31.

In *Young*, the Court found that the Summary of Alleged Violations form and affidavits at issue in the case had limited probative value, in part, because they were only prepared when violations of the Horse Protection Act were found, and, thus, were prepared in anticipation of litigation. However, the cases relied on by the court in *Young* are clearly distinguishable from the facts in *Young*. In *Palmer v. Hoffman*, the issue was whether a statement signed by the engineer of a train involved in an accident, who died before the trial, was admissible under the business record exception to the hearsay rule, under an Act which provided:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

318 U.S. at 111 n.1.

The Court held that the engineer's statement was not admissible because the statement was "not for the systematic conduct of the enterprise as a railroad business," and that the primary utility of the statement was "in litigating, not in railroading" (318 U.S. at 114). Specifically, the Court held:

The engineer's statement which was held inadmissible in this case falls into quite a different category. (Footnote omitted.) It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313, 105 P. 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That

provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

....

The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

318 U.S. at 113-15.

In *Young*, there was no question about the admissibility of the affidavits and Summary of Alleged Violations form under the Administrative Procedure Act (5 U.S.C. § 556(d)) and the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)). The documents were properly admitted. The only issue was whether the affidavits prepared by United States Department of Agriculture veterinary medical officers and the Summary of Alleged Violations form in question in *Young* were inherently unreliable and lacking in probative value. *Young v. United States Dep't of Agric.*, 53 F.3d at 730-32.

Furthermore, unlike the railroad business involved in *Palmer v. Hoffman*, the business of the United States Department of Agriculture, Animal and Plant Health Inspection Service, under the Horse Protection Act, is investigating suspected violations of the Horse Protection Act and litigating Horse Protection Act cases in those instances in which the agency believes it has *prima facie* evidence of a violation. As law enforcement officers, it is the duty of United States Department of Agriculture veterinary medical officers and inspectors to detect violations of the Horse Protection Act and to initiate the procedure for bringing disciplinary complaints against violators. Hence, litigating is "the inherent nature of the business in question" (318 U.S. at 115), and the preparation of the Summary of Alleged Violations forms and affidavits is the most important of the "methods

systematically employed for the conduct of the business as a business.” (*Id.*)

This issue is of the utmost importance to the executive branch of the Federal Government. There are undoubtedly law enforcement officials throughout the Federal Government who, like the United States Department of Agriculture veterinary medical officers and inspectors, “prepare summary reports and affidavits only when administrative proceedings are anticipated.” (53 F.3d at 730.) Moreover, like United States Department of Agriculture veterinary medical officers and inspectors, there are undoubtedly law enforcement officers throughout the Federal Government who handle such a high volume of work that they could not possibly remember the details of a particular violation by the time they appear at an administrative hearing more than a year later, and who are, therefore, totally dependent on past records made while the events were fresh in their minds. Law enforcement in the United States would be severely hampered if all such records, made in contemplation of litigation by agencies whose business is to litigate, are to be regarded as inherently lacking in indicia of reliability.

*Stone*, also relied upon by the court in *Young*, is similar in nature to *Palmer v. Hoffman*. The issue in *Stone* was “whether the government violated the hearsay rule and the defendant’s right of confrontation when the government used an affidavit instead of live testimony for the purpose of explaining how an official record demonstrated that the Treasury Department mailed a check that the defendant later had in his possession.” (604 F.2d at 924.) The Government argued that the affidavit was admissible under Federal Rule of Evidence 803(8)(A) as a public record or report setting forth “the activities of the office or agency.” (604 F.2d at 925.) The court held, however, that the affidavit “violates the hearsay rule and the defendant’s confrontation right” (604 F.2d at 924), as follows:

This hearsay exception is designed to allow admission of official records and reports prepared by an agency or government office for purposes independent of specific litigation. *See, e.g., Ellis v. Capps*, 500 F.2d 225, 226 n.1 (5 Cir. 1974) (allowing admission of official records compiled in prison’s “regular course of business”); *United States v. Newman*, 468 F.2d 791, 795-96 (5<sup>th</sup> Cir. 1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973) (same). This exception for an agency’s official records does not apply to Ford’s personal statements prepared solely for purposes of this litigation. Ford’s statements are likely to reflect the same lack of trustworthiness that prevents admission of litigation-oriented statements in cases such as *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943).

604 F.2d at 925-26.

As stated in my discussion of *Palmer v. Hoffman*, the lack of trustworthiness precluding admission of the engineer's statement as a business record arose only because the business involved in *Palmer v. Hoffman* was railroading, not litigating. That was not true in *Young*. Furthermore, here, again, we are not concerned with the admission of the United States Department of Agriculture veterinary medical officers' affidavits and APHIS FORM 7077 as business records, since they were properly admitted under the Administrative Procedure Act (5 U.S.C. § 556(d)) and the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)).

Moreover, even if the Federal Rules of Evidence were applicable to this proceeding (which they are not<sup>9</sup>), it appears that Dr. Price's affidavit, Dr. Taylor's affidavit, and APHIS FORM 7077 (CX 3, CX 7, CX 8) would be admissible under Federal Rules of Evidence 803(5), 803(6), and 803(8)(C), which provide:

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(5) Recorded recollection.— A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.— A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly

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<sup>9</sup>*In re Fred Hodgins*, 56 Agric. Dec. 1242, 1295 (1997), *appeal docketed*, No. 97-3899 (6<sup>th</sup> Cir. Aug. 12, 1997); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 407 (1994), *aff'd*, 48 F.3d 305 (8<sup>th</sup> Cir. 1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182, 1196 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1060, 1079 (1993), *aff'd*, 39 F.3d 670 (6<sup>th</sup> Cir. 1994).

conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(8) Public records and reports.— Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FED. R. EVID. 803(5), 803(6), 803(8)(C).

United States Department of Agriculture veterinary medical officer affidavits and APHIS 7077 Forms, such as those at issue in the instant proceeding, would be admissible under any of these exceptions. The exceptions to the hearsay rule in Rule 803 of the Federal Rules of Evidence proceed on the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he or she may be available. Such is inarguably the case here. Drs. Price and Taylor have no vested interest in the outcome of this proceeding. They merely recorded, contemporaneously and impartially, the observations and conclusions of the activities they conducted in the performance of their duties to enforce the Horse Protection Act. Hence, there is no basis, in the instant proceeding, for finding that Dr. Price’s affidavit, Dr. Taylor’s affidavit, or APHIS FORM 7077, which are past recollection recorded, are unreliable hearsay, as Respondent contends.

Fifth, Respondent, citing Tr. 100, 104, 109, 123, and 129, contends that Dr. Price repeatedly used his lack of recollection of his examination of Favorite’s Fargo to avoid answering questions during cross-examination and to alternately embellish or minimize his testimony (Appeal Pet. ¶ 2).

I find nothing in the record to indicate that Dr. Price used his lack of recollection to avoid questions or to embellish or minimize his testimony.

Sixth, Respondent contends that Ms. Carroll's numerous objections during Mr. Wright's cross-examinations of Drs. Price and Taylor violate Respondent's right under the Sixth Amendment to the United States Constitution to confront his accusers (Appeal Pet. ¶ 2).

The Sixth Amendment to the United States Constitution provides, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

This proceeding is not a criminal prosecution, but rather this proceeding is a disciplinary administrative proceeding conducted under the Horse Protection Act, in accordance with the Administrative Procedure Act, and the sanction imposed against Respondent in this proceeding is a civil penalty. It is well settled that the Sixth Amendment to the United States Constitution is only applicable to criminal proceedings and is not applicable to administrative proceedings.<sup>10</sup> Thus, I conclude

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<sup>10</sup>See *United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating that the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Loaisiga*, 104 F.3d 484, 486 (1<sup>st</sup> Cir.) (stating that deportation proceedings are civil matters exempt from Sixth Amendment protections; they are primarily conducted by administrative bodies and not by courts), *cert. denied*, 520 U.S. 1271 (1997); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7<sup>th</sup> Cir. 1993) (stating that deportation hearings are deemed civil proceedings and thus aliens have no constitutional right to counsel under the Sixth Amendment); *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6<sup>th</sup> Cir. 1991) (holding that the Sixth Amendment does not apply to a civil matter, such as a labor relations proceeding conducted by the National Labor Relations Board); *United States v. Schellong*, 717 F.2d 329, 336 (7<sup>th</sup> Cir. 1983) (holding that denaturalization proceedings are not criminal proceedings; therefore, there is no right to a jury trial under Article III of the United States Constitution or the Sixth Amendment), *cert. denied*, 465 U.S. 1007 (1984); *Schultz v. Wellman*, 717 F.2d 301, 307 (6<sup>th</sup> Cir. 1983) (holding that the Sixth Amendment does not apply to administrative discharge proceedings conducted by the National Guard because such proceedings are not criminal in nature); *Savina Home Industries, Inc. v. Secretary of Labor*, 594 F.2d 1358, 1366 (10<sup>th</sup> Cir. 1979) (rejecting the characterization of Occupational Safety and Health Administration administrative proceedings, in which civil penalties can be assessed, as criminal proceedings and the argument that the Sixth Amendment is applicable to such proceedings); *Camp v. United States*, 413 F.2d 419, 422 (5<sup>th</sup> Cir.) (holding that there is no Sixth Amendment right to counsel in non-criminal administrative proceedings before the Selective Service Board), *cert. denied*, 396 U.S. 968 (1969); *Haven v. United* (continued...)

that Respondent's rights under the Sixth Amendment to the United States Constitution are not implicated in this administrative proceeding.

Moreover, even if I found that the Sixth Amendment to the United States Constitution was applicable to this proceeding (which I do not so find), I would reject Respondent's contention that Ms. Carroll's objections to questions posed to Drs. Price and Taylor on cross-examination deprived Respondent of the right to confront witnesses against him. Mr. Wright asked Dr. Price 276 questions on cross-examination and re-cross-examination (Tr. 70-131, 135-37), Ms. Carroll objected to 61 of those questions, and the Chief ALJ sustained 12 of Ms. Carroll's objections (Tr. 83-86, 89, 93, 95, 97, 120, 124, 130). Mr. Wright asked Dr. Taylor 164 questions on cross-examination (Tr. 152-86), Ms. Carroll objected to 22 of those questions, and the Chief ALJ sustained 3 of Ms. Carroll's objections (Tr. 175-76, 186). I find that the Chief ALJ correctly ruled on the objections raised by Ms. Carroll and that neither Ms. Carroll's objections nor the Chief ALJ's rulings on

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<sup>10</sup>(...continued)

*States*, 403 F.2d 384, 385 (9<sup>th</sup> Cir. 1968) (holding that the Sixth Amendment right to counsel does not apply in administrative proceedings in the selective service process), *cert. dismissed*, 393 U.S. 1114 (1969); *Olshausen v. Commissioner*, 273 F.2d 23, 27 (9<sup>th</sup> Cir. 1960) (stating that the Sixth Amendment applies only to criminal proceedings and that Congress may properly provide civil proceedings for the collection of civil penalties which are civil or remedial sanctions rather than punitive and the Sixth Amendment has no application to such proceedings); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (7<sup>th</sup> Cir. 1933) (rejecting the contention that proceedings under section 6(a) of the Grain Futures Act of September 21, 1922, are "essentially criminal" and holding that, since the proceedings are not criminal in nature, there is no right to a jury trial under Article III, § 2 of the United States Constitution), *cert. denied*, 291 U.S. 680 (1934); *Gee Wah Lee v. United States*, 25 F.2d 107 (5<sup>th</sup> Cir.) (per curiam) (concluding that the appeal of a deportation order by a United States commissioner is not a trial on a criminal charge covered by Article III, § 2 of the United States Constitution), *cert. denied*, 277 U.S. 608 (1928); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273, 279 (W.D. Pa. 1947) (stating that the guarantee under the Sixth Amendment applies only to those proceedings technically criminal in nature); *Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill. 1931) (stating that the Sixth Amendment is only applicable to proceedings technically criminal in nature and concluding that the Sixth Amendment is not applicable to administrative proceedings under the Packers and Stockyards Act of 1921); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1132 (1998) (concluding that the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act, as amended), *appeal docketed*, Nos. 99-2640, 99-2665 (8<sup>th</sup> Cir. June 1 and June 25, 1999); *In re Conrad Payne*, 57 Agric. Dec. 921, 931 (1998) (concluding that the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended); *In re Saulsbury Enterprises, Inc.*, 57 Agric. Dec. 82, 100 (1997) (Order Denying Pet. for Recons.) (concluding that Article III, § 2 of the United States Constitution and the Sixth Amendment, which afford the right to a jury trial in criminal proceedings, are not applicable to administrative proceedings conducted in accordance with the Administrative Procedure Act and instituted under section 8c(14)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(14)(B))).

Ms. Carroll's objections deprived Respondent of the right to confront Drs. Price and Taylor.

Seventh, Respondent contends that "[t]he opinion evidence sponsored by the USDA lacks probative value, is conclusory, and constitutes speculation, conjecture, and is incompetent" (Appeal Pet. ¶ 2).

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) requires that each issue set forth in an appeal petition shall contain detailed citations to the record, statutes, regulations, or authorities relied upon in support of the issue. Respondent does not specifically identify the "opinion evidence" which he finds objectionable. Moreover, Respondent's Appeal Petition sets forth no basis for Respondent's contention that "[t]he opinion evidence sponsored by the USDA lacks probative value, is conclusory, and constitutes speculation, conjecture, and is incompetent." Therefore, I reject Respondent's objections to "USDA sponsored opinion evidence."

Eighth, Respondent contends that Dr. Price's affidavit and Dr. Taylor's affidavit are identical, proof that the affidavits were prepared in anticipation of litigation (Appeal Pet. ¶ 2). A review of Drs. Price's affidavit and Dr. Taylor's affidavit (CX 7, CX 8) reveals that they are not identical, as Respondent contends, but the affidavits are similar.

The question whether a document is prepared in anticipation of litigation is a factual matter to be determined from the nature of the document and the factual situation in the particular case. Courts generally focus on the motivation for the preparation of a document to determine whether that document was prepared in anticipation of litigation.<sup>11</sup> Respondent cites no authority for his view that proof that one document was prepared in anticipation of litigation is the existence of another identical document, and I cannot find any authority which supports Respondent's position. Therefore, I reject Respondent's contention that proof that a document was prepared in anticipation of litigation is the existence of an identical document.

Ninth, Respondent states that neither Dr. Price nor Dr. Taylor were compelled by subpoena to testify at the December 8, 1999, hearing, but instead both Dr. Price and Dr. Taylor testified "as a duty as USDA employees." (Appeal Pet. ¶ 2.)

The record establishes that Respondent's statement that Drs. Price and Taylor were not compelled by subpoena to testify at the hearing, is correct (Tr. 88, 157).

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<sup>11</sup>See *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3<sup>d</sup> Cir. 1993); *United States v. Rockwell International*, 897 F.2d 1255, 1266 (3<sup>d</sup> Cir. 1990); *United States v. El Paso Co.*, 682 F.2d 530, 542 (5<sup>th</sup> Cir. 1982), *cert. denied*, 466 U.S. 944 (1984); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3<sup>d</sup> Cir. 1979).

However, Complainant's failure to subpoena Drs. Price and Taylor does not affect their credibility or the weight I give their testimony. The Chief ALJ found that Drs. Price and Taylor were credible witnesses and that there is no evidence that either Dr. Price or Dr. Taylor was biased against Respondent (Initial Decision and Order at 7). I agree with the Chief ALJ. The fact that Drs. Price and Taylor were not compelled by subpoena to testify does not reduce their credibility or indicate that they were biased against Respondent.

Tenth, Respondent contends that the Chief ALJ's inference that if John Feltner, Jr., had testified, his testimony would not have favored Respondent, is error (Appeal Pet. ¶ 3).

I find the Chief ALJ's inference, that John Feltner, Jr.'s testimony would have been adverse to Respondent's position in this proceeding, is not error. A party's failure to produce a witness, when it would be natural for that party to produce that witness, if the facts known by the witness had been favorable, serves to indicate, as a natural inference, that the party fears to produce the witness. This fear is some evidence that the witness, if produced, would have exposed facts unfavorable to the party. This principle has been followed in many proceedings before the United States Department of Agriculture<sup>12</sup> and in many judicial proceedings.<sup>13</sup> "It is

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<sup>12</sup>*In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Terry Horton*, 50 Agric. Dec. 430, 450 (1991); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 420-22 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 224-25 (1989), *aff'd*, 891 F.2d 281 (3<sup>d</sup> Cir. 1989) (unpublished); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1611, 1612-13 (1988) (Order Denying Pet. for Recons.); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1229-30 (1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995, 1018-19 (1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234, 255-56 (1986); *In re James Grady*, 45 Agric. Dec. 66, 108-09 (1986); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1909-10 (1985); *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2487-89 (1985) (Decision on Remand); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 256 n.4 (1985); *In re Dr. Duane O. Petty*, 43 Agric. Dec. 1406, 1425-28 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1509-10 (1983); *In re Mattes Livestock Auction, Market Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125 (7<sup>th</sup> Cir. 1983); *In re Eldon Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9<sup>th</sup> Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3<sup>d</sup> Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9<sup>th</sup> Cir. 1984) (unpublished) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 21); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Dr. John Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Zelma Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8<sup>th</sup> Cir.) (2-1 decision), *cert. denied*, (continued...)

certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.” Lord Mansfield in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, EVIDENCE § 285 (3<sup>d</sup> ed. 1940).

Respondent contends that John Feltner, Jr., “was equally available to the [C]omplainant by subpoena, and [C]omplainant likewise chose not to present this evidence.” Therefore, the Chief ALJ’s inference that if John Feltner, Jr., had testified, his testimony would not have favored Respondent, is error. (Appeal Pet. ¶ 3.)

Section 6(d)(1) of the Horse Protection Act provides that the Secretary of Agriculture may require attendance by subpoena, as follows:

#### § 1825. Violations and penalties

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<sup>12</sup>(...continued)

436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff’d mem.*, 582 F.2d 39 (5<sup>th</sup> Cir. 1978); *In re C. D. Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff’d per curiam*, 575 F.2d 1258 (8<sup>th</sup> Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff’d*, 618 F.2d 1329 (9<sup>th</sup> Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Eric Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff’d per curiam*, 558 F.2d 748 (5<sup>th</sup> Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Ludwig Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff’d per curiam*, 510 F.2d 966 (4<sup>th</sup> Cir. 1975) (unpublished); *In re J. A. Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

<sup>13</sup>*United States v. Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Kirby v. Tallmadge*, 160 U.S. 379, 383 (1896); *Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *Underwriters Laboratories, Inc. v. NLRB*, 147 F.3d 1048, 1054 (9<sup>th</sup> Cir. 1998); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10<sup>th</sup> Cir. 1996); *Borrer v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A. 1981); *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 9-10 (2<sup>d</sup> Cir. 1978); *Blow v. Compagnie Maritime Belge (Lloyd Royal) S.A. v. Old Dominion Stevedoring Corp.*, 395 F.2d 74, 79 (4<sup>th</sup> Cir. 1968); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8<sup>th</sup> Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3<sup>d</sup> Cir. 1963); *Hoffman v. Commissioner*, 298 F.2d 784, 788 (3<sup>d</sup> Cir. 1962); *Illinois Central R.R. Co. v. Staples*, 272 F.2d 829, 834-35 (8<sup>th</sup> Cir. 1959); *Neidhoefer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7<sup>th</sup> Cir. 1950); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632, 636 (4<sup>th</sup> Cir.), *cert. denied*, 338 U.S. 868 (1949); *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42-43 (8<sup>th</sup> Cir. 1946); *Bowles v. Lentin*, 151 F.2d 615, 619 (7<sup>th</sup> Cir. 1945), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 F.2d 253, 256-57 (C.C.P.A. 1939).

**(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**

(1) The Secretary may require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

15 U.S.C. § 1825(d)(1). Therefore, I agree with Respondent that John Feltner, Jr., was equally available to Respondent and Complainant by subpoena. However, *equal availability*, in the context of the inference relating to non-production of a witness, is not merely that a witness is subject to compulsory process, and thus available in a descriptive sense, but that the witness is of equal avail to both parties in the sense that the witness is not presumptively interested in the outcome.<sup>14</sup> John Feltner, Jr., by virtue of his position as the trainer of Favorite's Fargo and his relationship with Respondent, is presumptively interested in a disposition of this proceeding which favors Respondent. Therefore, while John Feltner, Jr., was subject to compulsory process by Respondent and Complainant, I do not find that he was *equally available* to Respondent and Complainant. I reject Respondent's contention that the Chief ALJ erred by drawing an inference that John Feltner, Jr.'s testimony would have been adverse to Respondent's position in this proceeding based upon Respondent's failure to call John Feltner, Jr., as a witness.

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

**Order**

1. Respondent, David Tracy Bradshaw, is assessed a \$2,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

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<sup>14</sup>See *Oxman v. WLS-TV*, 12 F.3d 652, 661 (7<sup>th</sup> Cir. 1993); *Littlefield v. McGuffey*, 954 F.2d 1337, 1346-47 (7<sup>th</sup> Cir. 1992); *Tyler v. White*, 811 F.2d 1204, 1207 (8<sup>th</sup> Cir. 1987); *Kean v. Commissioner*, 469 F.2d 1183, 1187-88 (9<sup>th</sup> Cir. 1972); *McClanahan v. United States*, 230 F.2d 919, 925-26 (5<sup>th</sup> Cir.), *cert. denied*, 352 U.S. 824 (1956); *Samish v. United States*, 223 F.2d 358, 365 (9<sup>th</sup> Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States v. Beekman*, 155 F.2d 580, 584 (2<sup>d</sup> Cir. 1946).

Colleen A. Carroll  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0008.

2. Respondent is disqualified for 1 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, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of a horse to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up or inspection areas, or in any area where spectators are not allowed; and (d) financing the participation of any other person in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60<sup>th</sup> day after service of this Order on Respondent.

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**MISCELLANEOUS ORDERS**

**In re: RME FARMS, ROGELIO DOMINGO, ANTONIO TAGALICUD, NESTOR CACHO, VIRGINIA ASTE, PARADISE PRODUCERS, AND JOHNSON & SONS.**

**AMA Docket No. F&V 928-1.**

**Dismissal of Petition as to Nestor Cacho, Virginia Aste, and Johnson & Sons filed April 19, 2000.**

Gregory Cooper, for Complainant.

Steven D. Strauss, Hilo, HI, for Petitioners.

*Dismissal issued by Dorothea A. Baker, Administrative Law Judge.*

The Petition filed in this proceeding on February 2, 2000, included, as Petitioners, Nestor Cacho, Virginia Aste and Johnson & Sons, none of whom is a handler. The scope of a proceeding under section 8c(15)(A) is limited to a petition by a handler.

Accordingly, the Petition is dismissed as to Nestor Cacho, Virginia Aste and Johnson & Sons.

Their names shall be removed from the Petitioners herein. Hereinafter the case shall be entitled: RME Farms, Rogelio Domingo and Paradise Producers.

Copies hereof shall be served upon the parties.

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**In re: RME FARMS, ROGELIO DOMINGO, ANTONIO TAGALICUD, NESTOR CACHO, VIRGINIA ASTE, PARADISE PRODUCERS, AND JOHNSON & SONS.**

**AMA Docket No. F&V 928-1.**

**Antonio Tagalicud Withdraws as Petitioner filed April 19, 2000.**

Gregory Cooper, for Complainant.

Steven D. Strauss, Hilo, HI, for Petitioners.

*Withdrawal issued by Dorothea A. Baker, Administrative Law Judge.*

Pursuant to document dated February 28, 2000, Antonio Tagalicud withdrew as a Petitioner in the subject case. Such withdrawal is noted and his name shall be deleted from the named Petitioners.

Copies hereof shall be served upon the parties.

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**In re: LAMERS DAIRY, INC.**  
**AMA Docket No. M-30-1.**  
**Order Dismissing Petition filed January 20, 2000.**

Sharlene A. Deskins, for Respondent.  
Petitioner, Pro se.  
*Order issued by James W. Hunt, Administrative Law Judge.*

On October 4, 1999, Petitioner, a Wisconsin bottler of fluid milk, filed a petition under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c(15)(A), seeking an “exemption from certain regulations and/or modification of certain provisions of Federal Milk Order 30 (7 C.F.R. Part 1030) & or The New Midwest Order.” This petition will be referred to hereafter as Petition I.

Respondent, the Agricultural Marketing Service (AMS), moved to dismiss the petition on the grounds, *inter alia*, that the “New Midwest Order” had not yet gone into effect and that its implementation was indefinitely postponed by a court restraining order.

On November 8, 1999, Petitioner filed another petition (referred to hereafter as Petition II) entitled “Petition for Exemption from Certain Regulations and/or Modification of Certain Provisions of Federal Milk Order 30 (7 C.F.R. Part 1030) & or The New Midwest Order as amended.”

On November 15, 1999, Petitioner filed a third petition (Petition III). It was entitled “Petition for Exemption from Certain Regulations and/or Modification of Certain Provisions of Federal Milk Order 30 (7 CFR Part 1030) as amended and corrected.” The petition referred to the pricing of Class IV milk in that Order.

On December 3, 1999, Respondent moved to dismiss Petition III on the grounds, *inter alia*, that the petition was not challenging any regulations then in effect because Milk Order 1030 did not have any Class IV pricing. Respondent stated that such pricing was included in the proposed new Midwest Order but that the Order had not gone into effect.

On January 4, 2000, Petitioner filed a request to amend its petition “to address” the Midwest Order which it stated was due to take effect on January 1, 2000, “as soon as the copy of the New Midwest Order becomes available.” Respondent did not reply.

In view of the uncertainty of the status of the new Midwest Order and whether it includes the provisions for which Petitioner seeks an exemption or modification, Petitioner’s request to amend is denied and its petitions are dismissed without prejudice to the filing of a new petition when the market order becomes effective.

**In re: MIDWAY FARMS, INC., a CALIFORNIA CORPORATION.  
94 AMA Docket No. F&V 989-1.  
Order Dismissing Petitioner's Petition Without Prejudice filed May 1, 2000.**

Sharlene A. Deskins, for Respondent.  
Brian C. Leighton, Clovis, CA, for Petitioner.  
*Order issued by Edwin S. Bernstein, Administrative Law Judge.*

On April 19, 2000, Petitioner filed a motion to withdraw its Petition without prejudice. On April 20, 2000, I issued an Order to Show Cause which was served upon Respondent's attorney on that date. The Order to Show Cause ordered Respondent to show cause on or before April 28, 2000, why the motion should not be granted. Respondent has not responded to the motion. Therefore, Petitioner's Petition is dismissed without prejudice.

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**In re: MANUEL RAMOS, d/b/a OSCARIAN BROTHERS CIRCUS.  
AWA Docket No. 00-0025.  
Order filed June 26, 2000.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Upon motion of Complainant and with the agreement of Respondent, Complainant's complaint and motion for decision and order upon admission of facts by reason of default is withdrawn from consideration. Accordingly, the case is ordered closed.

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**In re: SUPREME BEEF PRODUCE, INC.  
FMIA Docket No. 00-0001.  
Order Dismissing Complaint filed January 19, 2000.**

Rick D. Herndon, James D. Holt, Sheila Novak, for Complainant.  
Robert G. Hibbert, Washington, DC, for Respondent.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant's unopposed motion to dismiss the complaint filed herein is granted. It is ordered that the complaint filed in this case on November 30, 1999, is dismissed without prejudice.

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**In re: CENTER MEAT COMPANY NO. 7, INC., AND RICKY JAMES  
JOHNSTONE.  
FMIA Docket No. 99-0001.  
PPIA Docket No. 99-0001.  
Order Dismissing Complaint filed June 22, 2000.**

Rick D. Herndon, for Complainant.  
Dennis R. Johnson, Brett T. Schwemer, Washington, DC, for Respondent.  
*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant's June 22, 2000, "Motion to Withdraw Complaint" is granted. It is ordered that the complaint, filed herein on October 13, 1998, be dismissed.

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**In re: DWAYNE WEBB AND GERALD SHARPE.  
HPA Docket No. 99-0025.  
Complaint Withdrawn Without Prejudice as to Gerald W. Sharpe filed  
March 17, 2000.**

Colleen A. Carroll, for Complainant.  
Respondent, Pro se.  
*Withdrawal issued by Dorothea A. Baker, Administrative Law Judge.*

Pursuant to Complainant's Notice of Withdrawal, filed March 16, 2000, the complaint filed June 22, 1999 as to Respondent Gerald W. Sharpe is hereby dismissed without prejudice.

Copies hereof shall be served upon the parties.

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**In re: JACK STEPP AND WILLIAM REINHART.  
HPA Docket No. 94-0014.  
Order Lifting Stay filed April 26, 2000.**

Sharlene A. Deskins, for Complainant.  
Respondents, Pro se.  
*Order issued by William G. Jenson, Judicial Officer.*

On May 6, 1998, I issued a Decision and Order: (1) concluding that Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(B)), and that Respondent William Reinhart violated section 5(2)(D) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(D)); (2) assessing Jack Stepp and William Reinhart [hereinafter Respondents] each a \$2,000 civil penalty; and (3) disqualifying each Respondent 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, horse sale, or horse auction, for 1 year. *In re Jack Stepp*, 57 Agric. Dec. 297 (1998). On May 27, 1998, Respondents filed a Petition for Reconsideration, which I denied based on my finding that Respondents' Petition for Reconsideration was not timely filed. *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondents requested a stay of the order in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), pending the outcome of proceedings for judicial review, and on July 1, 1998, I granted Respondents' request for a stay. *In re Jack Stepp*, 58 Agric. Dec. 397 (1998) (Stay Order).

Respondents filed an appeal with the United States Court of Appeals for the Sixth Circuit, which affirmed the May 6, 1998, Decision and Order. *Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6<sup>th</sup> Cir. 1999) (not to be cited as precedent under 6<sup>th</sup> Circuit Rule 206).

On March 23, 2000, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay; on April 18, 2000, Respondents filed a brief In Opposition to Motion to Lift Stay [hereinafter Reply to Motion to Lift Stay]; and on April 19, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

Respondents contend the Hearing Clerk mailed Complainant's Motion to Lift Stay to Respondents on March 27, 2000, and under section 1.147(c)(2) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] (7 C.F.R. § 1.147(c)(2)), the Hearing Clerk served Respondents with Complainant's Motion to Lift Stay on March 27, 2000 (Letter from William J. Reinhart to Office of the Hearing Clerk, dated April 13, 2000; Reply to Motion to Lift Stay at 2). Section 1.143(d) of the Rules of Practice provides that a response to a written motion must be filed within 20 days after service of the motion, as follows:

**§ 1.143 Motions and requests.**

....

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

Respondents filed Respondents' Reply to Motion to Lift Stay 22 days after the Hearing Clerk served Complainant's Motion to Lift Stay on Respondents. Respondents' Reply to Motion to Lift Stay is not timely filed and may not be considered.

Moreover, even if Respondents' Reply to Motion to Lift Stay had been timely filed, I would grant Complainant's Motion to Lift Stay because I issued the Stay Order in this proceeding pending the outcome of proceedings for judicial review, proceedings for judicial review are concluded, and Respondents raise no meritorious basis for my denying Complainant's Motion to Lift Stay.

Respondents contend that: (1) the administrative hearing was unfair; (2) the administrative law judge's finding "was not supported by evidence in the record"; (3) the "tribunal was unfair, not unbiased and detached"; (4) "[t]he method by which the horse [in question] was determined to be sore has been held illegal by the highest Federal Appellate Court that has considered the issue"; and (5) the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831), "is an unconstitutional exercise of power by the U.S. Congress" (Reply to Motion to Lift Stay at 31). Respondents state that, in their appeal to the United States Court of

Appeals for the Sixth Circuit, they only challenged the evidentiary findings in the May 6, 1998, Decision and Order, and that the opinion of the United States Court of Appeals for the Sixth Circuit in *Reinhart v. United States Dep't of Agric.*, *supra*, “does not satisfy the requirements for a full review as required when a constitutional challenge is raised” (Reply to Motion to Lift Stay at 32). Respondents request that I dismiss the proceeding and refer the proceeding to the “Federal District Court in Winchester, Tennessee” (Reply to Motion to Lift Stay at 32-33).

I disagree with Respondents’ contention that the proceeding should be referred to the “Federal District Court in Winchester, Tennessee.” I have no authority under the Rules of Practice to transfer a case to a district court of the United States.<sup>1</sup> Further, the United States District Court for the Eastern District of Tennessee has no jurisdiction to review the May 6, 1998, Decision and Order issued under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. Rather, section 6(b)(2) and (c) of the Horse Protection Act provides for judicial review of civil penalties assessed and disqualifications imposed under the Horse Protection Act, as follows:

**§ 1825. Violations and penalties**

....

**(b) Civil penalties; review and enforcement**

....

(2) Any person against whom a violation is found and a civil penalty assessed under [15 U.S.C. § 1825(b)(1)] . . . may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such

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<sup>1</sup>*In re Nkiambi Jean Lema*, 58 Agric. Dec. 302, 305 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue). *Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating the Chief Administrative Law Judge does not have authority to transfer a case to a district court of the United States under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

**(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any . . . civil penalty authorized under this section, any person . . . who paid a civil penalty assessed under [15 U.S.C. § 1825(b)] . . . or is subject to a final order under [15 U.S.C. § 1825(b)] assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, 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. . . . The provisions of [15 U.S.C. § 1825(b)] . . . respecting the . . . review . . . of a civil penalty apply with respect to civil penalties under this subsection.

15 U.S.C. § 1825(b)(2), (c).

Moreover, I disagree with Respondents' contention that proceedings for judicial review are not concluded. Respondents' failure to raise issues before the United States Court of Appeals for the Sixth Circuit is not a basis for finding that proceedings for judicial review have not been concluded. Respondents appealed this proceeding to the United States Court of Appeals for the Sixth Circuit, which affirmed the May 6, 1998, Decision and Order. *Reinhart v. United States Dep't of Agric., supra*. The time for filing a petition for a writ of certiorari with the Supreme Court of the United States has expired.

Therefore, Complainant's Motion to Lift Stay Order is granted; the Stay Order issued on July 1, 1998, *In re Jack Stepp*, 58 Agric. Dec. 397 (1998) (Stay Order), is lifted; and the Order issued in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), is effective, as follows:

**Order**

1. Respondent William Reinhart is assessed a \$2,000 civil penalty. The civil

penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Sharlene A. Deskins  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

Respondent William Reinhart's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent William Reinhart. Respondent William Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 94-0014.

2. Respondent Jack Stepp is assessed a \$2,000 civil penalty. The civil penalty shall be paid by a certified check or money order, made payable to the "Treasurer of the United States," and sent to:

Sharlene A. Deskins  
United States Department of Agriculture  
Office of the General Counsel  
Marketing Division  
1400 Independence Avenue, SW  
Room 2014-South Building  
Washington, DC 20250-1417

Respondent Jack Stepp's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on Respondent Jack Stepp. Respondent Jack Stepp shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 94-0014.

3. Respondent William Reinhart is disqualified for 1 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, horse sale, or horse auction, and until Respondent William Reinhart has paid the civil penalty assessed in this Order. When Respondent William Reinhart demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 1 year as provided in this Order and paid the civil

penalty assessed in this Order, a supplemental order will be issued in this proceeding, upon motion of Complainant, terminating the disqualification of Respondent William Reinhart imposed by this Order.

The disqualification of Respondent William Reinhart shall become effective on the 60<sup>th</sup> day after service of this Order on Respondent William Reinhart.

4. Respondent Jack Stepp is disqualified for 1 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, horse sale, or horse auction, and until Respondent Jack Stepp has paid the civil penalty assessed in this Order. When Respondent Jack Stepp demonstrates to the Animal and Plant Health Inspection Service that he has been disqualified for 1 year as provided in this Order and paid the civil penalty assessed in this Order, a supplemental order will be issued in this proceeding, upon motion of Complainant, terminating the disqualification of Respondent Jack Stepp imposed by this Order.

The disqualification of Respondent Jack Stepp shall become effective on the 60<sup>th</sup> day after service of this Order on Respondent Jack Stepp.

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**In re: JACK STEPP AND WILLIAM REINHART.  
HPA Docket No. 94-0014.  
Ruling Denying Respondents' Petition for Reconsideration of the Order  
Lifting Stay filed May 23, 2000.**

Sharlene A. Deskins, for Complainant.  
Respondents, Pro se.  
*Ruling issued by William G. Jenson, Judicial Officer.*

On May 6, 1998, I issued a Decision and Order: (1) concluding that Respondent Jack Stepp violated section 5(2)(B) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(B)), and that Respondent William Reinhart violated section 5(2)(D) of the Horse Protection Act of 1970, as amended (15 U.S.C. § 1824(2)(D)); (2) assessing Jack Stepp and William Reinhart [hereinafter Respondents] each a \$2,000 civil penalty; and (3) disqualifying each Respondent -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, horse sale, or horse auction, for 1 year. *In re Jack Stepp*, 57 Agric. Dec. 297 (1998). On May 27, 1998, Respondents filed a Petition for Reconsideration of the Decision and Order, which

I denied based on my finding that Respondents' Petition for Reconsideration of the Decision and Order was not timely filed. *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.).

On June 30, 1998, Respondents requested a stay of the order in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), pending the outcome of proceedings for judicial review, and on July 1, 1998, I granted Respondents' request for a stay. *In re Jack Stepp*, 58 Agric. Dec. 397 (1998) (Stay Order).

Respondents filed an appeal with the United States Court of Appeals for the Sixth Circuit, which affirmed the May 6, 1998, Decision and Order. *Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6<sup>th</sup> Cir. 1999) (not to be cited as precedent under 6<sup>th</sup> Circuit Rule 206).

On March 23, 2000, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion to Lift Stay; on April 18, 2000, Respondents filed a brief In Opposition to Motion to Lift Stay [hereinafter Reply to Motion to Lift Stay]; and on April 19, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay.

On April 26, 2000, I issued an Order Lifting Stay. *In re Jack Stepp*, 59 Agric. Dec. \_\_\_\_ (Apr. 26, 2000) (Order Lifting Stay); on May 15, 2000, Respondents filed a Petition for Reconsideration of the Order Lifting Stay; on May 19, 2000, Complainant filed Response to Petition for Reconsideration of the Order Lifting Stay; and on May 22, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondents' Petition for Reconsideration of the Order Lifting Stay.

Respondents contend in their Petition for Reconsideration of the Order Lifting Stay that my determinations in the Order Lifting Stay that Respondents filed their Reply to Motion to Lift Stay on April 18, 2000, and that Respondents' Reply to Motion to Lift Stay was late-filed, are error.

The Hearing Clerk served Respondents with Complainant's Motion to Lift Stay on March 27, 2000. *In re Jack Stepp*, 59 Agric. Dec. \_\_\_\_, slip op. at 2-3 (Apr. 26, 2000) (Order Lifting Stay). Section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice] provides that a response to a written motion must be filed within 20 days after service of the motion, as follows:

**§ 1.143 Motions and requests.**

....

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

Based on section 1.143(d) of the Rules of Practice (7 C.F.R. § 1.143(d)), Respondents would have been required to file a response to Complainant's Motion to Lift Stay no later than April 16, 2000. However, April 16, 2000, was a Sunday, and section 1.147(h) of the Rules of Practice provides that when the time for filing expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

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

....

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

7 C.F.R. § 1.147(h).

Therefore, Respondents were required to file their Reply to Motion to Lift Stay no later than April 17, 2000. Respondents submit with their Petition for Reconsideration of the Order Lifting Stay an attachment that indicates that Respondents mailed their Reply to Motion to Lift Stay to the Hearing Clerk on April 13, 2000 (Pet. for Recons., Attach. A). Further, Respondents submit with their Petition for Reconsideration of the Order Lifting Stay an attachment that indicates that the United States Postal Service delivered Respondents' Reply to Motion to Lift Stay to "Washington DC 20250" at 11:37 a.m., on April 14, 2000 (Pet. for Recons., Attach. B). Moreover, the envelope containing Respondents'

Reply to Motion to Lift Stay indicates that an employee of the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, received Respondents' Reply to Motion to Lift Stay at 11:30 a.m., on April 14, 2000. However, the date and time of receipt stamped by the Hearing Clerk on Respondents' Reply to Motion to Lift Stay establishes that the Hearing Clerk did not receive Respondents' Reply to Motion to Lift Stay until 2:05 p.m., April 18, 2000. The delay between receipt of Respondents' Reply to Motion to Lift Stay by the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, and receipt of Respondents' Reply to Motion to Lift Stay by the Hearing Clerk, is inexplicable.

Section 1.147(g) of the Rules of Practice provides that a document authorized to be filed under the Rules of Practice is deemed to be filed at the time when 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; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

Neither Respondents' mailing the Reply to Motion to Lift Stay nor the United States Postal Service's delivering the Reply to Motion to Lift Stay to the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, constitutes filing with the Hearing Clerk.<sup>1</sup> Therefore,

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<sup>1</sup>See *In re Harold P. Kafka*, 58 Agric. Dec. 357, 365 (1999) (Order Denying Late Appeal) (stating that 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), *appeal docketed*, No. 99-5313 (3<sup>d</sup> Cir. May 13, 1999); *In re Sweck's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating that appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed the litigants that appeal petitions must be filed with the Judicial Officer); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 82 (1999) (Order Denying Pet. for Recons.) (stating that 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); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 140 n.2 (1999) (stating that the date typed on a pleading by a party filing the pleading does not constitute the date the pleading is filed with  
(continued...))

Respondents' Reply to Motion to Lift Stay, which was required to be filed no later than April 17, 2000, was late-filed.<sup>2</sup>

Moreover, as I stated in *In re Jack Stepp*, 59 Agric. Dec. \_\_\_\_, slip op. at 3 (Apr. 26, 2000) (Order Lifting Stay), even if Respondents' Reply to Motion to Lift

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<sup>1</sup>(...continued)

the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal docketed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11<sup>th</sup> Cir. Feb. 7, 2000); *In re Severin Peterson*, 57 Agric. Dec. 1304, 1310 n.3 (1998) (Order Denying Late Appeal) (stating that 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); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that 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 (11<sup>th</sup> Cir. June 16, 1997).

<sup>2</sup>The record indicates that Respondents' Reply to Motion to Stay was not late-filed due to any inadvertence on the part of Respondents. Nevertheless, the Rules of Practice are binding on the Judicial Officer, and I cannot deem Respondents' late-filed Reply to Motion to Lift Stay to have been timely filed. *See In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the Judicial Officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders). *Cf. In re*, 59 Agric. Dec. \_\_\_\_, slip op. at 15-17 (Mar. 31, 2000) (Order Denying Pet. for Recons.) (stating that the administrative law judges and the Hearing Clerk are bound by the Rules of Practice and neither the administrative law judges nor the Hearing Clerk has the authority to modify the Rules of Practice); *In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating that generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

Stay had been timely filed and I considered Respondents' Reply to Motion to Lift Stay, I would grant Complainant's Motion to Lift Stay. I issued the Stay Order in this proceeding pending the outcome of proceedings for judicial review, proceedings for judicial review are concluded, and Respondents have not raised any meritorious basis in their Reply to Motion to Lift Stay or in their Petition for Reconsideration of the Order Lifting Stay for denying Complainant's Motion to Lift Stay.

Therefore, Respondents' Petition for Reconsideration of the Order Lifting Stay is denied and the Order Lifting Stay will not be disturbed.

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**In re: WU-CHU TRADING CORP., d/b/a TROPICAL WHOLESALE PRODUCE, INC., TRUNG TROUNG, d/b/a FIVE CONTINENTS LTD., AND LONG VAN, d/b/a THE GREAT WALL ORIENTAL.**

**P.Q. Docket No. 99-0048.**

**Order Dismissing Complaint as to Respondent Wu-Chu Trading Corp., d/b/a Tropical Wholesale Produce, Inc., filed March 16, 2000.**

James D. Holt, for Complainant.

F. Pirog John, Sioux, IA, for Respondent.

*Order issued by James W. Hunt, Administrative Law Judge.*

Complainant's motion to dismiss the complaint as to Respondent Wu-Chu Trading Corp. is granted. It is ordered that the complaint, filed herein on June 24, 1999, be dismissed as to Respondent Wu-Chu Trading Corp., d/b/a Tropical Wholesale Produce, Inc.

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**DEFAULT DECISIONS**

**ANIMAL QUARANTINE AND RELATED LAWS**

**In re: DAVID E. SMITH, d/b/a PERRY HOG MARKET, HASTINGS PORK, INC., JIMMIE ROGERS, INC., RODOLFO CABRERA, JR., MARY'S RANCH, INC., d/b/a CABRERA SLAUGHTERHOUSE, AND RAYMOND HARTMAN.**

**A.Q. Docket No. 99-0006.**

**Decision and Order as to Jimmie Rogers, Inc., filed March 28, 2000.**

Darlene M. Bolinger, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Chief Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of pseudorabies infected or exposed swine (9 C.F.R. §§ 85.1 *et seq.*, 71.19), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on September 23, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

**Findings of Fact**

1. Jimmie Rogers, Inc. is a corporation with a mailing address of Route 1, Box 51, Liberal, Kansas 67901.
2. On or about October 8, 1997, respondent violated 9 C.F.R. §§ 85.3 and 85.5 by moving approximately 631 pseudorabies infected and/or exposed swine from

Hastings Nebraska to Perry, Illinois, because the swine were not moved directly to a recognized slaughtering establishment, quarantined herd or quarantined feedlot; the swine were not accompanied by a permit or owner-shipper statement and such permit or statement delivered to the consignee; and the swine were moved without being individually identified or without such identification being listed on records used for the movement, as required.

3. Respondent Jimmie Rogers, Inc. moved 454 pseudorabies infected and/or exposed swine from Perry, Illinois to Miami, Florida on or about October 8, 1997 in violation of 9 C.F.R. §§ 85.3 and 85.5 because the swine were not accompanied by a permit or owner-shipper statement and such permit or statement delivered to the consignee and the swine were moved without being individually identified or without such identification being listed on records used for the movement, as required.

#### **Conclusion**

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

#### **Order**

The respondent is hereby assessed a civil penalty of two thousand dollars (\$2,000). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to A.Q. Docket No. 99-0006.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final May 6, 2000.-Editor]

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**In re: DAVID E. SMITH, d/b/a PERRY HOG MARKET, HASTINGS PORK, INC., JIMMIE ROGERS, INC., RODOLFO CABRERA, JR., MARY'S RANCH, INC., d/b/a CABRERA SLAUGHTERHOUSE, AND RAYMOND HARTMAN.**

**A.Q. Docket No. 99-0006.**

**Decision and Order as to Raymond Hartman filed May 5, 2000.**

Darlene M. Bolinger, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Chief Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of pseudorabies infected or exposed swine (9 C.F.R. §§ 85.1 *et seq.*, 71.19), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq.*

This proceeding was instituted under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111)(Act) and the regulations promulgated thereunder, by a complaint filed on September 23, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision and Order as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Raymond Hartman is an individual whose mailing address is Route 1, Box 51, Liberal, Kansas 67901.

2. On or about October 8, 1997, he violated 9 C.F.R. §§ 85.3 and 85.5 by moving approximately 631 pseudorabies infected and/or exposed swine from

Hastings Nebraska to Perry, Illinois, because the swine were not moved directly to a recognized slaughtering establishment, quarantined herd or quarantined feedlot; the swine were not accompanied by a permit or owner-shipper statement and such permit or statement delivered to the consignee; and the swine were moved without being individually identified or without such identification being listed on records used for the movement, as required.

3. Respondent Raymond Hartman moved 454 pseudorabies infected and/or exposed swine from Perry, Illinois to Miami, Florida on or about October 8, 1997 in violation of 9 C.F.R. §§ 85.3 and 85.5 because the swine were not accompanied by a permit or owner-shipper statement and such permit or statement delivered to the consignee and the swine were moved without being individually identified or without such identification being listed on records used for the movement, as required.

#### **Conclusion**

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

#### **Order**

The respondent is hereby assessed a civil penalty of five hundred dollars (\$500.00). Respondent Raymond Hartman shall send a certified check or money order made payable to the "Treasurer of the United States" to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

The civil penalty shall be payable as follows: fifty dollars (\$50) of the assessed amount shall be payable within thirty days (30) days from the effective date of this order. Thereafter, a monthly installment of fifty dollars (\$50) shall be due and payable on or before the tenth day of each month, for the next nine months, until the assessed penalty is paid in full. If the respondent is late in making any payment, then all remaining payments become immediately due and payable in full.

Respondent shall indicate that each payment is in reference to A.Q. Docket No. 99-0006.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final June 12, 2000.-Editor]

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**ANIMAL WELFARE ACT**

**In re: LOUIS JOHN SOUZA.**  
**AWA Docket 99-0037.**  
**Decision and Order filed December 22, 1999.**

Sharlene A. Deskins, for Complainant.  
Respondent, Pro se.  
Decision issued by James W. Hunt, Administrative Law Judge.

**Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon respondent by certified mail on August 5, 1999. Respondent was informed in the letter of service that an Answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondent failed to file an Answer addressing the allegations contained in the complaint within the time prescribed in the Rules of Practice. Therefore, the material facts alleged in the Complaint, which are admitted as set forth herein by respondent's failure to file an Answer pursuant to the Rules of Practice, are adopted as set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions of Law**

**I**

A. Louis John Souza, hereinafter referred to as respondent, is an individual whose address is Route 1, Box 702, Phillipsburg, Missouri 65722.

B. The respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

## II

Since at least August 26, 1997, and continuing to the present, the respondent operated as a dealer as defined in the Act and regulations without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2134) and section 2.1 of the regulations (9 C.F.R. § 2.1). The respondent sold or offered for sale, in commerce, at least 59 dogs for resale for use as pets. The sale or offer for sale of each animal constitutes a separate violation as set forth below.

1. On or about August 26, 1997, the respondent sold two dogs to a retail pet store in Hollywood, Florida.
2. On or about September 17, 1997, the respondent sold two dogs to a retail pet store in Stuart, Florida.
3. On or about November 5, 1997, the respondent sold one dog to a retail pet store in Stuart, Florida.
4. On or about November 19, 1997, the respondent sold two dogs to a retail pet store in Hollywood, Florida.
5. On or about December 3, 1997, the respondent sold one dog to a retail pet store in Hollywood, Florida.
6. On or about December 3, 1997, the respondent sold one dog to a retail pet store in Hollywood, Florida.
7. On or about December 15, 1997, the respondent sold three dogs to retail pet stores in Deland and Sunrise, Florida.
8. On or about January 4, 1998, the respondent sold one dog to a retail pet store in Hialeah, Florida.
9. On or about January 6, 1998, the respondent sold two dogs to a retail pet store in Stuart, Florida.
10. On or about February 6, 1998, the respondent sold three dogs to retail pet stores in Hollywood and Stuart, Florida.
11. On or about February 11, 1998, the respondent sold four dogs to retail pet stores in Sunrise, Hialeah and Stuart, Florida.
12. On or about February 18, 1998, the respondent sold two dogs to retail pet stores in Sunrise and Boynton Beach, Florida.
13. On or about February 21, 1998, the respondent sold one dog to a retail pet store in Stuart, Florida.
14. On or about February 26, 1998, the respondent sold one dog to a retail pet store in Boynton Beach, Florida.
15. On or about March 18, 1998, the respondent sold three dogs to retail pet stores in Sunrise, Deland and Carnvale, Florida.

16. On or about March 27, 1998, the respondent sold two dogs to a retail pet store in Hollywood, Florida.
17. On or about April 9, 1998, the respondent sold one dog to a retail pet store in Sunrise, Florida.
18. On or about April 15, 1998, the respondent sold two dogs to retail pet stores in Sunrise and Hollywood, Florida.
19. On or about April 18, 1998, the respondent sold two dogs to retail pet stores in Sunrise and Hollywood, Florida.
20. On or about April 23, 1998, the respondent sold three dogs to a retail pet stores in Hollywood, Boynton Beach and Ocala, Florida.
21. On or about April 24, 1998, the respondent sold one dog to a retail pet store in Stuart, Florida.
22. On or about May 7, 1998, the respondent sold one dog to a retail pet store in Stuart, Florida.
23. On or about May 12, 1998, the respondent sold two dogs to a retail pet stores in Hialeah and Boynton Beach, Florida.
24. On or about May 15, 1998, the respondent sold one dog to a retail pet store in Stuart, Florida.
25. On or about March 26, 1998, the respondent sold one dog to a retail pet store in Stuart, Florida.
26. On or about March 28, 1998, the respondent sold three dogs to a retail pet stores in Sunrise and Deland, Florida.
27. On or about June 18, 1998, the respondent sold eleven dogs retail pet stores in Hollywood, Hialeah, Boynton Beach, Deland and Fort Lauderdale, Florida.
28. Between July 6 and July 10, 1998, the respondent sold dogs to a retail pet store in Miami, Florida.

### III

A. On September 29, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On September 29, 1997, APHIS inspected respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Housing facilities for dogs were not structurally sound and maintained in good repair so as to protect the animals from injury, contain the animals securely, and restrict other animals from entering (9 C.F.R. § 3.1(a));
2. Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f));
3. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));
4. Prohibited objects specifically metal barrels were used as shelter structures in outdoor housing facilities for dogs (9 C.F.R. § 3.4(c));
5. The respondent failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise (9 C.F.R. § 3.8);
6. Food receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.9(b));
7. Watering receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.10);
8. Primary enclosures for dogs were not kept clean (9 C.F.R. § 3.11(a));  
and
9. The premises including buildings and surrounding grounds, were not kept in good repair, and clean and free of trash, junk, waste, and discarded matter, and weeds, grasses and bushes were not controlled, in order to protect the animals from injury, facilitate the required husbandry practices (9 C.F.R. § 3.11(c)).

#### IV

A. On December 11, 1997, APHIS inspected respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

B. On December 11, 1997, APHIS inspected respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b));
2. Primary enclosures for dogs were not constructed so that they provide sufficient space to allow each animal to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner (9 C.F.R. § 3.6(a));

3. The respondent failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise (9 C.F.R. § 3.8);
4. Food receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.9(b));
5. Watering receptacles for dogs were not kept clean and sanitized (9 C.F.R. § 3.10); and
6. Primary enclosures for dogs were not kept clean (9 C.F.R. § 3.11(a)).

#### V

On January 9, 1998, APHIS inspected respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. Interior surfaces of housing facilities and surfaces that come in contact with dogs were not free of jagged edges and sharp points that might injure the animals (9 C.F.R. § 3.1(c)(1)(ii));
2. Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f));
3. Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b)); and
4. The respondent failed to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise (9 C.F.R. § 3.8).

#### Conclusions

1. The Secretary has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated the Act and regulations promulgated under the Act.
3. The following Order is authorized by the Act and warranted under the circumstances.

#### Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

- (a) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required;
- (b) Failing to maintain housing facilities for dogs in a structurally sound condition and in good repair;
- (c) Failing to provide animals with adequate shelter from the elements;
- (d) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, in a manner that minimizes contamination and disease risks;
- (e) Failing to maintain surfaces that come into contact with animals that do not have jagged wire and sharp pointed wood;
- (f) Failing to provide sufficient space for animals in primary enclosures;
- (g) Failing to develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise;
- (h) Failing to provide dogs with food and water receptacles that are clean and sanitized;
- (i) Failing to keep the primary enclosures for animals clean;
- (j) Failing to keep the premises clean and in good repair and free of accumulations of trash, junk, waste, and discarded matter, and to control weeds, grasses and bushes; and
- (k) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

2. Respondent is assessed a civil penalty of \$21,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

3. Respondent is disqualified for 90 days from applying for a license. However, the period of disqualification shall continue until the Respondent pays the civil penalty assessed in this decision and order.

The provisions of this Order shall become effective on the first day after service of this decision on the respondent.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final February 4, 2000.-Editor]

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**In re: VERA JACKSON.  
AWA Docket 00-0019.  
Decision and Order filed May 15, 2000.**

Robert A. Ertman, for Complainant.  
Respondent, Pro se.  
Decision issued by James W. Hunt, Administrative Law Judge.

**Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent willfully violated the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on the Respondent by certified mail on January 26, 2000. The Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the Respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions of Law**

1. Vera Jackson, hereinafter referred to as the Respondent, is an individual doing business as Jackson Kennel whose address is Route 1, Box 82, Athol, Kansas 66932.
2. The Respondent, at all times material hereto, was operating as a dealer as defined in the Act and the regulations.
3. On thirty-four separate dates between July 8, 1997, and March 4, 1999, the Respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). The Respondent sold, in commerce, at least 161 dogs for resale for use as pets. The sale of each animal constitutes a separate violation.

### **Conclusions**

1. The Secretary has jurisdiction in this matter.
2. The following Order is authorized by the Act and warranted under the circumstances.

### **Order**

1. The Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. The Respondent is assessed a civil penalty of \$20,000, which shall be paid by a certified check or money order made payable to the Treasurer of United States and shall be sent to Robert A. Ertman, Attorney, Office of the General Counsel, United States Department of Agriculture, Room 2014 South Building, Washington, DC 20250.

3. The Respondent is disqualified for ten years from becoming licensed under the Animal Welfare Act, as amended.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final June 19, 2000.-Editor]

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**EGG RESEARCH AND CONSUMER INFORMATION ACT**

**In re: COUNTRY MAID FOODS, INC.**  
**ERCIA Docket No. 98-0001.**  
**Decision and Order filed October 15, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.  
*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This proceeding was instituted under the Egg Research and Consumer Information Act, 7 U.S.C. § 2701 *et seq.* (the "Act"), and the Egg Research and Promotion Order, 7 C.F.R. Part 1250, by a complaint filed by the Administrator of the Agricultural Marketing Service, United States Department of Agriculture, alleging that the respondent willfully violated the Order.

The Hearing Clerk served on the respondent, by mail, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. The respondent has failed to file an answer within the time prescribed in the Rules of Practice, or at all, and the material facts alleged in the complaint, which are admitted by the respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

**Findings of Fact**

1. Respondent Country Maid Foods, Inc., is a Missouri corporation whose mailing address is Box 229, Aurora, Missouri 65605, and whose agent for service of process is John C. Money maker, 321 East Olive, Aurora, Missouri 65605.

2. At all times mentioned herein, the respondent was a handler of eggs as defined in section 1250.309 of the Egg Research and Promotion Order (7 C.F.R. § 1250.309) and section 1250.500(i) of the administrative rules and regulations promulgated pursuant thereto (7 C.F.R. § 1250.500(i)).

3. From January 1993 through January 1995, the respondent failed to pay to the American Egg Board, \$18,649.00 in assessments, based on the rate of 5 cents per 30-dozen case of eggs, plus late charges, in willful violation of sections 1250.347, 1250.349 and 1250.517 of the Egg Research and Promotion Order and

the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517).

4. From February through April 1995, the respondent failed to pay to the American Egg Board \$6,589.00 in assessments, based on the rate of 10 cents per 30-dozen case of eggs, plus late charges, in willful violation of sections 1250.347, 1250.349 and 1250.517 of the Egg Research and Promotion Order and the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517).

5. From September through December 1996, the respondent failed to pay to the American Egg Board assessments based on the rate of 10 cents per 30-dozen case of eggs in the manner and in the time specified by the American Egg Board, and has failed to pay the resulting late charges, in willful violation of sections 1250.347, 1250.349 and 1250.517 of the Egg Research and Promotion Order and the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517).

6. From December 1996 through February 1997, the respondent failed to pay to the American Egg Board \$4,525.50 in assessments, based on the rate of 10 cents per 30-dozen case of eggs, plus late charges, in willful violation of sections 1250.347, 1250.349 and 1250.517 of the Egg Research and Promotion Order and the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517).

7. From March 1997 through May 1997, the respondent failed to pay to the American Egg Board approximately \$5,231.10 in assessments, based on the rate of 10 cents per 30-dozen case of eggs, plus late charges, in willful violation of sections 1250.347, 1250.349 and 1250.517 of the Egg Research and Promotion Order and the regulations promulgated thereunder (7 C.F.R. §§ 1250.347, 1250.349, 1250.517).

8. On three occasions from March through May 1997, the respondent failed to submit complete and accurate reports of the number of cases of eggs handled and other required information, in willful violation of section 1250.352 of the Egg Research and Promotion Order and sections 1250.529 of the regulations promulgated thereunder (7 C.F.R. §§ 1250.352, 1250.529).

#### **Conclusions**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact above, the respondent has violated sections 1250.347, 1250.349, 1250.352, 1250.517, and 1250.529 of the Egg Research and Promotion Order (7 C.F.R. §§ 1250.347, 1250.349, 1250.352, 1250.517, 1250.529), as specified above.

3. The following order is authorized by the Act and warranted under the circumstances.

**Order**

1. Respondent is assessed a civil penalty of \$18,500, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.

2. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, from paying to the American Egg Board \$34,994.60 in past due assessments owed from January 1, 1993, through May 1997, plus \$18,022.06 in late charges pursuant to section 1250.519 of the Egg Research and Promotion Order, 7 C.F.R. § 1250.519, and from paying to the American Egg Board any and all assessments due under the Egg Research and Promotion Order in any subsequent year..

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 11, 2000.-Editor]

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**FEDERAL CROP INSURANCE ACT**

**In re: LARRY STRANGER.**  
**FCIA Docket No. 00-0004.**  
**Decision and Order filed May 4, 2000.**

Donald McAmis, for Complainant.  
Respondent, Pro se.  
*Decision issued by Dorothea A. Baker, Administrative Law Judge.*

Pursuant to section (b) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the Motion for Summary Judgment filed by the complainant, Federal Crop Insurance Corporation (FCIC), is granted on the grounds that there are no genuine issues of material fact.

On March 28, 2000, the complainant filed a Motion for Summary Judgment together with a Proposed Decision. No response was forthcoming from respondent within the applicable time period.

The respondent, Larry Stranger (Stranger), willfully and intentionally provided false information to FCIC or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501 *et seq.*) when he conspired with, aided, and abetted Lawrence A. Grube (Grube) together with others to commit fraud and did commit fraud to obtain monetary benefits to which he was not entitled from the Federal Crop Insurance Corporation. The scheme involved the collection of money through the concealment of production and the filing of false claims by Grube with the insurer.

Therefore, it is found that the respondent has willfully and intentionally provided false and inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Act (7 U.S.C. § 1506(m)).

It is further found that, pursuant to section 506 of the Act (7 U.S.C. § 1506), respondent, and any entity in which he retains a substantial beneficial interest after the period of disqualification has commenced, is disqualified from purchasing catastrophic risk protection for a period of one year and from receiving any other benefit under the Act for a period of five years. The period of disqualification shall be effective thirty five days after this decision is served on the respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary.

If the period of disqualification would commence after the beginning of the crop year, and the respondent has a crop insurance policy in effect, disqualification will

commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final June 14, 2000.-Editor.]

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## HORSE PROTECTION ACT

**In re: LARRY G. VINSON, JR.**  
**HPA Docket No. 99-0024.**  
**Decision and Order filed October 27, 1999.**

Brian T. Hill, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.*

This proceeding was instituted under the Horse Protection Act, as amended (15 U.S.C. § 1821 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Act.

Copies of the complaint and the Rules of Practice governing proceeding under the Act (7 C.F.R. §§ 1.130-1.151) were sent via certified mail to Larry G. Vinson Jr., return receipt requested, on May 25, 1999. After two failed attempts to deliver the documents on May 30, 1999 and June 11, 1999, the copies sent to Larry G. Vinson Jr. were returned to the office of the Hearing Clerk marked "unclaimed" on June 24, 1999. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to Larry G. Vinson Jr. on June 30, 1999. The respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent Larry G. Vinson Jr. has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by the respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact. This decision and order is issued pursuant to section 1.139 of the Rules of Practice.

### Findings of Fact

A. Larry G. Vinson Jr., hereinafter referred to as the respondent, is an individual whose mailing address is 1200 Vanhouser Road, Woodbury, Tennessee 37190.

B. At all times material herein, the respondent owned and trained the horse known as "BK's Shadow Joe" and entered this horse as Entry No. 23, Class No. 44, on September 18, 1998, at the 19<sup>th</sup> Annual National Spotted Saddle Horse Association World Grand Championship in Murfreesboro, Tennessee.

**Conclusions of Law**

On September 18, 1998, the respondent, in violation of sections 5(2)(B) and (D) of the Act (15 U.S.C. §§ 1824(2)(B), (D)), entered and allowed the entry for the purpose of showing or exhibiting "BK's Shadow Joe" as Entry No. 23, in Class No. 44, at the 19<sup>th</sup> Annual National Spotted Saddle Horse Association World Grand Championship in Murfreesboro, Tennessee, while the horse was sore.

**Order**

1. The respondent is assessed a civil penalty of \$2,000.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

2. The respondent is disqualified for an uninterrupted period of one 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 and this disqualification shall continue indefinitely so long as their respective civil penalties described in paragraph 1 above remain unpaid.

3. For purposes of the disqualification described in paragraph 2 above, "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 provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

[This Decision and Order became final January 14, 2000.-Editor]

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**PLANT QUARANTINE ACT**

**In re: TAQUERIA LA MICHOACANA.**

**P.Q. Docket No. 99-0038.**

**Decision and Order filed May 26, 2000.**

James D. Holt, for Complainant.

Respondent, Pro se.

*Decision and Order issued by James W. Hunt, Chief Administrative Law Judge.*

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture [herein Complainant], instituted this administrative proceeding under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167), the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [herein the Acts], the regulations promulgated thereunder (7 C.F.R. §§ 301.11(b), 319.56-2ff), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [herein the Rules of Practice], by filing a Complaint on April 29, 1999.

The Complaint alleged that on January 22, 1999, Taqueria La Michoacana [herein Respondent] violated the Acts by moving 5 boxes of Mexican Hass avocados from Chicago, Illinois to Muscatine, Iowa, because such movement is prohibited. Federal Regulations provide that no person shall move any plant or plant part from a quarantined State into or through any State not quarantined with respect to that plant or plant part. 7 C.F.R. § 301.11. Federal Regulations prohibit the distribution of Mexican Hass avocados outside of the following States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. 7 C.F.R. §319.56-2ff(a)(3). The movement of each box of Mexican Hass avocados outside of the States quarantined for Mexican Hass avocados is a separate violation of the Acts. Pursuant to section 163 of the Plant Quarantine Act, the Complainant is authorized to assess a civil penalty of \$1,000 for each violation of the Act. 7 U.S.C. § 163. Therefore the maximum civil penalty which could be assessed in these proceedings is \$5,000.

The Hearing Clerk, Office of Administrative Law Judges, [herein Hearing Clerk] mailed the Complaint to Respondent by certified mail on April 30, 1999. On June 15, 1999, the Hearing Clerk notified Respondent that their answer to the Complaint had not been received within the required time. 7 C.F.R. § 1.136(a). Respondent has not filed an answer to date.

Pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), failure to deny or otherwise respond to the allegations in the Complaint constitutes, for the purposes of this proceeding, an admission of the allegations. By this failure to file a timely answer, Respondent has admitted the allegations of the Complaint.

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

#### **Finding of Fact**

1. The mailing address of Taqueria La Michoacana is 813 Oregon Street, Muscatine, Iowa 52761.
2. On January 22, 1999, Taqueria La Michoacana, respondent, moved 15 boxes of Mexican Hass avocados from Chicago, Illinois to Muscatine, Iowa.

#### **Conclusion**

It is a well established policy that "the 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." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991).

The success or failure of the programs designed to protect America's agriculture by the prevention, control and eradication of plant pests is dependent upon the compliance of individuals such as the Respondent. Without the adherence of these individuals to Federal Regulations concerned with the prevention of the spread of plant pests, the risk of the undetected spread of plant pests is greatly increased. The imposition of sanctions in cases such as this are extremely important in the prevention of the spreading of plant pests. The sanctions must be substantial enough to be meaningful. This is important not only to insure that a particular Respondent will not again violate the regulations, but that the sanction will also deter others in similar situations. These proceedings address five violations of the Acts. A single violation of the Acts could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. This suggests the need for a severe sanction to serve as an effective deterrent to violations.

Complainant believes that compliance and deterrence can now be achieved only with the imposition of the \$500 civil penalty requested. Complainant's

recommendation "as to the appropriate sanction is entitled to great weight, in view of the experience gained by the [Complainant] during [his] day-to-day supervision of the regulated industry." *In re: S.S. Farms Linn County, Inc. et al.*, 50 Agric. Dec. 476 (1991).

Complainant also seeks as a primary goal the deterrence of other persons similarly situated to the respondent. *In re: Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1831 (1976). "The civil penalties imposed by the Secretary for violations of his quarantine regulations should be sufficiently large to serve as an effective deterrent not only to the respondent but also to other potential violators." *In re Kaplinsky*, 47 Agric. Dec. 629 (1988). Furthermore, "if the person cannot pay the penalty imposed, arrangements can be made to pay the civil penalty over a period of time." *Id.* at 633.

Under USDA's sanction policy "great weight is given to the recommendation of the officials charge with the responsibility for administering the regulatory program." *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268, 447, *aff'd*, 841 F.2d 1451 (9th Cir. 1988). "In order to achieve the congressional purpose and to prevent the importation into the United States of items that could be disastrous to the United States agricultural community, it is necessary to take a hard-nosed approach and hold violators responsible for any violation irrespective of lack of evil motive or intent to violate the quarantine laws." *In re Capistrano*, 45 Agric. Dec. 2196, 2198 (1986). *Accord, In re Vallata*, 45 Agric. Dec. 1421 (1986).

Therefore, by reason of the facts contained in the Findings of Fact above, I find that the Respondent has violated the Acts and the regulations (7 C.F.R. §§ 301.11(b), 319.56-2ff).

Therefore, the following Order is issued.

#### **Order**

Taqueria La Michoacana is hereby assessed a civil penalty of five hundred dollars (\$500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
Butler Square West, 5th Floor  
100 North Sixth Street  
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final July 7, 2000.-Editor]

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**In re: VERONICA ARRIAGO.**  
**P.Q. Docket No. 99-0050.**  
**Decision and Order filed May 30, 2000.**

Rick D. Herndon, for Complainant.  
Respondent, Pro se.

*Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.*

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 380.1 *et seq.*

This proceeding was instituted under the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj), the Plant Quarantine Act, as amended (7 U.S.C. §§ 151-154, 156-165 and 167)(Acts), and the regulations promulgated under the Acts, by a complaint filed on July 9, 1999, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Veronica Arriago, herein referred to as the respondent, is an individual whose mailing address is 144 Renwich Street, Newburgh, New York 12550.

2. On or about July 27, 1998, at J.F. Kennedy International Airport, Jamaica, New York, respondent imported ten (10) mangoes from Mexico into the United States in violation of 7 C.F.R. § 319.56 because importation of mangoes from Mexico into the United States is prohibited.

### **Conclusion**

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts (7 C.F.R. § 319.56 *et seq.*). Therefore, the following Order is issued.

### **Order**

The respondent is hereby assessed a civil penalty of seven hundred and fifty dollars (\$750.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to P.Q. Docket No. 99-0050.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final July 9, 2000.-Editor]

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**CONSENT DECISIONS**

(Not published herein - Editor)

**ANIMAL WELFARE ACT**

Pamela Sue Schapman. AWA Docket No. 99-0009. 1/6/00.

Donald Surritte and Carolyn Surritte. AWA Docket No. 99-0002. 1/14/00.

Mark A. McKee, Sr., and Dora June Mckee, d/b/a Critter. AWA Docket No. 99-0008. 1/18/00.

Michael Mattier, d/b/a Elkhorn Rabbitry. AWA Docket No. 98-0030. 1/24/00.

Cole Bros. Circus, Inc., d/b/a Clyde Beatty-Cole Bros. Circus. AWA Docket No. 99-0017. 1/24/00.

City of El Paso, Texas, d/b/a El Paso Zoo. AWA Docket No. 00-0018. 1/27/00.

Laura LaPorte and David LaPorte, d/b/a LaPorte Farms. AWA Docket No. 00-0007. 2/18/00.

William Joseph Vergis. AWA Docket No. 99-0016. 3/8/00.

Trans World Airlines, Inc., a Delaware corporation. AWA Docket No. 99-0025. 4/10/00.

Jeanne Milewski and American Wildlife Rescue Service, Inc., a California corporation. AWA Docket No. 99-0032. 5/12/00.

Kale Rottinghaus and Sandra Rottinghaus, d/b/a NVK, Inc. AWA Docket No. 99-0028. 5/31/00.

Vicki Weaver and Jerold Weaver, d/b/a Victoria Kennels. AWA Docket No. 00-0006. 6/7/00.

Lyle Jensen and New England Alive Nature Study Center, Inc. AWA Docket No. 00-0002. 6/20/00.

Elaine Bennett, d/b/a Rio Grande Valley Monkey Jungle & Sanctuary. AWA Docket No. 00-0031. 6/20/00.

Manuel Ramos, d/b/a Oscarian Brothers Circus. AWA Docket No. 99-0041. 6/23/00.

#### **HORSE PROTECTION ACT**

Consent Decision as to Shenandoah Valley Horsemen's Association, Inc., and William P. Ruark. HPA Docket No. 99-0018. 1/13/00.

Consent Decision as to Donna Gross and Alan Gross. HPA Docket No. 99-0018. 1/27/00.

Barbara J. Utermark and Allen Forman. HPA Docket No. 99-0026. 2/9/00.

Consent Decision as to Janet T. Bolton. HPA Docket No. 99-0010. 3/30/00.

Jonathan B. Holsomback and The Holsomback Family, an unincorporated association. HPA Docket No. 99-0032. 5/12/00.

James Harris and Virgil Harris. HPA Docket No. 00-0001. 5/12/00.

Phyllis Heppenstall. HPA Docket No. 99-0012. 6/15/00.

Consent Decision as to David W. Oliver. HPA Docket No. 00-0012. 6/19/00.

Robert R. Dean. HPA Docket No. 00-0013. 6/28/00.

#### **PLANT QUARANTINE ACT**

Nena's Mexican Imports. P.Q. Docket No. 99-0035. 2/7/00.

Mark I. Samuels. P.Q. Docket No. 00-0001. 2/24/00.

Rick Johnson, Doug Johnson, and Dennis Johnson, d/b/a Vern Johnson and Sons. P.Q. Docket No. 96-0041. 2/25/00.

Consent Decision as to Trung Troung, d/b/a Five Continents Ltd. P.Q. Docket No. 99-0048. 4/7/00.

Consent Decision as to Mendez Wholesale, Inc. P.Q. Docket No. 99-0049. 4/20/00.

Consent Decision as to Dennis Nowlin, Jr. P.Q. Docket No. 00-0003. 4/25/00.

Jun Jun Lorenzo. P.Q. Docket No. 00-0005. 6/30/00.

#### **VETERINARY ACCREDITATION**

James T. O'Connor, D.V.M. V.A. Docket No. 95-0002. 4/19/00.

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